IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JAMES O'MALLEY, Appellant.	S024046 Santa Clara Case No. 131339-0

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Santa Clara County

Honorable Hugh F. Mullin, III, Judge

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STATEMENT OF THE CASE

On April 24, 1991, the Santa Clara County district attorney filed a six-count amended information against appellant James O'Malley. (XXIV CT 5393.) The information charged as follows:

1) Count one charged an April 25, 1986 murder in violation of Penal Code section 187. This count added three enhancing allegations, charging that Mr. O'Malley personally used a firearm, personally used a knife and carried out the murder for financial gain, in violation of sections 12022.5(a) and 12022(b) respectively. (XXIV CT 5393.)

2) Count two charged an August 15, 1987 conspiracy to commit murder in violation of section 182.1. (XXIV CT 5394.) This count alleged three overt acts in support of the conspiracy. (XXIV CT 5394.)

3) Count three charged an August 15, 1987 robbery in violation of section 211. (XXIV CT 5394.)

4) Count four charged an August 15, 1987 murder in violation of section 187. (XXIV CT 5395.) This count added a robbery special circumstance allegation. (XXIV CT 5395.)

5) Count five charged an October 24, 1987 conspiracy to commit murder in violation of section 182.1. (XXIV CT 5395.) This count alleged four overt acts in support of the conspiracy. (XXIV CT 5395-5396.)

6) Count six charged an October 24, 1987 murder in violation of section 187. (XXIV CT 5396.) This count added a multiple murder special circumstance allegation as well as firearm and knife use allegations under sections 12022.5 and 12022 respectively. (XXIV CT 5396.)

Mr. O'Malley pled not guilty and denied the enhancing allegations. (XX CT 4245.)

Opening statements in the guilt phase began on April 30, 1991. (XXIV CT 5402.) The jury began deliberating on August 20, 1991. On September 9, 1991 -- after 7 days of deliberations -- the jury acquitted Mr. O'Malley of the charge in count two, but convicted on the remaining counts. (XXV CT 5569-5583.)

The penalty phase began on September 24, 1991. (XXV CT 5700.) The jury began deliberations in this phase on October 3, 1991. (XXV CT 5715.) On October 10 -- after another 6 days of deliberations -- the jury sentenced Mr. O'Malley to death. (XXV CT 5722.)

The trial court denied Mr. O'Malley's automatic motion to modify the verdict to life imprisonment. This appeal is automatic.

STATEMENT OF FACTS

A. Overview Of The Crimes, The Theories Of Culpability And Defense And The Jury Deliberations.

The state charged Mr. O'Malley with three separate murders arising from the deaths of Sharley German, Herbert Parr and Michael Robertson. The murders themselves occurred on three different occasions over the course of 19 months and the state and defense theories as to each crime were vastly different.

As to the Sharley German killing, the defense was simple: Mr. O'Malley was innocent, and in fact was visiting friends and relatives in Massachusetts at the time of the killing. The killer was most likely Connie Ramos, a neighbor of the Germans, whose husband Frank had been shot to death in the German house only seven months earlier. Not only did Connie Ramos meet the description of a suspect seen leaving the German house on the day of the homicide, but when interrogated by police Ramos gave conflicting stories about where she was, including an alibi later contradicted by her own sister. When called as a witness at trial, Ramos relied on the advice of counsel to assert her Fifth Amendment privilege to refuse to incriminate herself; after a hearing outside the presence of the jury (and counsel), the trial court ruled Ramos "does have justification to

take the Fifth." The jury never heard from Connie Ramos.

The state's theory as to the German homicide was quite different. According to the state, the fact that Connie Ramos' husband had been murdered in the German house months earlier, and that Ramos met the description of someone leaving the crime scene on the morning of the offense, was simply a coincidence. Instead, Mr. O'Malley was hired to kill Sharley German by her husband, Geary German, because Geary had a girlfriend and was afraid Sharley was going to divorce him. The state relied largely on the testimony of Brandi Hohman, an ex-girlfriend of Mr. O'Malley's who had been granted immunity in connection with accessory to murder charges. Hohman told the jury Mr. O'Malley confessed to the murder.

In contrast to the German homicide, Mr. O'Malley admitted being present when the Parr and Robertson murders occurred. He testified, however, that Rex Sheffield -- who was charged as a co-defendant in both homicides -- did the killings, that he (Mr. O'Malley) had nothing to do with them and that he was being framed by the Freedom Riders, a motorcycle club of which he had been a member. The state's theory was that while Rex Sheffield may have been involved in both the Parr and Robertson killings, Mr. O'Malley was -- at least -- an accomplice. Again the state relied primarily on testimony from ex-girlfriend Hohman that Mr. O'Malley confessed. Indeed, the prosecutor himself

would admit during trial that Hohman was "the chief witness" against Mr. O'Malley and thus "critical [and] crucial to this case."

The jury struggled with the case. At the guilt phase, the jury deliberated more than 32 hours over more than seven days before convicting on the murder charges. Similarly, at the penalty phase, although the jury had found Mr. O'Malley guilty of three murder counts, it deliberated more than 20 hours over the course of another six days before returning a death sentence. As discussed below, there was good reason for the jury's pause.

B. The Sharley Ann German Homicide.

1. The April 25, 1986, homicide.

Geary German and Sharley Ann German were married and lived with Sharley's son Tommy McNeel in San Jose, California. (13 RT 2823.) Geary German was a member of the Freedom Riders. (13 RT 2826, 2831-2832; 15 RT 3150.)

Early on the morning of April 25, 1986, Geary left for work and Tommy left for school. (13 RT 2823, 2825, 2843, 2850-2853.) Around 4:00 p.m. that afternoon, Tommy

returned from school and found his mother dead on the floor in his bedroom. (14 RT 2874.) She had been shot in the head and stabbed in the neck. (15 RT 3101-3102, 3104-3105.) Sharley was shot with a .25 caliber bullet. (19 RT 3768.)

2. Connie Ramos' motive for the killing, her false and inconsistent statements to police about her whereabouts, the crime-stoppers tip and her invocation of the Fifth Amendment privilege against self-incrimination.

Sharley German's homicide was not the first homicide to occur at the German home. In September 1985, just seven months earlier, Frank Ramos -- a neighbor -- was shot and killed in the Germans' garage. (14 RT 2862; 15 RT 3138.)

Frank Ramos was married to Connie Ramos. (14 RT 2911.) The Ramoses lived directly behind the Germans, renting a house that Sharley German owned. (14 RT 2911, 2913; 18 RT 3632.) Although Frank Ramos and Geary German were friends, they had a falling out because Geary believed Frank was having an affair with Sharley. (14 RT 2868-2869; 15 RT 3162, 3165.) Sharley told a good friend that Frank was in love with her but that she did not have similar feelings for him. (18 RT 3583, 3640.)

As noted, Frank was shot to death in the garage of the Germans' home in September of 1985. (14 RT 2862; 15 RT 3138.) Both Geary German and Rex Sheffield

were arrested in connection with Frank's death. (14 RT 2862; 15 RT 3138.) After Geary's arrest, Sharley told police it was Sheffield, not Geary, who shot and killed Frank and showed police where the murder weapon was located -- in a can of water softener in her garage. (14 RT 2863-2864; 15 RT 3066; 19 RT 3719-3720.) Geary pled guilty to being an accessory in the Frank Ramos killing. (19 RT 3821-3822.) Sheffield was convicted of involuntary manslaughter. (14 RT 2865.)

Frank Ramos's death started a feud between the Ramos and German families. (14 RT 2867.) The Ramos family, including Connie Ramos, believed that Frank had been set up to be killed by Geary German and Rex Sheffield. (19 RT 6991.) Thus, in the months after Frank's death, someone shot at, vandalized and made harassing phone calls to the Germans' home. (14 RT 2910.) There were also several fights between Sharley's son Tommy and Frank's son Michael Espinoza. (14 RT 2868.) Moreover, the Ramos family directly threatened Sharley on several occasions, once telling her that her "troubles" were not over. (15 RT 3053, 3171.) Only days before Sharley's murder, Connie Ramos used a hammer to vandalize the rental home belonging to Sharley. (33 RT 7007-7008.) And two to four weeks before Sharley's death, someone from the Ramos family threatened Sharley's life. (15 RT 3173.)

For obvious reasons, Connie Ramos was a primary suspect in Sharley's murder.

When Tommy German first spoke with police he told them he believed the Ramos family was responsible for his mother's death. (14 RT 2880.) Geary German believed Connie was the killer. (16 RT 3229.) Police confirmed that based on the past animosity between the Ramos and German families, Connie was the primary suspect in Ms. German's homicide. (33 RT 7009-7012.)

During the investigation, Connie Ramos gave police conflicting accounts of her whereabouts when Sharley was killed. When police first interrogated her only three days after the murder, Ramos gave them an alibi which was subsequently contradicted by her own sister. (32 RT 6901-6902; 33 RT 6994, 7016; 39 RT 8168-69.) In a second interrogation, Ramos provided a different story about where she was on the day Sharley was killed. (39 RT 8168-8169.)

In order to gain more information on the German homicide, police set up an anonymous Crime Stoppers tip line. On July 7, 1986, police received an anonymous tip from a woman who had been walking her dog by the German house on the morning Sharley was killed. (39 RT 8226.) The caller saw a light blue Ford Pinto park across from Sharley's house and a woman with large sunglasses get out of the car and knock on Sharley's door. (39 RT 8226-8227, 8239.) The woman appeared to force her way into the German home, and the caller heard voices of two women yelling inside the house.

(39 RT 8227, 8239.) The woman from the Ford Pinto came out of the house a few minutes later with a rust colored towel wrapped around her hand. (39 RT 8227, 8239.) She threw the towel into the car and drove away. (39 RT 8227, 8239.)

The description given by the anonymous caller fit Connie Ramos, her sunglasses and her car. (33 RT 6989-6990, 6996; 39 RT 8208, 8237, 8242-8243; *see also* 33 RT 6938-6939.) When police obtained a warrant to search Connie Ramos' home and car, they found a rust colored towel in her car. (33 RT 6989-6990, 6996-6997; 39 RT 8208.) Police also seized four Buck knives from the Ramoses' home. (19 RT 3722-3725, 3744.) The knives were analyzed and there was a presumptive showing that one may have had human blood on it. (19 RT 3745; 31 RT 6528.) However, no further testing was done on these knives. (19 RT 3745, 3749.)

As noted above, when the defense called Connie Ramos to testify at trial, she asserted her Fifth Amendment privilege not to testify. (34 RT 7263-7265.) After hearing her explanation outside the presence of both the jury and counsel, the trial court ruled "that she does have justification to take the Fifth." (34 RT 7266.) Although the prosecutor could have obtained Ramos' testimony by offering her immunity, he never did and the jury never heard from her.

3. The testimony of Brandi Hohman, Ted Grandstedt and Robert Fulton.

James O'Malley grew up in Wrentham, Massachusetts. (56 RT 11572.) When he was 18 years old he left home and headed to California. (57 RT 11639.) He briefly returned to Massachusetts where he fell in love with Karen Dolan. (39 RT 8269-8270.) In 1983, they returned to California together. (38 RT 8044.) Shortly after, their first child Megan was born. (39 RT 8269-8270.)[1]

Despite his relationship with Karen, in early 1987, Mr. O'Malley became romantically involved with Brandi Hohman and they lived together in various motels. (26 RT 5450, 5452.) Brandi knew that Mr. O'Malley and Karen had children together and that Mr. O'Malley supported them financially and spent significant time with them. (26 RT 5451, 5454.)

In contrast to Connie Ramos, the state *did* offer immunity to Brandi Hohman in order to obtain her testimony. Two years after the German murder, police interrogated Hohman in connection with the Herbert Parr and Michael Robertson homicides. (28 RT 5924.) Hohman had been arrested and charged as an accessory to murder. (28 RT 5919-

[1] Mr. O'Malley and Karen Dolan married after Mr. O'Malley was taken into custody in this case. (35 RT 7503.) For simplicity's sake, Karen Dolan is referred to as Karen O'Malley in this brief. They have three children together. (39 RT 8270.)

5922.)

Prior to Hohman's testimony, Mr. O'Malley had reconciled with Karen Dolan. (45 RT 9409.) Ultimately, the state granted Hohman immunity, placed her in a witness protection program, and paid over $28,000 in cash and money orders. (28 RT 5938, 5941-5944; 30 RT 6338-6340; Second ACT 72-79.)

After receiving both protection and payment, Hohman testified at trial that Mr. O'Malley told her he killed a woman named Sharley Ann. (28 RT 5860.) According to Hohman, Sharley's husband wanted her killed because he had a girlfriend. (28 RT 5860-5861.) Hohman testified that O'Malley told her that he brought over two beers to drink with Sharley and then he killed her using a .25 caliber gun. (28 RT 5861, 5865-5866.)[2] Mr. O'Malley told Hohman that he sold the gun to someone he met at the home of

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[2] At the time of death, Sharley Ann had a blood alcohol level of .02 which was consistent with her having consumed one beer within thirty minutes of her death. (15 RT 3120.) However, no empty beer cans were found at the scene. (19 RT 3780.)

Laurel Bieling. (28 RT 5867.)[3]

The state also presented evidence that Mr. O'Malley admitted the German murder to Ted Grandstedt and Robert Fulton. Ted Grandstedt was interviewed by district attorney investigator James Gillespie more than two years after the German homicide. (19 RT 3786.) At trial, investigator Gillespie admitted that Grandstedt may have told him he "was too high" to even remember what Mr. O'Malley said that day. (19 RT 3795.) Investigator Gillespie also admitted that Grandstedt said "it [was] hard to remember anything" about the incident at all. (19 RT 3795.) Nevertheless, investigator Gillespie told the jury that despite these disclaimers, Grandstedt said Mr. O'Malley admitted being hired by Geary German to kill Sharley. (19 RT 3791-3793.)

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[3] The state sought to corroborate Hohman's testimony by introducing evidence that Mr. O'Malley may have owned a .25 automatic pistol at one time. Richard Balthazar, a friend of Mr. O'Malley's, testified that he had once cleaned a gun for Mr. O'Malley and kept the box that the gun had come in. (16 RT 3249.) Balthazar told police that the gun looked like the photo of the gun on the outside of the box, although he believed the gun was a .38 caliber. (16 RT 3260-3263.) In fact, the gun pictured on the box was a .25 caliber Targa automatic pistol. (16 RT 3262, 3776.) State criminalist Edward Peterson testified that the gun pictured on the gun box had characteristics consistent with the gun that fired the bullet that killed Sharley. (31 RT 6557.)

Moreover, Alison Hurst testified that in December 1986, Mr. O'Malley sold her a .25 caliber semiautomatic pistol. (18 RT 3653-3654.) According to Hurst, Mr. O'Malley told her not to tell anyone that she got the gun from him. (18 RT 3661.) Hurst thought that the gun Mr. O'Malley sold her looked like the gun on the gun box given to Balthazar. (18 RT 3653, 3679.) Hurst no longer had the gun. (18 RT 3656.)

For his part, at trial Grandstedt explained he told police whatever they wanted to hear to "get them off [his] back." (16 RT 3316, 3333.) This was because Grandstedt was on probation and the police accused him of somehow being involved in the German murder. (16 RT 3316, 3333.) And Grandstedt admitted he had read the details of the German murder in the newspaper. (16 RT 3334-3335.) He explained that the statements he told police were "conclusions that [he] came up with" rather than what Mr. O'Malley told him. (16 RT 3332.) Mr. O'Malley had *not* confessed to a killing, though he (Grandstedt) did recall that after Sharley's murder Geary owed Mr. O'Malley money and he had heard Mr. O'Malley and his wife Karen say something about Mr. O'Malley having done his end of the job but that Geary had not taken care of his end. (16 RT 3309-3310, 3334, 3336.) Grandstedt was not sure what they were referring to. (16 RT 3334.)

The state also relied on a purported confession made to Robert Fulton -- a member of the Freedom Riders -- and his wife Marlene. Both also testified that Mr. O'Malley confessed to killing Sharley German. (17 RT 3426, 3435-3456; 18 RT 3525.) Fulton testified that Mr. O'Malley said Geary gave him $2,500 and Sharley's Honda in payment for the murder. (17 RT 3441.) Both Fulton and his wife saw Mr. O'Malley in Sharley's Honda after her death. (17 RT 3441-3442; 18 RT 3529-3533.)

Thus, from the state's perspective, with respect to the Sharley German homicide it

presented four witnesses who each testified that Mr. O'Malley had confessed to having been hired by Geary German to kill Sharley. Curiously, though, the state did not charge Geary with this crime, only Mr. O'Malley. (33 RT 6989.)

4. Mr. O'Malley's alibi.

Separate and apart from presenting evidence that Connie Ramos was the real killer, the defense also presented evidence showing that Mr. O'Malley was out of state at the time of the killing. In this regard, Mr. O'Malley testified that he had nothing to do with Sharley German's murder. (40 RT 8694.) In fact, for the entire month of April 1986, Mr. O'Malley was on the East Coast, traveling between New Jersey, Massachusetts and New Hampshire. (39 RT 8328.)

Specifically, during the week of April 25, 1986, Mr. O'Malley was in Wrentham, Massachusetts, where he grew up, visiting his childhood friends Robert Thompson and Mark Webber. (31 RT 6656-6659, 6680-6681.) While he was there, Karen O'Malley telephoned to tell him about Sharley's murder. (39 RT 8330.) Mr. O'Malley called Freedom Rider president Greg Hosac, and Hosac asked Mr. O'Malley to return to California for Sharley's funeral. (43 RT 9005-9006.)

The next day, Mr. O'Malley's childhood friend Bobby Thompson drove him to the Boston airport, where Mr. O'Malley first flew to New Jersey to meet John Mercuri -- for whom he was working construction while on the East Coast -- and then flew home to California on May 1, 1986. (39 RT 8332-8333; 43 RT 9008-9009, 9022.) Mr. O'Malley's friend and former neighbor Glenn Johnson picked Mr. O'Malley up at the San Francisco airport and drove him home. (40 RT 8353; 43 RT 9013.) Mr. O'Malleyattended Sharley's funeral on May 3, 1986. (43 RT 9020.)[4]

Numerous witnesses corroborated Mr. O'Malley's testimony. Thus, Bobby Thompson confirmed he was with Mr. O'Malley during the last week in April 1986. (31 RT 6659-6660.) Thompson recalled driving Mr. O'Malley to Mark Webber's home on Sunday, April 27, 1986, picking him up again the following day and driving him to Logan Airport. (32 RT 6787-6788.) For his part, while Mark Webber could not remember exact dates, he confirmed that Mr. O'Malley stayed at his home on a Sunday night after being dropped off by Thompson and that Mr. O'Malley left the following day. (31 RT 6679-6681; 32 RT 6799-6802.)

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[4] Mr. O'Malley specifically denied making any confessions in the case. Hohman was lying to protect herself because of the charges against her, and because she was upset that Mr. O'Malley had returned to his wife. (45 RT 9409.) Grandstedt was telling the truth when he testified that Mr. O'Malley had not confessed. (39 RT 8289-8292, 8297, 8301-8303.) And the Fultons were lying as part of a scheme by the Freedom Riders to frame Mr. O'Malley for the crimes. (45 RT 9374-9376, 9380-9381.)

Thompson's sister, Karen Shaw, also confirmed Mr. O'Malley's testimony. She recalled that Mr. O'Malley stayed with her and her family in North Attleborough, Massachusetts for two or three nights the last week in April 1986. (34 RT 7328-7330, 7334, 7352.) Shaw remembered that Mr. O'Malley's wife Karen called her on April 27, 1986, looking for Mr. O'Malley. (34 RT 7353, 7368.) Shaw told Karen that Mr. O'Malley was not there and Karen asked someone to find him and tell him that it was important he come home to California. (34 RT 7330, 7352.) And Glenn Johnson -- one of Mr. O'Malley's neighbors in California -- confirmed that he picked Mr. O'Malley up at the San Francisco International Airport sometime in the last part of April or first part of May 1986. (33 RT 6912, 6915.)

Mr. O'Malley's wife Karen also verified that Mr. O'Malley was working on the East Coast at the time of Sharley's murder. (35 RT 7524.) Freedom Riders' president Greg Hosac's wife Carol called a few days after Sharley's murder looking for Mr. O'Malley. (35 RT 7526.) Carol wanted Mr. O'Malley to be a pallbearer at Sharley's funeral. (35 RT 7526.) On April 27, 1986, Karen called various people in New Jersey, New York and Massachusetts trying to find Mr. O'Malley, including Karen Shaw in North Attleborough, Massachusetts. (35 RT 7527; 36 RT 7703-7705.) Karen O'Malley, who had contacted Mr. O'Malley at Shaw's home recently, left a message with Shaw for Mr. O'Malley to call her. (35 RT 7527.)

Telephone records corroborated Karen O'Malley's testimony. These records confirmed calls between Karen O'Malley's home and Karen Shaw's home on April 25 and April 26, 1986. (ACT 7352, 7354; 51 RT 10442.) Karen O'Malley testified that after receiving her message from Shaw, Mr. O'Malley returned her call that day. (35 RT 7528.) Karen told Mr. O'Malley that the Hosacs were trying to contact him and Mr. O'Malley returned home a few days later. (35 RT 7528.) Karen was sure Mr. O'Malley was not in California from early April 1986 until he returned for Sharley's funeral. (35 RT 7530; 36 RT 7696.)

Karen O'Malley also explained that she and Mr. O'Malley had a conversation after Sharley's murder in the presence of Ted Grandstedt. They discussed the fact that Mr. O'Malley had given a motorcycle part to Geary German which German had not paid for. (36 RT 7725.) Karen explained that while Mr. O'Malley had done his part of this deal, Geary German had not. (36 RT 7724.) They were not referring to Sharley's murder, but to the purchase of a motorcycle part. (36 RT 7725.) This explained the statements Grandstedt testified to at trial.[5]

With respect to the physical evidence, none tied Mr. O'Malley to the murder scene.

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[5] Karen also explained that Geary loaned Sharley's Honda to her and Mr. O'Malley after the murder because they did not own a car. (36 RT 7726-7727.)

(19 RT 3701-3783.) Indeed, there were no fingerprints, no footprints, and no ballistics evidence tying Mr. O'Malley to Sharley's murder. (19 RT 3750, 3774, 3779.) Although a stray hair was found on German's body, it did not match Mr. O'Malley's hair. (19 RT 3779.)

5. The state's response.

The state responded to Mr. O'Malley's alibi evidence. While the state did not dispute that Mr. O'Malley visited Massachusetts in April of 1986, it rebutted the defense alibi with two different types of evidence. First, the prosecutor presented telephone bill records showing a series of calls billed to Mr. O'Malley's home in early April 1986 from out-of-state. (51 RT 10520-10524.) These calls were made from Massachusetts, New Hampshire and New Jersey. (51 RT 10520-10525.) They included collect calls made to Mr. O'Malley's home up until April 10, 1986. (51 RT 10520-10525.) The last collect call was made on April 10, and was from a pay telephone at the San Francisco Airport. (51 RT 10528.) Based on these telephone records, the state's position was that Mr. O'Malley's witnesses simply got their dates wrong, and that Mr. O'Malley had returned to California on April 10. (53 RT 10901, 10910.)

With respect to this evidence, Mr. O'Malley explained that when he first arrived

on the East Coast, he did not have very much money and therefore was billing all his telephone calls to his home in California. (44 RT 9191.) However, after getting paid for his work on the East Coast, he no longer needed to bill his telephone calls to his home phone number. (44 RT 9191; 45 RT 9294.) Thus, the collect calls stopped on April 10, not because he was home from the East Coast, but rather because he stopped charging his calls to his California home. (44 RT 9191; 45 RT 9294.)

Mr. O'Malley also presented evidence showing that the April 10 phone call from the San Francisco International Airport collect to his home could not have been him. The reason was simple. The telephone records show a telephone call was charged from the Newark, New Jersey airport on the afternoon of April 10. (51 RT 10527.) Mr. O'Malley testified that he was in Newark at this time and may have made a phone call. (RT 9281.) In order for the San Francisco airport call to have been his, however, Mr. O'Malley would have had to leave the phone he was using in Newark, fly from Newark to San Francisco, get off the plane in the San Francisco domestic terminal and get to the San Francisco international terminal in 5 hours and 8 minutes. (51 RT 10527; 52 RT 10741-10742.) Travel consultant Marilyn Byrnes confirmed that the shortest possible flight from Newark to San Francisco would take 5 hours and 59 minutes. (52 RT 10741-10742.) She had never heard of a flight leaving early and flights often left late from Newark. (52 RT 10747.) Byrnes also testified that while it was possible for a flight to be shorter by 10 to

20 minutes, she had never heard of a flight arriving an hour early. (52 RT 10747) Mr. O'Malley believed that it may have been Ted Grandstedt who was at the San Francisco international terminal on April 10th and charged a call to Mr. O'Malley's home. (54 RT 11184-11186.)

The prosecutor also responded to the defense alibi with testimony from Karen O'Neal. O'Neal lived in Texas and in 1986 was in the process of getting a divorce from her husband John Mercuri. (52 RT 10658, 10689-10690.) Mr. O'Malley occasionally worked for Mercuri and was a friend. (42 RT 8811-8816, 8831-8832.) A court hearing had been held in Texas to address distribution of marital property. (52 RT 10658, 10689-10690.)

According to O'Neal, Mr. O'Malley called her on the telephone after the hearing, threatened her, and gave her a deadline to decide whether she would sign everything over to Mercuri. (52 RT 10659-10660, 10678, 10690.) O'Neal testified that she decided that it was not in her best interest to contest the property distribution any longer and that she would sign all of the marital assets over to Mercuri, and she called Mr. O'Malley's home in Redwood City, California to let him know of her decision. (52 RT 10660-10661.) When O'Neal called, Karen O'Malley answered the phone and told her Mr. O'Malley was at a meeting. (52 RT 10662.) O'Neal said she left a number where she could be

reached, which she assumed was her mother's phone number, and Mr. O'Malley called her back later that same day. (*Ibid.*)

O'Neal could not recall the date of this phone call. (52 RT 10691.) However, when the prosecutor showed O'Neal a phone record of an April 14, 1986, phone call placed from Mr. O'Malley's home to O'Neal's mother's home, O'Neal testified that was the approximate time frame of Mr. O'Malley's call. (52 RT 10662-10666.) The prosecutor relied on O'Neal's testimony to show that Mr. O'Malley was indeed in California on April 14, 1986. (53 RT 10901-10902, 10906-10907, 10910.)

For his part, Mr. O'Malley denied calling O'Neal from his California home in late April 1986. (44 RT 9221.) Instead, Mr. O'Malley believed that any conversations were between O'Neal and his wife Karen O'Malley. (44 RT 9219-9220.)

C. The Herbert Parr Murder.

1. The April 14, 1987, homicide.

In late 1986 or early 1987, Herbert Parr started associating with the Freedom Riders but was not a member. (20 RT 3875, 3879, 3891.) Parr had a new Harley

Davidson Heritage motorcycle. (20 RT 3874, 3880-3881, 3892.) On August 14, 1987, Parr rode his motorcycle to a party at the home of his brother, David Parr. (20 RT 3904.) He arrived at the party with Mr. O'Malley, Sheffield, Joseph Martinez and several others. (20 RT 3901, 3906-3907, 3916.) When David went to bed between 1:00 a.m. and 3:00 a.m. Herbert and the people he came with were still at the party. (20 RT 3912.)

In the early morning hours of April 15, 1987, Cammy Ransfield arrived home to the house she shared with her mother Laurel Bieling. (22 RT 4483-4485.) She noticed a new Harley Davidson parked in front of the house. (22 RT 4483-4485, 4489.) Inside the house were Mr. O'Malley, Brandi Hohman, Rex Sheffield, Rex's wife Gail, and Herbert Parr. (22 RT 4487, 4489.) Cammy saw Sheffield, Mr. O'Malley and Parr go into the backyard. (22 RT 4490-4491.) Cammy left the house to have lunch with her boyfriend. (22 RT 4490-4491.)

Parr's body was later found buried in the backyard of the home that Mr. O'Malley rented. (31 RT 6654.) Parr had died of multiple stab wounds. (31 RT 6606.) Almost all of the stab wounds were inflicted by a single edged blade. (31 RT 6622.) Although the medical examiner could not be sure, he did not believe that the wounds were caused by a double-edged blade. (23 RT 4708-4709; 31 RT 6623-6626.) There was no evidence to suggest more than one knife was used in the stabbing. (31 RT 6642.)

2. The testimony of Brandi Hohman and Laurel Bieling.

With respect to Mr. O'Malley's involvement in Parr's murder, the state's primary witness was once again Brandi Hohman. According to Hohman, Mr. O'Malley did not like Parr. (26 RT 5471.) On April 14, 1987, Hohman, Mr. O'Malley, and Rex and Gail Sheffield were at David Parr's party when Herbert Parr arrived. (26 RT 5457, 5480, 5483, 5486, 5495.) Herbert Parr was bragging about his new Harley Davidson motorcycle and took Mr. O'Malley and Rex Sheffield out to see it. (26 RT 5498-5499.) Parr also bragged about having a friend in the Hell's Angels. (26 RT 5512-5513.) This upset Sheffield because he knew the man Parr was referring to, the man had been a friend of Sheffield's and the man was now dead. (26 RT 5512-5514.)

Still testifying under a grant of immunity, Hohman testified that at the party, Mr. O'Malley told her he wanted to take Parr's new motorcycle for a ride. (26 RT 5501.) Mr. O'Malley invited Parr over to Laurel Bieling's home in Mountain View. (26 RT 5515-5517.) Hohman and Mr. O'Malley drove in O'Malley's car while Parr followed on his motorcycle. (26 RT 5517-5519.) On the way there, Mr. O'Malley said he was going to beat up Parr and take his motorcycle. (26 RT 5525.)

When they got to Bieling's home, Hohman, Parr and O'Malley used

methamphetamine. (26 RT 5528, 5530.) Laurel Bieling was asleep, and Gail and Rex Sheffield arrived a short time later. (26 RT 5528, 5531.)

Sometime later, Rex, Mr. O'Malley and Parr went into the backyard. (26 RT 5534.) Hohman heard high-pitched noises coming from the back yard that sounded like Mr. O'Malley and a noise which sounded like "gurgling." (26 RT 5536.) O'Malley and Rex came back inside the house 15 to 30 minutes later without Parr. (26 RT 5538-5539.) When Hohman left Bieling's home that morning, Parr's motorcycle was still parked out front. (26 RT 5545.) Later that day, Mr. O'Malley rented a U-Haul truck and told Hohman that he was going to take Parr's motorcycle and sell it for parts. (26 RT 5553-5554.)

According to Hohman, at some point later, Mr. O'Malley admitted stabbing and killing Parr. (26 RT 5573.) In late August 1987 -- nearly four months after Parr's April 1987 killing -- Hohman went to O'Malley's rental house where another Freedom Rider Steve Dyson and Mr. O'Malley buried Parr's body which had been in the truck of Mr. O'Malley's car. (26 RT 5603, 5612, 5626.)

Laurel Bieling also testified for the state with respect to the Parr murder. Veronica Bell who met Bieling in 1986 and lived with her in November 1987, described Bieling as

a paranoid "nutcase" who injected drugs, lived in a fantasy world and never told the truth. (31 RT 6718; 32 RT 6820-6821.) Indeed, after Bieling spoke with police about Mr. O'Malley, Bell overheard Bieling tell Mr. O'Malley that if she had not lied, Mr. O'Malley would not be in the "mess" he was in. (32 RT 6830.) Bieling then apologized to Mr. O'Malley for lying to police about him. (32 RT 6830.)

Donna Mitchell, who lived with Bieling for 6 months in 1988, said Bieling told her she *assumed* Mr. O'Malley had committed a murder in her backyard. (33 RT 7170.) Shortly after this conversation, Mitchell was present when Bieling received a threatening phone call. (33 RT 7176.) Although Mitchell was not sure who the call was from, it was *not* from Mr. O'Malley. (33 RT 7176.) After this call, Bieling said that people were threatening her. (33 RT 7170.) Bieling then admitted that she was now knew it was not Mr. O'Malley who committed the murder in her backyard. (33 RT 7169-7170.)

Nevertheless, at trial Bieling provided inculpatory testimony against Mr. O'Malley. On August 16, 1987, Bieling noticed a board with blood and knife marks, in a shed in her backyard. (23 RT 4697-4698.) She also noticed that the double-edged knife she wore on her belt was missing. (23 RT 4698-4699.) Bieling told Mr. O'Malley about the board in the shed and the missing knife. (23 RT 4704.) According to Bieling, O'Malley said he did not mean to leave a mess and was going to clean it up. (23 RT

4704, 4707.) He also gave her her knife back and told her the knife was "clean." (23 RT 4707.) Bieling and Mr. O'Malley then cleaned up the blood in the shed and burned the board with the knife marks. (23 RT 4713, 4718.)

According to Bieling, Mr. O'Malley gave numerous stories about what happened in the shed, including several where Rex Sheffield alone was the killer. (23 RT 4727, 4728.) Mr. O'Malley also told versions of the story where he and Rex were both the killers or where he (Mr. O'Malley) alone was the killer. (23 RT 4728, 4730-4732.) At the preliminary hearing, however, Bieling said she did not remember Mr. O'Malley ever telling her that he participated in Parr's death. (25 RT 5185.)[6]

3. Sheffield's involvement in the Parr murder.

Mr. O'Malley admitted helping to bury Parr, but denied involvement in Parr's murder. Mr. O'Malley confirmed Hohman's testimony that they went to a party at David Parr's home where Herbert Parr was present. (40 RT 8376.) He also confirmed her testimony that there was tension between Sheffield and Parr. (40 RT 8391-8392.)

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[6] Beiling also testified that Rex and Gail Sheffield approached her about killing Mr. O'Malley. (34 RT 7291; 35 RT 7432.) The Sheffields wanted Bieling to kill Mr. O'Malley because she was the only person who could get close to Mr. O'Malley at that time. (35 RT 7433.)

This tension continued when the group moved from David Parr's home to Laurel Bieling's home. (40 RT 8398.) Sheffield wanted to beat Parr up. (40 RT 8398.) Mr. O'Malley calmed Sheffield down and told him that Parr was just trying to fit in. (40 RT 8398.)

At Bieling's home, Parr, Hohman and O'Malley went into Bieling's bedroom where she was sleeping. (40 RT 8395-8396.) Hohman took Bieling's double-edged knife and they used it to cut up methamphetamine. (46 RT 9567.) Mr. O'Malley then put Bieling's knife on his belt. (46 RT 9567.)

Sometime later, Mr. O'Malley, Parr, and Sheffield went into the backyard by a shed to drink Tequila and snort methamphetamine off the tip of Bieling's knife. (40 RT 8400-8401.) Parr was telling a story about getting a tattoo in Vietnam. (40 RT 8404.) Sheffield suddenly "snapped" and started to stab Parr. (40 RT 8403-8404.) Mr. O'Malley yelled and started to run but then returned to the shed where he saw Sheffield stabbing Parr. (40 RT 8406-8407.) Mr. O'Malley was "shocked" and then afraid of Sheffield. (46 RT 9608, 9610.) He thought the knife Sheffield used to stab Parr had been clipped to Sheffield's belt. (40 RT 8409.) The double-edged knife Mr. O'Malley had -- which belonged to Bieling -- was not used in the stabbing. (40 RT 8408.)

Because Sheffield was a fellow Freedom Rider, Mr. O'Malley helped Sheffield take care of Parr's body by putting into the trunk of O'Malley's car and later burying it in his backyard. (40 RT 8415, 8456; 46 RT 9623.) Mr. O'Malley also helped take apart Parr's motorcycle and dropped some of the parts off at Greg Hosac's house. (40 RT 8434-8435, 8440-8442, 8444-8445.) With respect to helping Sheffield bury Parr's body, Mr. O'Malley explained that -- although it "doesn't make sense to [him] today either" -- at the time his Freedom Rider lifestyle meant that "you do not walk out on a brother no matter what he does." (46 RT 9623.)

After Parr's death, Mr. O'Malley told Hohman that Parr had been stabbed and his body was in the trunk. (40 RT 8417.) He admitted lying to Hohman, either telling her that he stabbed Parr or implying it. (48 RT 9911-9912, 9916.) There were two reasons for this.

First, Mr. O'Malley was afraid of Rex Sheffield and would not want him to know he "snitch[ed]" on him to Hohman. (48 RT 9921-9922.) Second, Hohman liked to perceive Mr. O'Malley as a criminal and tough guy, and Mr. O'Malley did nothing to detract from that image. (41 RT 8687-8688; 48 RT 9917-9919.) Thus, Mr. O'Malley led Brandi to believe he had been in Walpole State Prison in Massachusetts. (33 RT 7090; 39 RT 8270; 41 RT 8687.) Mr. O'Malley told Brandi numerous other stories, including that

he had killed a Connecticut State Trooper and that he had killed someone in a drug deal in New York. (41 RT 8687.) None of these stories were true -- in fact, Mr. O'Malley had never even been to prison. (39 RT 8270.)

After Parr's murder, O'Malley began staying away from the Freedom Riders. He was particularly wary of Hosac and Sheffield. (40 RT 8456; 47 RT 9777, 9788-9789.) On September 19, 1987, Hosac, Joseph Martinez and two other Freedom Riders came to Mr. O'Malley's home to find out why he was distancing himself from the club. (40 RT 8457-8458.) Mr. O'Malley explained he was disturbed by the Parr murder and that Parr was buried in his backyard. (40 RT 8457-8458.) Karen O'Malley confirmed that Mr. O'Malley started to distance himself from the club and told her he did not want her associating with any club members. (36 RT 7753, 7774.)

D. The Michael Robertson Murder.

1. The October 1987 homicide.

Mr. O'Malley met Michael Robertson in September 1987. (40 RT 8458-8459.) Robertson had just gotten out of prison and soon became Mr. O'Malley's best friend. (40 RT 8505; 48 RT 9914.) Mr. O'Malley, Robertson and Hohman all shared a motel room

at the Rainbow West Motel. (40 RT 8505.)

On October 24, 1987, police discovered an abandoned Chevrolet station wagon; the front seat was covered in blood. (21 RT 4017.) The car belonged to Gilbert Martinez, a cousin of Freedom Rider Joseph Martinez. (21 RT 4028-4030, 4043-4044.) The car was found just off Highway 17 near Santa Cruz, California. (21 RT 4016.) As police would later learn, Joseph had loaned the station wagon to Rex and Gail Sheffield. (21 RT 4028-4030, 4041 4043-4044.)

The next morning between 4:00 a.m. and 6:00 a.m., Rex Sheffield and Greg Hosac arrived at Laurel Bieling's house. (23 RT 4769-4771.) Hosac claimed that Mr. O'Malley wanted Bieling to make up an alibi for Sheffield for the prior evening. (23 RT 4769-4771.) When Bieling asked why Robertson was not going to make up an alibi for Sheffield, Hosac told her that Robertson was "taking care of other matters." (23 RT 4771.) Despite the fact that Sheffield had not been at Bieling house the night before, and that Bieling did not know where Sheffield had been, Bieling made up an alibi for Sheffield. (23 RT 4775.) The false alibi was that Sheffield was at her house on the evening of October 24 helping Bieling move her things from her upstairs bedroom down into the basement. (23 RT 4771.) Moreover, Sheffield could not leave her house all evening because Robertson was going to give Sheffield a tattoo, Robertson had borrowed

Sheffield's station wagon to go get his tattooing tools, but he had never returned. (23 RT 4805-4806, 4848.)

On November 1, 1987, a motorist discovered Michael Robertson's body in a grassy ditch on the side of the road off Highway 17 near Santa Cruz, California. (21 RT 4194-4196, 4200, 4212.) Robertson's body was found near where the station wagon had been found days earlier. (21 RT 4016, 4248.)

Robertson had been shot in the head with a .25 caliber weapon and stabbed in the neck. (21 RT 4208, 4276-4277, 4280.) The bullet recovered from Robertson's head came from a semi-automatic pistol owned by Rex Sheffield's wife Gail. (31 RT 6506, 6512-6513.) When police interviewed Sheffield about his whereabouts at the time of Robertson's murder, Sheffield gave police the false alibi he had concocted with Bieling. (34 RT 7238-7239.)

2. The testimony of Brandi Hohman.

Both Sheffield and Mr. O'Malley were charged with Robertson's murder. (25 CT 5393-5396.) At Mr. O'Malley's trial, the state's main witness as to the Robertson charge was again Brandi Hohman. Hohman testified that before Robertson's death, Mr.

O'Malley and Michael Robertson were "good friends." (27 RT 5680-5681.) According to Hohman, Mr. O'Malley was having problems with the Freedom Riders and so Robertson was acting as a go-between to communicate with the club. (27 RT 5681.) Hohman claimed that at some point Mr. O'Malley starting worrying that Robertson was a "snitch" and would provide information to police about Mr. O'Malley. (27 RT 5683-5684.) According to Hohman, Mr. O'Malley said that snitches should be killed. (27 RT 5695.)

On October 24, 1987, Mr. O'Malley and Hohman drove to J.W.'s Bar in Mountain View. (25 RT 5728.) Mr. O'Malley said he was meeting Greg Hosac and Sheffield at the bar in order to straighten things out between Mr. O'Malley and the Freedom Riders and talk about whether Robertson was a snitch. (27 RT 5706-5707.)

At the bar, Mr. O'Malley spoke with Hosac. (27 RT 5732.) Afterward, Mr. O'Malley said that Robertson had been lying both to Mr. O'Malley and the club. (27 RT 5733.)

Robertson then arrived at the bar. (27 RT 5733.) Neither Mr. O'Malley nor Hosac spoke with him. (27 RT 5733-5734.) Sheffield arrived at some point and spoke with Mr. O'Malley and Hosac. (27 RT 5742-5743.) Shortly after, the group invited Robertson to

play pool with them. (27 RT 5742.) Mr. O'Malley suggested that he, Sheffield and Robertson go get some methamphetamine. (27 RT 5746-5747.) Initially Robertson did not want to go, but then changed his mind after Mr. O'Malley teased him about it. (27 RT 5747-5749.) All three got into Sheffield's station wagon, which belonged to Gilbert Martinez. (27 RT 5748, 5751-5752.) Sheffield was driving, Mr. O'Malley was sitting in the front passenger seat, and Robertson was sitting in between them. (27 RT 5753-5754.)

Hohman testified that Mr. O'Malley and Sheffield returned to the Rainbow West Motel around 3:00 a.m. on the morning of October 25th. (27 RT 5762-5763.) After showering, Sheffield placed the clothes he was wearing into a paper bag. (27 RT 5767-5768, 5771.) Mr. O'Malley did not take a shower. (27 RT 5769.) Hosac arrived at the motel and said that police suspected Mr. O'Malley was involved in a murder. (27 RT 5773.)

Hosac and Sheffield left the motel in Mr. O'Malley's car and Hohman and O'Malley took a taxi to the Der Ghan Motel. (27 RT 5779-5780.) There, Mr. O'Malley cut off the ponytail he was wearing and hid his knife, along with the clothes Sheffield and he had been wearing, in the ceiling over the bed. (27 RT 5803-5805.) According to Hohman, Mr. O'Malley said that while they were driving, Robertson said something to

make him (Mr. O'Malley) mad and he shot Robertson in the head. (27 RT 5791.)[7]

3. Mr. O'Malley's initial arrest and subsequent flight.

Christopher Walsh was a member of the Freedom Riders. (39 RT 8286.) After he decided to leave the club he returned to a motel room where he had been staying with Mr. O'Malley to get some of his belongings. (19 RT 3832-3835.) There, Mr. O'Malley beat him up and threatened to kill him. (19 RT 3832-3835; 20 RT 3847-3848.) Mr. O'Malley then made Walsh draw up a bill of sale giving Mr. O'Malley title to Walsh's motorcycle. (19 RT 3835.) Walsh believed this occurred because he had quit the Freedom Riders club. (20 RT 3849.)

Mr. O'Malley was arrested in connection with this incident, posted bail, and then failed to appear in court. (22 RT 4400-4401, 4409-4411, 4413.) On October 26, 1987, the Freedom Riders turned Mr. O'Malley into police on the Christopher Walsh case. Greg Hosac called police and told them Mr. O'Malley was staying at the Der Ghan Motel. (22 RT 4414-4415, 4428.) Police arrested Mr. O'Malley for his failure to appear in connection with the Walsh case. (22 RT 4418, 4420, 4428-4429.)

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[7] Beiling's daughter Cammy Ransfield testified that on the day of Robertson's murder, Mr. O'Malley called her and told her that he was going to have to take Robertson out because he was a federal snitch. (22 RT 4548.) Cammy never explained why Mr. O'Malley called her to tell her this. (22 RT 4548.)

After Mr. O'Malley's arrest, Hohman took the bag of clothes hidden in the motel room ceiling and hid them at her mother's house. (27 RT 5806-5808.) She looked inside and saw that the clothes were bloody. (27 RT 5810.) Mr. O'Malley called Hohman and said that he needed to be bailed out of jail before police performed a paraffin test which would show he had fired a gun. (28 RT 5831-5832.) Mr. O'Malley told Hohman to call several people who might be able to bail him out and tell them "REDRUM." (28 RT 5832.) Hohman explained that "REDRUM" was murder spelled backwards. (28 RT 5833.)

Mr. O'Malley soon posted bail. (22 RT 4421.) According to Laurel Bieling, Mr. O'Malley said that he and his family were going to the East Coast because "there was just too much heat." (23 RT 4812-4813.) Mr. O'Malley traveled with his wife and children and Hohman to Reno and then on to the East Coast. (28 RT 5883, 5889.)

On January 1, 1988, Hohman was arrested at Boston's Logan Airport. (28 RT 5912, 5919-5920.) Hohman told police about the knife and bloody clothing at her mother's home. (28 RT 5923-5924, 5936, 6478.) Police recovered the knife and two pairs of jeans. (31 RT 6480-6482.) The blood on the clothing was "consistent" with Robertson's blood. (31 RT 6558-6559.) No blood was found on Mr. O'Malley's knife. (31 RT 6560.)

4. Evidence implicating Sheffield in the Robertson murder.

Karen O'Malley testified that on October 24, 1987 (the day of Robertson's murder), she and her children were kidnaped by the Freedom Riders and taken to Laurel Bieling's house and then to Greg Hosac's house. (35 RT 7554-7559.) Karen was "frightened." (35 RT 7552.) She believed she was kidnaped because Hosac and Sheffield were angry with Mr. O'Malley for avoiding the club and using Robertson as a middleman. (36 RT 7788.) Cammy Ransfield, who told Hosac and Sheffield at which motel Karen was staying, confirmed that Hosac and Sheffield were angry. (23 RT 4763.)

At Bieling's house, Karen heard Hosac and Sheffield say Robertson knew too much. (36 RT 7788.) She specifically heard Sheffield say that Robertson "has to go" because "he knows too much." (36 RT 7816.) At Hosac's house, Karen heard Greg and Carol Hosac joking that Robertson, who was known as "Hostage" was going to be a "dead hostage." (36 RT 7787; 37 RT 7820.)

Karen testified that around 10 or 11 p.m., Rex Sheffield called the Hosac house. (36 RT 7635.) Gail Sheffield and Greg Hosac left the house sometime after midnight. (36 RT 7638.) They returned a few hours later with Rex Sheffield. (36 RT 7639.) Sheffield admitted that he shot and killed Robertson. (35 RT 7570-7571, 7799, 7820.)

Sheffield told Karen that Mr. O'Malley was with him when he killed Robertson and Mr. O'Malley was "lucky he didn't get it too." (35 RT 7570.) Sheffield commented that he had never seen so much blood. (35 RT 7571.) Then Sheffield and Hosac discussed going to Bieling's home to create a false alibi and Sheffield went into the bathroom and shaved off his beard. (36 RT 7838-7843.)

Later, when Karen and Mr. O'Malley traveled to the East Coast, Mr. O'Malley told her he had not killed Robertson. (35 RT 7574; 37 RT 7865-7866.) He also told her that he was afraid the club would try to harm him. (37 RT 7864-7865, 7869.)

The physical evidence also supported the defense theory that Sheffield was Robertson's killer. In 1986, during the Sharley German murder investigation, the police obtained and test fired a .25 caliber semi-automatic handgun from Gail Sheffield. (19 RT 3740-3741; 31 RT 6506-6508.) The police eliminated the gun as the gun which killed German and returned it to Gail Sheffield. (19 RT 3741-3742; 31 RT 6508-6509.) Later, during the Robertson homicide investigation, the test fired bullet from the Sheffield gun was compared to the bullet removed for Robertson's head. (31 RT 6511-6512; 33 RT 7026-7027.) It was a match; Sheffield's gun killed Robertson. (31 RT 6511-6512; 33 RT 7026-7027.)

Not only did the gun used to kill Robertson belong to the Sheffields but the Sheffields tried to frame Mr. O'Malley by concocting a plan to put the gun in Mr. O'Malley's possession. Before traveling east, Mr. O'Malley's family lived in a rental house at 655 North 15th Street where Pamela Murdock had once lived. (49 RT 10189.) At trial, Pamela Murdock testified that shortly before trial she was approached by members of the Freedom Riders who asked her to speak with Gail Sheffield. (49 RT 10186.) Gail told Murdock that she had a .25 caliber gun registered in her name and she wanted Murdock to tell police that she (Murdock) bought the gun and left it at the house on North 15th Street when she moved out. (49 RT 10190.) Murdock told Gail she wanted nothing to do with the case. (49 RT 10189.)

After Mr. O'Malley's trial started, Gail Sheffield approached Murdock a second time. (49 RT 10190.) Again, Gail asked Murdock to testify that the .25 caliber handgun was hers and she had left it at the North 15th Street house where Mr. O'Malley would have had access to it. (49 RT 10190.) Murdock refused, instead testifying that Gail Sheffield never gave or sold her a gun and that she (Murdock) had not left a gun at the North 15th Street home. (49 RT 10190.)

When Murdock refused to help Gail Sheffield connect the Robertson murder weapon to Mr. O'Malley, Gail tried another tactic. She told police she had gotten rid of

the handgun in November or December 1986 because Rex was going to get out of prison and his parole status would preclude having a gun in the house. (48 RT 9945.) Gail told police she gave or sold the gun to a Pamela Manns. (48 RT 9946.) Gail also said that Mr. O'Malley had at one time rented a room from Manns and she was afraid Mr. O'Malley took the gun from Manns when he moved out. (48 RT 9946.)

Gail's attempt to connect Mr. O'Malley with the murder weapon through Pamela Manns was no more successful than her attempt to do so through Pamela Murdock. At trial, Manns testified she never bought nor received a gun from Gail Sheffield. (48 RT 9945.) Manns provided this trial testimony even though -- after having testified to this effect at Gail Sheffield's preliminary hearing -- she was threatened numerous times by bikers. (48 RT 9945, 9947, 9967, 9969.)

In addition to Karen O'Malley's testimony, the matching gun evidence and Gail Sheffield's attempts at framing Mr. O'Malley, Mr. O'Malley's own testimony also connected Sheffield to the Robertson killing. Mr. O'Malley testified he was not Robertson's killer. (50 RT 10391-10392.) In fact, Robertson and he had been best friends. (48 RT 9914.) Just before Robertson's death, Robertson, Mr. O'Malley, and Hohman were living together at the Rainbow West Motel. (40 RT 8505.) At this time, there were no problems between Robertson and Mr. O'Malley, and Robertson was still

his best friend. (49 RT 10062-10063, 10068.)

Contrary to Hohman's testimony, Mr. O'Malley did not believe Robertson was a "snitch." (49 RT 10064, 10065, 10067.) And at no time did Mr. O'Malley call Cammy Ransfield and tell her he was going to take Robertson out because he was a federal snitch. (49 RT 10066.)

Towards the end of October 1987, Mr. O'Malley learned through Robertson that the club wanted to contact him. (40 RT 8507.) Mr. O'Malley was not interested in associating further with the club. (40 RT 8507.) On October 24, 1987, Mr. O'Malley learned that Hosac and Sheffield had taken Karen and the children from the Der Ghan Motel to Hosac's home. (40 RT 8532.) Hosac called Mr. O'Malley but would not let him speak to Karen. (40 RT 8532; 49 RT 10054.) Mr. O'Malley was not sure whether Hosac had harmed Karen and/or the children. (49 RT 10054.) Because of Karen and the children, Mr. O'Malley agreed to met Hosac at J.W.'s bar. (49 RT 10049.) Mr. O'Malley was concerned that this meeting was a set up and that the club was planning to harm or kill him. (49 RT 10059-10060.)

Mr. O'Malley brought Hohman to the bar in hopes that it would prevent anything bad happening to him. (49 RT 10062.) There, Mr. O'Malley spoke with Hosac. (40 RT

8542.) Hosac was angry that Mr. O'Malley was no longer communicating with the club and was instead using Robertson as a go-between. (40 RT 8543-8544; 49 RT 10091.) Sheffield then arrived and Mr. O'Malley was initially frightened by his presence. (49 RT 10060, 10098.)

Robertson then arrived unexpectedly. (40 RT 8545.) Sheffield wanted to know if Robertson knew about Parr's murder and where he was buried. (40 RT 8548-8549.) Mr. O'Malley lied, telling them that Robertson knew nothing about Parr. (40 RT 8549; 49 RT 10110.) In fact, however, Mr. O'Malley had told Robertson that Sheffield killed Parr and that Parr's body was buried in the North 15th Street backyard. (48 RT 9904, 9910.) Sheffield said Robertson was "no good" and was concerned that Robertson was a snitch. (40 RT 8549; 49 RT 10109-10110.)

Robertson approached Mr. O'Malley and Mr. O'Malley told him that everything appeared okay with the club. (40 RT 8551-8552.) Hosac left the bar, and O'Malley, Robertson and Sheffield discussed getting some methamphetamine from Santa Cruz, staying up all night and having Robertson give them tattoos. (40 RT 8562-8563, 8567.) Robertson agreed, and they all got into the front seat of Sheffield's station wagon. (40 RT 8567.) Sheffield was driving, Robertson sat in the middle and O'Malley was in the passenger seat. (40 RT 8567.)

On the drive to Santa Cruz, Sheffield appeared intoxicated. (40 RT 8569.) And at some point the car ran out of gas. (40 RT 8569-8570.) At first, they did not know this is what happened because the gas gauge did not show that the tank was empty. (40 RT 8570.) Sheffield got out to the car, lifted the hood, and then came around to the passenger side, opened the door, and said he was getting a flashlight from under Mr. O'Malley's seat. (40 RT 8572-8573.) But instead of a flashlight, Sheffield pulled out a gun and shot and killed Robertson. (40 RT 8574-8575.)

Mr. O'Malley was "shocked" and "scared." (40 RT 8576.) He got out of the car and complied with Sheffield's demand to push the car over to the shoulder of the road. (40 RT 8577-8579.) Sheffield pulled Robertson from the car and Mr. O'Malley helped Sheffield carry the body across the road. (40 RT 8579-8580.) Mr. O'Malley helped because he was afraid of Sheffield and because Hosac still had his family. (49 RT 10142, 10150, 10152, 10154.) Mr. O'Malley did not see Sheffield cut Robertson's throat. (49 RT 10149-10150.)

Mr. O'Malley and Sheffield then walked to Santa Cruz. (40 RT 8588; 49 RT 10151.) Along the way, Sheffield buried his gun on the side of the road. (40 RT 8588; 49 RT 10151.) At the defense's request, Mr. O'Malley was transported to the location that he saw Sheffield bury the gun. (41 RT 8609; 49 RT 10619-10624.) A search was

conducted, but the gun was not found. (41 RT 8609-8610.) Nevertheless, as mentioned above, prior ballistics testing in the German homicide established that the Robertson murder weapon belonged to the Sheffields. (51 RT 10579.)

That night, Mr. O'Malley returned to the Der Ghan Motel. (41 RT 8617-8618.) He put the knife he had been carrying into a maroon bag and left it in the motel room. (41 RT 8628-8629.) He placed the clothes he was wearing into a brown paper bag along with Sheffield's clothes and threw the bag in a dumpster outside the motel. (41 RT 8630; 50 RT 10248.)[8]

Mr. O'Malley denied calling Hohman when he was being held in the Walsh case and saying "REDRUM." (41 RT 8631.) He also denied ever telling Hohman he shot Robertson. (49 RT 10215.) Instead, he told Hohman what others were saying and let her draw her own conclusions. (49 RT 10218-10219.)

After Robertson's death, Mr. O'Malley, Hohman, Karen and the children traveled east. (35 RT 7562-7563.) Mr. O'Malley wanted to get away from the Freedom Riders

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[8] This squarely contradicted Hohman's testimony that Mr. O'Malley hid the clothes in the motel room ceiling and later asked her to hide them at her mother's home where the police found them. (*Compare* 41 RT 8630 and 50 RT 10248 *with* 27 RT 5803-5805.) To assess this contradiction, defense investigator Joe Jones measured the distance between the ceiling tiles and ceiling at the Der Ghan motel; the distance was 3/4 of an inch; not enough room to hide a bag full of clothes. (34 RT 7243-7247.)

out of his concern for his own safety and the safety of Hohman, Karen and his children. (50 RT 10262, 10299.) Mr. O'Malley knew that Hosac and the Freedom Riders had turned him in to police for his failure to appear in connection with the Walsh case. (50 RT 10262-10263.) He also learned that the Freedom Riders voted him out of the club. (50 RT 10400.) Mr. O'Malley was now afraid of the Freedom Riders and believed they were trying to frame him for murder. (49 RT 10055; 50 RT 10290, 10319, 10321, 10335, 10358-10359.)

While on the East Coast, Mr. O'Malley learned that he was wanted on a murder charge. (50 RT 10348.) Mr. O'Malley wanted to turn himself in but was afraid of the police. (50 RT 10348.) Mr. O'Malley's aunt confirmed Mr. O'Malley's fear of police, testifying that Mr. O'Malley called her in a frantic state saying he would not turn himself in because if he was taken into custody he would be killed before trial. (38 RT 7993-7994.) On January 28, 1988, Mr. O'Malley was arrested in New York City and subsequently returned to California. (50 RT 10371, 10373-10377.)

Although both Sheffield and Mr. O'Malley were charged with the Robertson and Parr homicides, Sheffield, while in jail awaiting trial, told Danny Payne that he was solely responsible for both murders. In the Santa Clara jail, Sheffield was housed next to Payne, who was at the time of trial serving time for kidnaping and rape. (34 RT 7369-7370,

7385.) Sheffield told Payne that he was a member of the Freedom Riders. (34 RT 7372-7373.) Sheffield explained that he had once killed a man and buried him in a backyard. (34 RT 7372-7373.) And while a man named "Jimmy" was generally his partner in crime, "Jimmy" had not committed this killing. (34 RT 7378, 7407, 7409.) Sheffield said he had also killed another man when "Jimmy" was present but that Sheffield alone was the killer. (34 RT 7407.) He said that after this killing a girl who was supposed to dispose of his bloody clothes had instead turned them over to police. (34 RT 7378-7379.) Sheffield said he was disappointed in "Jimmy" and should have killed "Jimmy" and the girl when he had the chance. (34 RT 7381-7382.) Sheffield was also upset that "Jimmy's old lady Karen" testified against him at the preliminary hearing. (34 RT 7391-7392, 7409.) Sheffield said he wanted to kill "Jimmy" because of this. (34 RT 7409.)

E. The Guilt Phase Jury Deliberations.

The jury in this case deliberated for seven days, requested numerous re-readings of trial testimony and clarification on the law, and unanimously acquitted of the count two conspiracy before finding Mr. O'Malley guilty of the German, Parr and Robertson murders. (25 CT 5553-5555, 5556-5567, 5569-5583, 5585.)

On August 19, 1991, and following closing arguments, the jury begun

deliberations. (25 CT 5553.) The jury deliberated 3 hours on this first day. (25 CT 5553-5554.) On August 20, the jury continued deliberations, deliberating the entire day. (25 CT 5555.) During deliberations, the jury asked for readback of the testimony of Robert and Marlene Fulton. (25 CT 5555, 5560.)

The jury next deliberated on August 26, 1991. (25 CT 5556.) During the all-day deliberations, the jury requested readback of Hohman's testimony regarding statements Mr. O'Malley purportedly made to Hohman on the night of Parr's death. (25 CT 5556, 5561.) The next day on August 27, the jury again deliberated all day. (25 CT 5557.)

Once again on August 28, the jury deliberated all day. (25 CT 5558.) During these deliberations, and on three separate occasions, the jury requested additional readback of trial testimony. (25 CT 5562, 5564, 5566.) The jury wanted to hear (1) Hohman's testimony regarding Mr. O'Malley's confession to Parr's murder, (2) Mr. O'Malley's testimony regarding wanting to ride Parr's motorcycle, and (3) Hohman's testimony regarding burying Parr's body. (25 CT 5562, 5564, 5566.) The jury also asked for clarification on the law of conspiracy. (25 CT 5568.)

On August 29, the jury deliberated another full day. (25 CT 5559.) The next day, and after more than a total of 32 hours of deliberation, the jury unanimously acquitted of the count two conspiracy before finding Mr. O'Malley guilty of the German, Parr and Robertson murders. (25 CT 5553-5555, 5556-5567, 5569-5583, 5585.)

F. The Penalty Phase.

The only additional evidence presented by the prosecution at the penalty phase was a certified copy of Mr. O'Malley's November 16, 1979 Massachusetts felony conviction for assault with a deadly weapon on Wrentham, Massachusetts police officer John Accord. (56 RT 11501-11502.)[9]

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[9] During the guilt phase, and on cross examination, Mr. O'Malley testified that in 1979, when he was 20 years old and living in Wrentham, Massachusetts, he and a friend got drunk and threw bottles at the police station. (49 RT 10171-10172.) They then drove to O'Malley's parents' home and when a police car came driving down the street, they "flipped them off." (49 RT 10172.) When the officer in the car stopped and started to get out, Mr. O'Malley yelled, "What the fuck are you doing here," and kicked the car door shut on the officer's legs. (49 RT 10172.) The officer reached for his billy club and Mr. O'Malley pulled out his knife and challenged him. (49 RT 10173.) Mr. O'Malley testified he made some gesture toward the officer, then stopped. (49 RT 10174.) In response to questions from the prosecutor, Mr. O'Malley denied he pulled open the knife as soon as the officer stopped and began slashing at the officer's face. (49 RT 10174.) Mr. O'Malley received probation in the criminal case arising out of the incident. (49 RT 10175.) On rebuttal, Officer Accord, testified that during the confrontation, Mr. O'Malley tried to slash his face with a knife, narrowly missing his throat. (49 RT 10718-10719, 10721.)

There was, however, extensive mitigating evidence put on by the defense. Thus, the defense presented favorable testimony from Reverend Laurence Walton, the assistant chaplain of the Santa Clara county jail system, as to Mr. O'Malley's spiritual development. (56 RT 11504-11517.) Although Reverend Walton generally did not testify for inmates, he made an exception in this case precisely because over the two years he knew Mr. O'Malley, he found him "unique." (56 RT 11508-11509, 11518-11519.) This was partly because Mr. O'Malley was open and honest in identifying where things went wrong in his early years and why he should have done things differently. (56 RT 11517.) Reverend Walton explained that he had extensive experience working with individuals charged with and convicted of capital crimes and most of them do not honestly "seek God." (56RT 11518-11519.) Reverend Walton testified that Mr. O'Malley had been and would continue to be a positive influence on others. (56 RT 11511-11513.)

Father Jim Misfud, a Catholic priest, echoed this testimony. (58 RT 11923-1-11923-8.) According to Father Misfud, Mr. O'Malley was "probably the best prisoner" he had ever seen. (58 RT 11923-4.)

There was also powerful evidence about Mr. O'Malley's troubled background. Mr. O'Malley's mother became an alcoholic after her husband (Mr. O'Malley's father)

began to abuse her. (56 RT 11617, 11621.) Mr. O'Malley himself began to receive severe beatings from his father -- who was a strict disciplinarian -- beginning at age 10. (56 RT 11617, 11621.) These beatings included punching, slapping, and hitting him with a belt. (56 RT 11617, 11621.) Although his mother tried to stop the abuse by covering for Mr. O'Malley when he made minor mistakes, the beatings did not stop. (56 RT 11628.)[10]

Mr. O'Malley's father's first wife Ellen Muzzy confirmed that O'Malley's father was a physically abusive man. (59 RT 12180.) Muzzy testified that O'Malley's father had a violent temper and would "slap [her] around." (59 RT 12182.) On one occasion, O'Malley's father beat and choked her when she was pregnant with Mr. O'Malley's half-sister. (59 RT 12182.)

Mr. O'Malley's father pushed him into playing hockey, and when Mr. O'Malley was only 11 years old his father started to send him away to hockey camp for summers. (56 RT 11625.) At 14 years old, Mr. O'Malley became a counselor at the camp. (56 RT

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[10] In rebuttal, the state presented evidence that Mr. O'Malley's childhood neighbor Jane Anderson thought that Mr. O'Malley's father was "kind-hearted" and that she had not seen any evidence that Mr. O'Malley was physically abused. (58 RT 12069-12071.) Anderson admitted, however, that she had little contact with Mr. O'Malley's father and had not seen how Mr. O'Malley was raised inside the home. (58 RT 12068.) William Manning Jr., a friend of Mr. O'Malley's between the ages of 15 and 20, also testified that he had never seen Mr. O'Malley's father hit Mr. O'Malley and he never heard Mr. O'Malley complain that he was being abused by his father. (58 RT 12099-12101, 12105.)

11628.) Because the other counselors were all between the ages of 16 and 21, Mr. O'Malley was introduced to marijuana and alcohol at a young age. (56 RT 11628-11629.) Mr. O'Malley's father started lying about Mr. O'Malley's age so that he could play in a semi-pro hockey league. (56 RT 11629.)

Although Mr. O'Malley was only 14, his father permitted him to drink alcohol and to come and go unsupervised. (56 RT 11634.) Mr. O'Malley began to abuse alcohol as well as marijuana. (56 RT 11635.) Around this time, three of Mr. O'Malley's friends died: one by suicide, one in an automobile accident and one in a fire. (56 RT 11635-11636.) The next year, when he was only 15, Mr. O'Malley dropped out of school and began experimenting with harder drugs. (56 RT 11637.) When he was 18, he moved out of his home and left for California. (56 RT 11639.)

In addition to this evidence, Mr. O'Malley presented evidence from seven law enforcement officers about his behavior in jail since his arrest. (57 RT 11718-11748, 11845-11857; 58 RT 11893-11900.) He behaved well in jail, respected staff and other inmates and did not create any problems for jail staff. (57 RT 11718-11748, 11845-11857; 58 RT 11893-11900.) Defendant would be a benefit to the jail or inmate population. (57 RT 11733.)

Judith Perlite, the program manager for educational programs at the Santa Clara County jail, reached the same conclusion. Mr. O'Malley earned both a GED and a regular high school diploma while in the county jail. (57 RT 11750-11753.) He was instrumental in starting the educational program in the jail. (57 RT 11750.) Ms. Perlite personally saw Mr. O'Malley have a calming influence on at least one volatile inmate. (57 RT 11754.)

The penalty phase jury deliberations also show this was a close case. In deciding between life and death, the jury deliberated more than 20 hours over six days. (25 CT 5715-5722.) Thus, deliberations began on October 3, 1991. (25 CT 5715.) On October 4, the jury deliberated all day. (25 CT 5716.) During deliberations, the jurors indicated that they were having trouble deciding between life and death and requested to hear "the oath" they "swore to" on the first day of trial. (25 CT 5717.)

The penalty deliberations continued on October 7. (25 CT 5718.) The jury deliberated the entire day. (25 CT 5718.) On October 8, all-day deliberations continued. (25 CT 5720.) The same occurred on October 9. (25 CT 5721.) On October 10, and after more than 20 hours of deliberations, the jury set the penalty at death (25 CT 5722.)

ARGUMENT

JURY VOIR DIRE ISSUES

I. BECAUSE THE PROSECUTOR USED PEREMPTORY CHALLENGES TO STRIKE THE ONLY PROSPECTIVE AFRICAN-AMERICAN JURORS CALLED TO THE JURY BOX, MR. O'MALLEY'S CONVICTION VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

Jury voir dire began in this case on March 19, 1991. (24 CT 5402.) There were only two African-American prospective jurors: Donald Carey and Richard Allen. (13 RT 2657-2659.)

By all accounts, Donald Carey should have been a very good juror for the prosecution. His father had been a police officer for three decades. (13 Aug. CT 3069.)[11] He was politically moderate. (13 Aug. CT 3066.) When asked to describe the role of prosecutors in the criminal justice system, he explained they were "trying to serve justice." (13 Aug. CT 3072.) And when asked what problems there were with the criminal justice system, his answer was one any prosecutor would want to hear --

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[11] "Aug. CT" refers to the first Augmented Clerk's Transcript in this case.

especially in a capital case:

"People do terrible crimes and get off lightly." (13 Aug. CT 3071.)

Richard Allen also appeared to be a good juror for the prosecution. He was a former police officer. (11 Aug. CT 2469; 6 RT 1257.) When asked his feelings about firearms, he noted that they "must be kept from criminals." (11 Aug. CT 2471.) He was politically moderate and made clear he had no opposition at all to the death penalty. (11 Aug. CT 2466, 2480.) He had served in the military, listed George Bush as one of the people he admired most, and noted that "crime" was one of the nation's biggest problems. (11 Aug. CT 2465-2466, 2471, 2478.)

The clerk called 12 prospective jurors into the jury box to begin the peremptory challenge process. (13 RT 2649-2650.) As luck would have it, black prospective juror Carey was among this group of 12 jurors. (13 RT 2650.)

The prosecutor wasted no time. The prosecutor used his very first peremptory challenge to discharge Mr. Carey. (13 RT 2651.)

Moments later, black prospective juror Allen was called into the jury box. (13 RT

2656.) Again the prosecutor wasted no time, immediately discharging Mr. Allen. (13 RT 2657.) Defense counsel objected but, after hearing the prosecutor's reasons for the two discharges, the trial court ruled that "the People's reason for exercising the peremptory challenges are valid reasons." (13 RT 2657-2660.)

Each discharge requires reversal. As to Mr. Carey, the prosecutor stated four reasons for the discharge. As discussed in Argument B, below, one of these reasons was entirely unsupported by the record, while the remaining three were equally applicable to numerous white jurors who were not struck. Because the absence of any legitimate reasons squarely demonstrates discrimination, and the discriminatory strike of even a single juror is unconstitutional, reversal is required.

As to Mr. Allen, the prosecutor stated five reasons for the discharge. As discussed in Argument C below, although several of these reasons were proper, others were either inherently implausible or equally applicable to white jurors who were not struck. Because a prosecutor's reliance on proper and improper reasons also demonstrates discrimination, the discharge of Mr. Allen requires reversal as well.

B. Because The Prosecutor's Stated Reasons For Discharging Prospective Juror Carey Were Either Unsupported By The Record Or Equally Applicable To White Jurors Who Were Not Struck, They Were Simply Pretexts For Discrimination And A New Trial Is Required.

1. The prosecutor's stated reasons for discharging African-American prospective juror Carey were unsupported by the record or equally applicable to white jurors who were not struck.

When he was called for jury duty, Donald Carey had been a Santa Clara resident for 14 years. (13 Aug. CT 3061.) He was a high school graduate, with two years of college, who was employed full time as a welder, and had been steadily employed by the same welding company for more than eight years. (13 Aug. CT 3062, 3064-65.) He had been married for two and one-half years. (13 Aug. CT 3062.)

He received a summons to appear for jury duty. Mr. Carey honored his summons, dutifully appearing at the San Jose County courthouse to fulfill his civic responsibility. He arrived in San Jose to answer questions on the morning of April 4, 1991. (6 RT 1333.)

As noted above, at first blush Donald Carey appeared to be a juror that the prosecution would want to sit on this case. His father was a police officer for three decades, he believed prosecutors were "trying to serve justice" and, in his view, the major

problem with the criminal justice system was that "[p]eople do terrible crimes and get off lightly." (13 Aug. CT 3069, 3071, 3072.) Nevertheless, the prosecutor used his very first peremptory challenge to discharge Mr. Carey. (13 RT 2651.)

After defense counsel's objection, the prosecutor put his reasons on the record. First, he accurately noted that Mr. Carey was "a 33-year old black male" who was "married, three kids, renting." (13 RT 2658.) The prosecutor emphasized his purported concern with Mr. Carey's status as a renter later, when he explained his reasons for discharging Mr. Allen by noting that Allen was also a renter and added "as I indicated, the other juror [Mr. Carey] is [also] a renter." (13 RT 2659.) Second, the prosecutor went on to note that Mr. Carey's father had been a police officer, but he then added "[h]owever, he [Carey] recalled and spoke of the prejudice." (13 RT 2658) Third, the prosecutor expressed concern with Mr. Carey's written answer (on the jury questionnaire) to question 58b, which (the prosecutor stated) "asked how he felt about if somebody bragged about something, whether they could be punished – whether or not they actually did it. He put down in response to that, in effect, that a bragger could simply be joking." (13 RT 2659.) Finally, the prosecutor stated that he did not like Mr. Carey's answer to question 55j, which asked about the burden of proof. (13 RT 2659.)

None of the prosecutor's stated reasons withstands even rudimentary scrutiny. As

an initial matter, the prosecutor's reference to the fact that Mr. Carey "recalled and spoke of the prejudice" is simply unsupported. Mr. Carey said nothing about prejudice in his questionnaire. (13 Aug. CT 3059-3084.) Nor did he "recall[] and [speak] of prejudice" in his voir dire. (6 RT 1331-1337.) This stated reason has utterly no support in the record.

In contrast, the prosecutor's remaining three reasons are all supported by the record. However, every one of these reasons was applicable to numerous white jurors whom the prosecutor elected *not* to strike and who were actually seated either as jurors or alternates.

For example, the prosecutor noted that Mr. Carey was "married, three kids, renting." (13 RT 2658.) Of the sixteen jurors seated in this case (12 jurors and 4 alternates), nine were married (26 CT 5802, 5828, 5854, 5906, 5984, 6010, 6026; 27 CT 6114 6140), six had children (26 CT 5829, 5907, 5933, 5985, 6037; 27 CT 6141), and five did not own their own home, but rented. (26 CT 5775, 5853, 6009; 27 CT 6061, 6165.) Yet the prosecutor discharged none of these white jurors for being parents who were married and renting.

The prosecutor's next stated reason suffers from an identical problem. The

prosecutor expressed concern with Mr. Carey's written answer (on the jury questionnaire) to question 58b, which (the prosecutor said) "asked how he felt about if somebody bragged about something, whether they could be punished – whether or not they actually did it. He put down in response to that, in effect, that a bragger could simply be joking." (13 RT 2659.)

Question 58b was a remarkable question which read as follows:

> "58. Please indicate to what extent you agree or disagree with the following statements:
>
> "B. If someone brags about doing something wrong, he should be punished – whether or not he actually did it."
>
> ____ Strongly Agree
> ____ Somewhat Agree
> ____ Neutral
> ____ Somewhat Disagree
> ____ Strongly Disagree" (13 Aug. CT 3076.)

The question advised the prospective jurors that if they wished to explain their answer, they could do so. (13 Aug. CT 3076.)

In his questionnaire, Mr. Carey checked the "strongly disagree" box. (13 Aug. CT 3076.) He explained that he would not punish someone just for bragging "whether or not

he actually did it" because they "could be joking around." (13 Aug. CT 3076.) The prosecutor relied on this answer in supporting the discharge. (13 RT 2659.)

The prosecutor's concern with Mr. Carey's answer was extremely selective. Not surprisingly, of the 16 jurors who were seated in the case, fully 12 gave the identical checked answer as Mr. Carey, "strongly disagree[ing]" that someone should be punished for bragging about doing something wrong "whether they did it or not." (26 CT 5790, 5816, 5842, 5894, 5920, 5946, 5972, 6050; 27 CT 6076, 6102, 6154, 6180.)

Several of these jurors gave an explanation identical to Mr. Carey's explanation. Thus, seated juror number 2, Linda Rosco, explained that "[b]ragging is just talking, not committing a crime." (26 CT 5816.) Seated juror number 11, Mary Ann Snedeker, explained that "[p]eople say a lot of things that they often don't mean or to show off to others." (26 CT 6050.) Yet the prosecutor discharged none of these white jurors either for "strongly disagreeing" that someone should be punished for bragging about doing something wrong "whether they did it or not" or for recognizing that sometimes people brag about things they have not done.

The prosecutor's final stated reason also applies equally well to white jurors whom the prosecutor did not strike. The prosecutor stated he did not like Mr. Carey's answer to

question 55j, which asked about the appropriate burden of proof. (13 RT 2659.)

Question 55j read as follows:

> "55. Please indicate to what extent you agree or disagree with the following statements:
>
> "J. I think I would require that the prosecution prove its case not only beyond a reasonable doubt as the law requires, but beyond all possible doubt and to an absolute certainty before I would convict anyone of a serious crime."
>
> ____ Strongly Agree
> ____ Somewhat Agree
> ____ Neutral
> ____ Somewhat Disagree
> ____ Strongly Disagree" (13 Aug. CT 3075, emphasis in original.)

In his questionnaire, Mr. Carey checked the "somewhat agree" box. (13 Aug. CT 3075.)

The prosecutor's reliance on this answer is puzzling. Two other white prospective actually checked the "strongly agree" answer. (26 CT 5867, 5945.) The prosecutor questioned Mr. Carey, as well as these other two jurors, about this and received identical assurances from each they would follow the law as it was given by the court. (5 RT 1039-1041 [Juror Rellamas]; 6 RT 1153-1154 [Juror Sherrell]; 6 RT 1336 [Prospective Juror Carey].) Yet while the prosecutor discharged neither of the two white jurors who "**strongly** agreed" a standard of proof higher than reasonable doubt was required, he

elected to discharge black prospective juror Carey who "**somewhat** agreed" with this same proposition.

The trial court did not explore even a single one of these problems in the prosecutor's explanation. The court did not ask any questions of the prosecutor nor did it perform any inquiry at all into the stated reasons. Instead, and without any analysis, the court simply ruled that the stated reasons were "valid." (13 RT 2660.)

2. The prosecutor's discharge of Mr. Carey violated the Sixth and Fourteenth Amendments.

The United States Supreme Court has long recognized that a defendant's Sixth Amendment right to an impartial jury precludes prosecutors in criminal cases from excusing jurors because of their membership in a cognizable class such as race. (*See e.g.*, *Smith v. Texas* (1940) 311 U.S. 128 (1940); *Peters v. Kiff* (1972) 407 U.S. 493. *Cf. Glasser v. United States* (1942) 315 U.S. 60.) Similarly, the Court has noted the right of potential jurors, protected by the equal protection clause of the Fourteenth Amendment, not to be excluded from a jury panel on the basis of group bias. (*See, e.g.*, *Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky* (1986) 476 U.S. 79.)

This Court has been equally zealous in guarding against discrimination in the

seating of a criminal jury, repeatedly noting that prosecutors may not discharge a juror because of membership in a cognizable racial, ethnic or religious group. (*See, e.g.*, *People v. Crittenden* (1995) 9 Cal.4th 83, 114; *People v. Garceau* (1994) 6 Cal.4th 140, 170; *People v. Wheeler* (1978) 22 Cal.3d 258, 276.) The discriminatory striking of even a single member of a cognizable group requires reversal . (*See, e.g.*, *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1086; *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541.)

Challenging a prosecutor's dismissal of a potential juror for group bias, or making a so-called "*Batson* motion," involves a three-step process. (*Purkett v. Elem* (1995) 514 U.S. 765, 747-768.) First, a defendant must make a prima facie showing the prosecutor challenged the juror because of membership in a cognizable group. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) Second, if a prima facie case of purposeful discrimination has been established, the burden shifts to the prosecution to come forward with a group-neutral explanation for challenging the juror (step two). (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) At the third stage, the trial court must determine whether defendant has established purposeful discrimination; where the prosecutor proffers a facially neutral explanation, this determination turns on an assessment of whether the explanation is bona fide or simply a pretext. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98, fn. 20.)

Generally, a reviewing court must show deference to a trial court's determination that facially neutral reasons are genuine. (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) But deference is due "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386.) The trial court's obligation to make a "sincere and reasoned" evaluation of the prosecutor's stated reasons requires the trial judge to consider "the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) "[W]hen the prosecutor's stated reasons are *either* [1] unsupported by the record, [2] inherently implausible, or [3] both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, emphasis added.)

This case involves step three of the *Batson* inquiry. The prosecutor here struck the only two black jurors called to the jury box. Although the trial court did not formally announce that a prima facie case of discrimination had been established, the prosecutor himself went ahead and offered justifications for his discharge of the only two black jurors. (13 RT 2652-2660.) In this situation, the Court must perform a *Batson* third-stage inquiry to determine whether the prosecutor's stated reasons were genuine race-neutral

reasons or merely pretexts for discrimination. (*Hernandez v. New York* (1991) 500 U.S. 352, 359. *See also People v. Fuentes* (1991) 54 Cal.3d 707, 716-717.)

In making this determination, there are several techniques available to this Court. First, the Court may examine whether a prosecutor's stated reasons are actually supported by the trial record. Stated reasons which are *not* supported by the record point toward a finding of pretext. (*People v. Silva*, *supra*, 25 Cal.4th at p. 385; *People v. Turner* (1986) 42 Cal.3d 711, 723.) Where some of a prosecutor's stated reasons are unsupported, this is strong evidence that the reasons given as a whole are insufficient. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698 [as to each of two Hispanic jurors the prosecutor stated two reasons for the discharge, one reason as to each juror was unsupported; held, although the remaining reason would have been adequate, the fact that the prosecutor stated invalid reasons indicates bias was involved].)

Second, the Court can examine whether a prosecutor's stated reasons for discharging "cognizable-class" jurors apply equally to jurors who are *not* members of the class (and who were *not* discharged). Where the prosecutor states reasons for discharging a minority juror which are equally applicable to white jurors who were not discharged, the prosecutor's reasons are a pretext for discrimination. As the United States Supreme Court has explicitly concluded, "[i]f a prosecutor's proffered reason for striking a black

panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 2325.) Since *Miller-El* was decided, this Court has consistently relied on this type of comparative-juror analysis in determining whether a prosecutor's stated reasons were pretexts for discrimination. (*See, e.g., People v. Lewis* (2006) 39 Cal.4th 970, 1017-1024; *People v. Ledesma* (2006) 39 Cal.4th 641, 688; *People v. Avila* (2006) 38 Cal.4th 491, 547-548; *People v. Huggins* (2006) 38 Cal.4th 175, 232; *People v. Jurado* (2006) 38 Cal.4th 72, 105-106; *People v. Schmeck* (2005) 37 Cal.4th 240, 270-273.)

In this case, both of these techniques lead to the same conclusion. First, the prosecutor's statement that he discharged Mr. Carey because he "recalled and spoke of [] prejudice" is totally unsupported. Mr. Carey said nothing at all about prejudice in his questionnaire or in his voir dire. (13 Aug. CT 3059-3084; 6 RT 1331-1337.) And as discussed above, the prosecutor's remaining reasons for discharging Mr. Carey -- Mr. Carey's personal characteristics (married, with children and a renter), his view as to the burden of proof and his views about whether a person should be punished for bragging about a crime which he did not actually commit -- were equally applicable to white jurors whom the prosecutor elected not to strike.

In short, as to Mr. Carey the prosecutor's stated reasons for the discharge were either unsupported by the record or implausible precisely because they were equally applicable to white jurors who were not stricken. In this situation, the trial court was required to do something more than merely make a "global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) After all, as this Court has noted, "[t]he trial court has a duty to determine the credibility of the prosecutor's proffered explanations . . . and it should be suspicious when presented with reasons that are unsupported or otherwise implausible." (*Id.* at p. 385.)

Here, the trial court not only failed to make *any* inquiry into the credibility of "the prosecutor's proffered explanations" but it made the precise "global finding that the reasons appear sufficient" condemned in *Silva*, concluding that "the People's reason for exercising the peremptory challenges are valid reasons." (13 RT 2660.) This conclusory ruling hardly constitutes a "reasoned and sincere attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known . . . and . . . the manner in which the prosecutor has . . . exercised challenges . . . ." (*People v. Hall*, *supra*, 35 Cal.3d at pp. 167-168.) The trial court did not consider either the "circumstances of the case" or "the manner in which the prosecutor has . . . exercised challenges . . . ."

Indeed, in light of the reasons given by the prosecutor in this case, if the trial court's inquiry here constitutes the "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror" required by *Batson* and its progeny, then the requirement of such an inquiry is meaningless. The stated reasons for discharging Mr. Carey were a pretext for discrimination. Because the discriminatory striking of even a single member of a cognizable group is prohibited, reversal is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)[12]

C. Because The Prosecutor's Stated Reasons For Discharging African-American Prospective Juror Allen Reveal That The Discharge Was Based On Race, Reversal Is Required.

Prospective juror Richard Allen was 59 years old at the time of trial. (11 Aug. CT 2461.) He had been a Santa Clara resident for eight years. (11 Aug. CT 2461.) He was a high school graduate, with several years of college, and was employed full time as a janitor. (11 Aug. CT 2462-2464.) Mr. Allen had served three years in the Air Force and described himself as a political moderate. (11 Aug. CT 2465-2466.)

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[12] As discussed above, Mr. Carey's experiences as indicated on his questionnaire would normally have been considered favorable to the prosecution. The prosecutor's discharge of such a juror also is a factor which supports a finding of discrimination. (*See People v. Allen* (2004) 115 Cal.App.4th 542, 550 ["The prosecutor excused the only two African-American jurors in the jury box, both of whom had experiences or contacts that normally would be considered favorable to the prosecution, thereby demonstrating 'a strong likelihood' that they were challenged because of their group association."].)

Like Mr. Carey, Richard Allen also received a summons to appear for jury duty. He too honored the summons, appearing at the Santa Clara County courthouse to fulfill his civic responsibility. He arrived to answer questions on the morning of April 3, 1991. (6 RT 1252.)

Richard Allen also appeared to be a juror that the prosecution would want to sit on this case. He had no personal, philosophical or religious opposition to the death penalty, he himself had been a police officer, he listed George Bush among the men he most admired, he had served in the military and he made clear that among the country's biggest problems was "crime in the street." (11 Aug. CT 2465-2466, 2467, 2469, 2471, 2478; 6 RT 1257.) Nevertheless, the prosecutor used a peremptory challenge to discharge Mr. Allen as soon as he was seated in the jury box. (13 RT 2657.)

After defense counsel's objection, the prosecutor put his reasons on the record. There were five of them. First, the prosecutor noted that Mr. Allen, like Mr. Carey, "is a renter." (13 RT 2659.) Second, the prosecutor noted that Mr. Allen's answer to question 11 of the questionnaire showed a "lack of knowledge or something about certain circumstances regarding his children." (13 RT 2659.) Third, Mr. Allen listed as a hobby that he was an amateur magician, which the prosecutor did not like. (13 RT 2659-2660.) Fourth, the prosecutor believed the voir dire showed that Mr. Allen would "require [a]

burden of proof over and above what the law required." (13 RT 2660.) Finally, the prosecutor believed that "in terms of the death penalty he was somewhat equivocal." (13 RT 2660.)

Mr. O'Malley concedes that in stark contrast to the prosecutor's stated reasons for discharging Mr. Carey -- where every one of the stated reasons was pretextual -- the reasons given for discharging Mr. Allen are a mixed bag. For example, the prosecutor's stated concern with Mr. Allen's status as a renter was entirely illusory. As discussed above, the prosecutor had no concern at all with white jurors that were renters. (26 CT 5775, 5853, 6009; 27 CT 6061, 6165.) This stated reason was improper. (*Miller-El*, 125 S.Ct. at p. 2325.)

The prosecutor's stated concern with Mr. Allen's interest in magic suffers from a different flaw. When a prosecutor's stated reason for discharging a minority juror are "inherently implausible," the trial court may not simply accept the reason without inquiry. (*People v. Silva*, 25 Cal.4th at p. 386.) As *Silva* makes clear, while a facially neutral but implausible reason for a strike is not itself unconstitutional -- and a trial court may ultimately decide to accept such a reason -- the law places a burden of inquiry on the trial court. In such a situation, the court must inquire further to determine if the proffered reason is merely a pretext for discrimination. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768;

People v. Silva, *supra*, 25 Cal.4th at p. 386.) What the trial court may not do is simply make a "global finding that the reasons appear sufficient." (*Silva*, 25 Cal.4th at p. 386.)

Here, the prosecutor accurately noted that Mr. Allen had an interest in magic as a hobby. (13 RT 2659-2660.) This is certainly a race-neutral reason. It is also supported by the record. (11 Aug. CT 2466.) But given that this case has nothing at all to do with magic, this reason is patently implausible. When confronted with this reason the trial court was obligated under *Silva* to inquire further; instead, the court blithely accepted this reason and found it "valid." (13 RT 2660.) This is exactly what *Silva* forbids.[13]

To be sure, Mr. O'Malley recognizes that as to Mr. Allen, several of the other reasons stated by the prosecutor were race-neutral, supported by the record and not common to numerous white jurors seated in the case. For example, the prosecutor's stated concerns with Mr. Allen's view as to the burden of proof, and his views on the death penalty -- standing alone -- may have been adequate reasons on which to support the discharge. But where a prosecutor states both adequate and inadequate reasons for a discharge, this is strong evidence that the discharge was based at least in part on improper

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[13] Indeed, this same argument applies to the prosecutor's reliance on (1) status as a renter, (2) marital status and (3) parenthood as one or more reasons justifying his discharges of Carey and Allen. Because this case has nothing to do with any of these areas, these reasons are on their face implausible, and some kind of further inquiry was required under *Silva*. No such inquiry occurred.

considerations. (*United States v. Chinchilla*, *supra*, 874 F.2d at 698 [as to each of two Hispanic jurors the prosecutor stated two reasons for the discharge, one reason as to each juror was improper; held, although the remaining reason would have been adequate, the fact that the prosecutor stated invalid reasons suggests bias was involved].)

In short, the prosecutor's stated explanation for discharging Mr. Allen included both plausible and implausible reasons. Under *Silva*, the trial court was obligated to perform a searching inquiry; instead, the court simply found the reasons "valid." Because the stated reasons for discharging Mr. Allen include several reasons which were pretexts, and because the discriminatory striking of even a single member of a cognizable group is prohibited, reversal is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)[14]

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[14] Of course, because the prosecutor improperly struck prospective juror Carey -- which itself requires reversal -- there is no need to even reach the separate question of whether the strike of Mr. Allen was also improper. (*See People v. Allen*, *supra*, 115 Cal.App.4th at p. 550 [declining to address question of whether prosecutor improperly struck a second black juror where record showed the prosecutor's initial strike of a black juror was improper and required reversal].)

II. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF PROSPECTIVE JUROR NISHURA AFFECTED THE COMPOSITION OF THE JURY PANEL, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, AND A RELIABLE DETERMINATION OF PENALTY.

A. The Relevant Facts.

Prospective juror Kumiko Nishura was questioned on Monday, April 1, 1991. (4 RT 923.) Under questioning by the court, Mrs. Nishura said she believed in the death penalty, although she conceded it would be personally difficult to sentence someone to die. (4 RT 926-927, 937.) She agreed to follow the court's instructions and consider both penalties. (4 RT 929.) On follow-up questioning by the prosecutor, Mrs. Nishura said she could vote for a death sentence if selected as a juror, but was "uncomfortable" with imposing a death verdict. (RT 943-946.)

The prosecutor challenged Mrs. Nishura for cause. (RT 948-950.) The trial court denied the challenge. The court recognized the case would be personally "difficult" for Mrs. Nishura, and Mrs. Nishura "doesn't want to have anything to do with a death penalty case," but denied the challenge because "she would to the best of her ability follow the Court's instructions on the law." (4 RT 950.)

Apparently this ruling angered Mrs. Nishura. (4 RT 972.) According to the prosecutor, she "slammed the door" and walked out of the courtroom "mad." (5 RT 972.)

The next morning, Mrs. Nishura called the court clerk and asked to be removed from the jury panel. (5 RT 972.) According to the message relayed from the clerk, Mrs. Nishura said she had "a very stressful night." (*Ibid.*) The trial court reiterated its finding of the day before that Mrs. Nishura's views on the death penalty "would not, in the court's mind, be a valid basis for a challenge for cause . . . ." (5 RT 973.) But although neither the court nor the parties had spoken directly with Mrs. Nishura after the court denied the state's "for cause" challenge, the court reversed field and decided to now find "cause" to dismiss her:

> "The fact is that she is still having a very hard time with it, even though she wouldn't have to come back to the court for a month, basically. [¶] Apparently, it was bothering her quite a bit last night. I am going to find cause." (5 RT 973-974.)

Defense counsel objected, noting Mrs. Nishura was being removed because she did not want to sit on the jury, and observing that probably ninety percent of the jury panel did not want to sit on this capital case jury and face the difficult decision of returning a death verdict. (5 RT 974.) The trial court reiterated it was *not* discharging Mrs. Nishura "because of her views at all on the death penalty whatsoever." (5 RT 974-

975.) Instead, the judge made clear he had decided to excuse her because of her personal difficulty in reaching a death verdict:

> "I'm only excusing her and finding cause to excuse her because her attitude, her feelings, her emotional state, in the court's mind, would prevent or substantially impair her in the performance of her duties as a juror in accordance with the instructions." (5 RT 975.)

The prosecutor then said he "hate[d] to see an issue arise at this point," and suggested the court have Mrs. Nishura come back into court and state under oath what she told the clerk on the telephone. (5 RT 975.) The court agreed to think about this. (5 RT 975.)

At the end of the day, the court informed the parties the clerk had contacted Mrs. Nishura to return to court. (5 RT 1141.) The court made clear, however, it had already made the decision to discharge her and simply wanted to ask her some questions:

> "I have a few other questions that I want to ask her and I'll make the determination that I want to excuse her for the reasons I was thinking about before." (5 RT 1141.)

On Thursday, April 4, 1991, Mrs. Nishura returned to court. She explained she had "a rather restless Monday night." (6 RT 1295.) She explained that because of the

prospect of sitting on the jury she "couldn't sleep" on Monday night. (6 RT 1295.) Because she only slept four hours on Monday night, she thought she would be exhausted. (6 RT 1296.) The court then discharged Mrs. Nishura, reiterating the findings it had reached several days earlier:

> "The court finds that the juror's emotional state would prevent her or substantially impair her performance and duty as a juror in accordance with the instructions and oath." (6 RT 1297.)

In addition, the court stated "her emotional state would prevent her from hearing all the evidence and giving the proceedings the proper attention required[.]" (6 RT 1296-1297.)

As discussed below, it was the state's burden to establish that Mrs. Nishura met the criteria for dismissal. Here, the record before the trial court simply does not support a conclusion that Mrs. Nishura's emotional state would impair her performance as a juror, or that she would be unable to "hear[] all the evidence and giv[e] the proceedings the proper attention required." This error violated appellant's state and federal constitutional rights to due process, a fair and impartial jury, and a reliable determination of penalty and requires automatic reversal of the death judgment.

B. The Trial Court Improperly Discharged Mrs. Nishura For Cause.

In *Adams v. Texas* (1980) 448 U.S. 38, 45, the Supreme Court held "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Discharge of a potential juror is proper "where the record showed [the juror] unable to follow the law as set forth by the court." (448 U.S. at p. 48.) Moreover, if the state seeks to exclude a juror for cause, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.) On appeal, the trial court's ruling will be reversed if not supported by "substantial evidence." *People v. Schmeck* (2005) 37 Cal.4th 240, 262.)

Here, "substantial evidence" does not support either of the trial court's findings. Initially, of course, the trial court questioned Mrs. Nishura, who assured the court that she "absolutely kn[e]w" she could follow the law and instructions as given by the court. (5 RT 938.) Indeed, the court ruled Mrs. Nishura would *not* be discharged for cause precisely because she agreed to follow the law. (4 RT 950.) Subsequently, however, the court excused Mrs. Nishura by finding "her attitude, her feelings, her emotional state . . . would prevent or substantially impair her in the performance of her duties as a juror in accordance with the instructions." (5 RT 975. *See Wainwright v. Witt, supra,* 469 U.S. at

p. 424 ["test for excluding a juror for cause is whether the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."].)

Significantly, the only thing changed since the trial court rejected the state's for-cause challenge was that Mrs. Nishura told the court clerk she had a single stressful night and wanted off the jury. (6 RT 972.) Based on this exchange alone, the court made up its mind that it was going to excuse her. (*See* 6 RT 973-975; *see also* 6 RT 1141 ["I have a few other questions that I want to ask her and *I'll make the determination that I want to excuse her for the reasons I was thinking about before.*"].)

After bringing Mrs. Nishura back several days later, the court again turned to the language of *Witt*, saying her "emotional state would prevent her or substantially impair her performance and duty as a juror in accordance with the instructions and oath." (*Compare Wainwright v. Witt, supra,* 469 U.S. at p. 424). However, as noted above, not only had Mrs. Nishura already told the court she "absolutely kn[e]w" she could follow the law and instructions as given by the court, but the court found her entirely sincere. (5 RT 938, 950.) And although the trial court called Mrs. Nishura back for more questions, *it asked no further questions at all about her ability to follow instructions.* (6 RT 1295-1296.) Accordingly there is simply no evidence at all to support a finding Mrs. Nishura

would have been unable to follow the "instructions [or her] oath."

As noted, the trial court also excused Mrs. Nishura because "her emotional state would prevent her from hearing all the evidence and giving the proceedings the proper attention required[.]" (6 RT 1296-1297.) Yet again, however, the trial court did not ask any questions of significance as to whether service as a juror would affect her emotional state. The only thing the court asked Mrs. Nishura when it brought her back was whether her feelings about sitting on a capital trial jury would make it difficult for her to pay attention, to which Mrs. Nishura responded, "Well, if Monday night was any indication, I probably slept about four hours, you know, I probably will be extremely exhausted." (6 RT 1296.) Notably, even though her discussion with the trial court occurred on Thursday, Mrs. Nishura did *not* say she had any difficulties at all after the one initial sleepless night on Monday. (6 RT 1295-1296.)

At best, the court's questioning merely established Mrs. Nishura found the prospect of imposing the death penalty an emotional issue, and had spent a single restless night because she did not want to sit on the jury in this case. As defense counsel noted, however, probably the vast majority of jurors would rather not sit on a capital jury and face the difficult decision of returning a death verdict. (5 RT 974.) In the words of this Court,"[a]ny juror sitting in a case such as this would properly expect the issues and

evidence to have an emotional impact. A juror is not to be disqualified for cause simply because the issues are emotional." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1091.) And as the United States Supreme Court stated in *Witherspoon v. Illinois* (1968) 391 U.S. 510, "'the declaration of the rejected jurors, in this case, amounted only to a statement that they would not like . . . a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Id.* at p. 515.)

To be sure, a trial court may excuse a juror from a capital case where the juror "anticipate[s] . . . a physical or emotional reaction from his participation in a capital vote . . . ." (*People v. Bradford* (1969) 70 Cal.2d 333, 346.) But in order to sustain a discharge on this ground, the potential juror "must explain in his own words why he would expect such a reaction. If he sets forth reasons based on his background and medical history, and these reasons are deemed persuasive, the court can dismiss him for cause pursuant to the statutory provision allowing such dismissal for 'Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror." (*Id.* at p. 346.) A statement from a potential juror that she would be "very nervous" in voting for death, along with a declaration that "the physical effect [of a guilty verdict] might be too great" is an insufficient basis to sustain a discharge:

> "The venireman herein expressed little more than a deep uneasiness about participating in a death verdict. She complained that a death vote would make her 'very nervous' and agreed with the trial court's suggestion that such a vote might have a 'great physical effect' on her. It cannot be said from this limited examination that the venireman was physically 'incapable of performing the duties of a juror.' The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty."

(*People v. Bradford, supra,* 70 Cal.2d at pp. 346-347. *Accord People v. Fain* (1969) 70 Cal.2d 588, 602 [potential juror's "strong distaste at the prospect of imposing a death sentence" insufficient to justify a for-cause discharge].)

A similar result is warranted here. Nothing in the trial court's questioning of Mrs. Nishura supported a finding that the prospective juror's emotional state would impair her ability to follow her oath and instructions, and that service on the jury would be detrimental to her mental or physical well-being. The court never delved into how, and in what manner, Mrs. Nishura's well-being might be affected by service on the jury, and merely listened without further inquiry when she said she had a single restless night and would "probably . . . be extremely exhausted" were she to sit on the jury. (6 RT 1296.) The trial court's conclusion that cause existed to excuse Mrs. Nishura from the jury panel was not fairly supported by the record. She should not have been excused.

C. Because The Trial Court's Erroneous Discharge Of Mrs. Nishura Resulted In The Discharge Of An Otherwise Fully Qualified Juror, Reversal Of The Death Sentence Is Required.

There are two general types of errors in the voir dire process. First, there are errors which result in a trial court's failure to strike a biased juror who should not sit on the case. Second, there are errors which result in a trial court's decision to strike a juror who is, in fact, fully qualified to sit on the case. The rules of prejudice which apply to these two situations are very different.

When error during the voir dire process results in a trial court's failure to strike a biased potential juror who should have been excluded from the jury, reversal is required only where the biased juror actually sits on the jury. Where the biased juror does not sit -- as when defense counsel uses a peremptory challenge to remove him or her from the jury pool -- reversal is not required. (*Ross v. Oklahoma* (1988) 487 U.S. 81.) This is because the risk from an erroneous failure to strike a biased juror is that the jury will be biased; when the biased juror has not actually sat on the jury, the harm has not come to pass and there is no prejudice from the court's error. (*Id.* at p. 88.)

The rule governing the second situation -- errors which result in a trial court's decision to strike a juror who is fully qualified to sit on the case -- stands in sharp

contrast. When an error during the voir dire process results in exclusion of a potential juror who is fully qualified to serve as a juror, reversal is automatic. (*See, e.g.*, *Gray v. Mississippi*, *supra*, 481 U.S. 648; *Davis v. Georgia* (1976) 429 U.S. 122; *People v. Ashmus* (1992) 54 Cal.3d 932, 962.) In contrast to the failure to exclude a biased juror -- which is easily remedied if the biased juror does not actually sit on the jury -- the error in this situation is far more difficult to quantify or remedy.

The reason is simple. When error causes exclusion of a qualified juror, the harm is that the jury composition as a whole has been irreparably altered. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 665.) When a qualified juror is struck because of error in the voir dire process, it is impossible to measure the impact of the juror's discharge on the voir dire process, the composition of the jury or the outcome of the trial. Accordingly, a strict rule of reversal is entirely justified. (*Cf. Arizona v. Fulminante* (1991) 499 U.S. 279, 307-311 [harmless error analysis does not apply to errors which cannot be "quantitatively assessed" in the context of trial]; *Holloway v. Arkansas* (1978) 435 U.S. 475, 490 [no harmless error analysis applied conflict of interest claim because there is no way to assess the impact of the error]; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010 ["[a]pplication of the per se standard requiring automatic reversal . . . normally is dependant upon the . . . impossibility of assessing prejudice."]; *In re Joseph* (1983) 34 Cal.3d 936, 946 [harmless error inapplicable to the denial of defendant's right to self-representation because it is

impossible to assess prejudice from the error]; *People v. Hosner* (1975) 15 Cal.3d 60, 70 [harmless error inapplicable to a trial court's failure to provide a transcript to indigent defendant on re-trial because it is impossible to assess prejudice from the error]; *In re William F.* (1974) 11 Cal.3d 249, 256 [harmless error inapplicable to a trial court's denial of the right to have counsel present at closing argument because it is impossible to determine prejudice from the error].)

Here, as discussed above, the trial court's discharge of Mrs. Nishura cannot be upheld. It is, of course, impossible to assess the consequences of this error. Under the authorities discussed above, however, this is precisely why reversal is required. Because of the trial court's ruling, and over defense objection, a fully qualified juror was excluded from the jury in this case. The improper exclusion of a prospective juror requires reversal of the death judgment. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660 [improper exclusion of a single juror warrants reversal]; *People v. Schmeck*, 37 Cal.4th at p. 257, n.3.) The death sentence in this case must be reversed.

GUILT PHASE ISSUES

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR UNDER BOTH STATE AND FEDERAL LAW WHEN IT PERMITTED THE STATE TO TRY THREE SEPARATE MURDER CHARGES TOGETHER.

A. The Relevant Facts.

Mr. O'Malley was charged and tried on seven counts relating to three separate homicides. (XXIV CT 5215-5218.) Count one charged that O'Malley -- while acting alone -- murdered Sharley Ann German in April 1986. (XXV CT 5215.) Counts two through five charged O'Malley and Rex Sheffield with conspiracy, robbery and the murder of Herb Parr in August 1987, sixteen months after the Sharley Ann German murder. (XXV CT 5216-5218.) Counts six and seven charged O'Malley and Sheffield with conspiracy and the murder of Michael Robertson in October 1987. (XXV CT 5218.)

Initially, appellant filed a motion in the municipal court to sever the charges against him. (II ACT 421-469.) Judge Nelson, the municipal court judge, denied appellant's motion because he was unsure whether he, acting as a magistrate, had the discretion or jurisdiction to grant a severance motion. (II ACT 502; 15 ART 422; 18

ART 582-583.)[15] Nevertheless, Judge Nelson said he "would not at all be surprised" if appellant was later successful in having the trial court sever the Sharley Ann German homicide from the other charges. (18 ART 582-583.)

The motion was renewed in the Superior Court, where the trial court granted appellant's motion to sever his and Sheffield's trials. (RT 3/5/91 at 147.) However, the court denied appellant's motion to sever counts. (*Ibid.*) The court recognized that a "real possibility of prejudice" arose from joining the charges against appellant in a single trial, based on "the jury adding up counts against [appellant] and letting the evidence of one murder eliminate the possible reasonable doubt as to another . . . and vice versa." (*Ibid.*) Nevertheless, the court said it could ensure appellant a fair trial on all counts "because of the jury instructions to the contrary and the fact that this Court will pre-instruct the jury as to adding up each count separately and without regard to the verdicts on the other counts[.]" (*Id.* at 147-148.)

Contrary to what it said it would do, the trial court never preinstructed the jury to consider each count separately and without regard to the evidence presented on the other counts. (*See* 13 RT 2681-2689.) The only instruction on a topic related to these came at the close of the guilt trial when, after almost four months of guilt phase testimony,

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[15] "ART" refers to the first Augmented Reporter's Transcript.

evidence and argument, and after reading the jury nearly an hour of other instructions, the court read the following four sentence instruction:

> "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (53 RT 10825-10826.)

As more fully discussed below, the trial court's refusal to sever counts violated both state and federal law. Reversal is required.

B. The Trial Court's Refusal To Sever Counts Denied Mr. O'Malley Rights Under State Law.

Penal Code section 954 allows a consolidated trial on "two or more different offenses of the same class of crimes or offenses . . . ." Where the state meets this relatively low threshold -- as where it seeks to consolidate two murder charges -- joinder is appropriate under state law "unless a clear showing of potential prejudice was made." (*People v. Jenkins* (2000) 22 Cal.4th 900, 947; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Of course, the prejudice in joining unrelated offenses in a single trial is that the combined evidence will lead the jurors to infer the defendant has a criminal disposition,

thereby impacting their perceptions of the defendant and the strength of the evidence against him. (*People v. Bean* (1988) 46 Cal.3d 919, 935; *Williams v. Superior* Court (1984) 36 Cal.3d 441, 448.) In the words of the trial judge below, the prejudice that inures from joining counts is "the jury adding up counts against a defendant and letting the evidence of one murder eliminate the possible reasonable doubt as to another . . . and vice versa." (RT 3/5/91 at 147.)

The question of whether a "clear showing of potential prejudice" has been made requiring charges to be separately tried is dependent on the particular circumstances of each individual case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 172.) Nevertheless, four criteria provide guidance: (1) the cross-admissibility of the evidence in separate trials, (2) whether some of the charges are likely to inflame the jury against the defendant, (3) whether a weak case has been joined with a strong case, such that there is a "spillover" effect which may alter the outcome of some or all of the charges, and (4) whether the case to be tried is a capital case. (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 947-948.) Applying these criteria here shows joinder was not appropriate under state law.

1. Evidence of the three murders was not cross-admissible.

"[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Jenkins, supra,* 22 Cal.4th at p. 948.) As discussed below, evidence of the Sharley Ann German homicide would not have been cross-admissible with either the Parr or Robertson homicides. Moreover, the Parr and Robertson homicides were not cross-admissible with each other.

a. The Sharley Ann German evidence would not have been admissible at trial in the Parr homicide.

The state argued that evidence of the Sharley Ann German homicide would be admissible in trials of the Parr homicide because "financial gain" was a factor in both charges. (RT 3/5/91 at 101-102.) According to the prosecutor, the two cases could be tried together because "recent witnesses" who had not testified at the preliminary hearing indicated appellant received Sharley Ann's car as partial payment for the homicide. (*Ibid.*) Under the state's theory, this linked the Sharley Ann German homicide to the Parr homicide because evidence at the preliminary hearing indicated appellant obtained Parr's motorcycle after he was killed. (*Ibid.*) The propriety of the trial court's ruling on the

severance motion must, however, be decided on the facts then before the court, not on the prosecutor's statement of what might subsequently develop from witnesses who had not testified at the preliminary hearing. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1246; *People v. Cummings* (1993) 4 Cal.4th 1233, 1284; *People v. Price* (1991) 1 Cal.4th 324, 388.)

Moreover, there was nothing in the record before the trial court indicating the Sharley Ann German and Parr homicides shared common features, or established a motive for one another, or were part of a common plan or design. (*People v. McDermott* (2002) 28 Cal.4th 946, 999, citing Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394, 402-403.) Indeed, on the record of this case, the proffered facts that appellant allegedly received Sharley Ann's car and obtained Parr's motorcycle have no tendency to "logically, naturally and by reasonable inference" prove his identity as the perpetrator of both homicides. (*People v. Thompson* (1980) 27 Cal.3d 303, 316, disapproved on other grounds by *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

After all, the state's theory here was that Sharley Ann's husband hired appellant to kill her and that the killing took place at Sharley Ann's home where she was shot in the head and stabbed in the neck. (RT 3/5/91 at 101; I CT 28, 31; CT 3264, 3266.) In

contrast, Parr was killed almost a year and a half later at Laurel Bieling's home where he was stabbed 18 times, allegedly by appellant and Rex Sheffield, acting as cohorts in order to rob Parr of his motorcycle. (I CT 21, 64; II CT 470; IV CT 872, 892, 899, 912, 927; X CT 2256, 2332-2333.) Plainly, the Sharley Ann German and Parr homicides were vastly dissimilar. Evidence of one would not have been cross-admissible in a separate trial of the other because there was no connection whatsoever between these crimes from which it could logically be inferred that if appellant committed one, he must have committed the other. (*See People v. Haston* (1968) 69 Cal.2d 233, 246.)

b. The Sharley Ann German evidence would not have been admissible at trial in the Robertson homicide.

The state argued that evidence of the Sharley Ann German homicide would be admissible in a separate trial on the Robertson homicide for three reasons: (1) the .25 caliber bullet recovered from Robertson's body was fired from a gun the police seized from Gail Sheffield during investigation of the Sharley Ann German killing, (2) Robertson was killed in same manner as Sharley Ann German, and (3) appellant compared shooting Robertson to shooting Sharley Ann German, and said Robertson "died easier." (RT 3/5/91 at 93-97; XXII CT 4833-4834, 4847.)

According to the prosecutor, the fact that the bullet recovered from Robertson's

body was fired from a .25 caliber pistol obtained from Rex Sheffield's wife, Gail, during the investigation of the Sharley Ann German homicide and was last seen when officer's returned it to Gail was of "*critical importance*" and by itself, sufficient to join the two cases. (XXII CT 4834.) However, while this evidence may have tied Rex Sheffield to Robertson's murder, it was entirely irrelevant in a separate trial of Mr. O'Malley for the Robertson murder. This fact provides no connection at all between the Sharley Ann German and Robertson killings: Sheffield was not tried with appellant, nor was he, or his wife, charged with Sharley Ann German's death. And not only was there no evidence whatever indicating that appellant had ever possessed this gun, but -- in fact -- the gun used to kill Robertson was *not* the gun used to kill Sharley Ann. (XV CT 3293-3295.)

With respect to the prosecutor's argument that Sharley Ann German and Robertson were killed in the same manner, in order to be admissible in separate trials, the killings had to contain characteristics "so unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403; *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.) The highly unusual nature of the killings would have to be such as to "virtually eliminate[] the possibility that anyone other than the defendant committed the charged offense[s]." (*Balcom, supra,* at p. 425; *see also People v. Kipp* (1998) 18 Cal.4th 349, 370; *People v. Bradford* (1997) 15 Cal.4th 1229, 1316; *People v. Bean, supra,* 46 Cal.3d at p. 937; *Williams v. Superior Court, supra,* 36 Cal.3d at p. 450.)

While both Sharley Ann German and Robertson were shot in the head and stabbed in the neck, these factors are not unique, and they certainly did not establish an unusual and distinct modus operandi. In fact, the crimes were quite dissimilar. Sharley Ann German was shot in the top of her head, from a distance of more than two feet away. (II CT 451, 458-459.) She was stabbed on the left side of the neck, and had an incise wound on the right side of her neck and three small abrasions on her chest, beginning at the abdomen. (II CT 451.) The stab wound that severed the left carotid artery, which takes blood from the heart to the brain, was approximately 3 and 1/8 inches deep, and the medical examiner opined this stab wound was inflicted prior to the gunshot. (II CT 453-454.)

In contrast, Robertson was shot not in the top of his head, but in the front of his face, at an upward angle. (XVI CT 3324-3325.) The wound was *not* a distance wound; to the contrary, the state's theory was that the gun could have been placed up against Robertson's face. (XVI CT 3326.) He was stabbed *not* in the side of the neck, but in the front just below his Adam's apple, at a downward angle. (XVI CT 3328.) And, the state's own witness testified that Robertson was first shot, then stabbed. (V CT 1101.)

Sharley Ann German and Robertson were shot with different guns, and given the difference in the depth of the stab wounds, the evidence indicted they were stabbed with

different knives. (II CT 453-454; XV CT 3328; XVI CT 3293-3295.) As alleged by the state, the two killings were committed one and one-half years apart, at different locations, and for allegedly different motives. O'Malley had vastly different relationships with Sharley Ann German and Robertson and, while he was alleged to have killed Sharley Ann alone, the state alleged that Robertson was killed by O'Malley and Sheffield acting together. In short, the "distinctions were significant[]" (*People v. Bean, supra,* 46 Cal.3d at p. 938) and the two killings can by no means be deemed "'so unusual and distinctive'" as to "virtually eliminate[] the possibility that anyone other than the defendant committed [both] charged offense[s]." (*People v. Balcom, supra*, 7 Cal.4th at p. 425.)

Finally, as noted, the prosecutor argued that the Sharley Ann German and Robertson homicides should be joined because appellant compared shooting Sharley Ann and Robertson in the head, and told Brandi Hohman that Robertson "died easier." (RT 3/5/91 at 93-95; XII CT 4847.) However, any alleged admissions appellant may have made to Hohman would be admitted not as other crimes evidence, but instead, as statements that in and of themselves tended to prove he committed a charged offense. (*See People v. Robinson* (2000) 85 Cal.App.4th 434, 445.) While appellant's statement itself may have been allowed to come in during separate trials on the two offenses, it would by no means justify the enormous amount of evidence detailing the two killings that would be allowed in a joint trial. (*See, e.g., United States v. Bronco* (1979) 597 F.2d

1300, 1303 [defendant prejudiced by a trial of joint charges because "if at a separate trial on the substantive counts the court would have admitted some evidence of the [other crime], it would not have permitted the extensive testimony that was introduced at the joint trial on the [two charges]."].) In other words, a distinction must be made between certain *particular evidence* (here, appellant's statement to Hohman), and *wholesale admission* of the entire corpus of evidence relating to each separate charge. Admissibility of appellant's statement simply would not provide for the wholesale admission of both the Sharley Ann German evidence and the Robertson evidence in separate prosecutions for each crime.

In short, the Sharley Ann German homicide was not cross-admissible with either the Parr or Robertson killings.

c. The Herbert Parr evidence would not have been admissible at trial in the Robertson homicide.

Nor were the Parr and Robertson murders cross-admissible with one another. The state argued that the Parr and Robertson murders were cross-admissible because: (1) appellant told Hohman he removed Robertson's boots from his body because appellant was wearing these boots when Parr was murdered and thought they had Parr's blood on them, (2) appellant involved Robertson in efforts to cover up Parr's murder by having

him fumigate the trunk of appellant's car where Parr's body had been, and (3) both Parr and Robertson were on the "outs" with appellant and Sheffield, and appellant and Sheffield lured them back into their graces before killing them. (RT 3/5/91 at 86-92; XXII CT 4846-4847.)

Again, however, while appellant's statement about the boots may have been allowed to come in during separate trials on the two offenses, it would by no means lead to wholesale admission of the enormous amount of evidence detailing the two killing that would be allowed in a joint trial. (*United States v. Bronco, supra,* 597 F.2d at p. 1303.) There was no evidence other than the statement itself linking the boots removed from Robertson to Parr, and no showing whatsoever that these boots did have Parr's blood on them. Parr and Robertson had vastly different relationships with appellant, and they were killed in different manners and at different times. The alleged motive for Parr's murder was robbery. The motive for the Robertson killing was unclear, with nothing more than the prosecutor's speculation that Robertson was killed because he knew of Parr's death. The entire body of evidence relating to each charge would not have been cross-admissible in separate trials of the charges.

2. The Sharley Ann German murder charge was highly inflammatory in comparison with the Parr and Robertson charges.

As noted, the second factor to look at in deciding if consolidation was improper under state law is whether some of the charges are likely to inflame the jury against the defendant. (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 947-948.) Here, that is exactly what happened.

Tragic and reprehensible as the deaths of Parr and Robertson were, the Sharley Ann German homicide was far more inflammatory. The state's evidence depicted Parr as a liar and male chauvinist, who physically abused his girlfriend, used an alias to avoid warrants for failing to support his children, and aspired to be a Hell's Angel. (III CT 551, 575, 579-580, 584, 602, 607, 610, 616.) Robertson was a recent parolee from prison, who took pride in acting as a "go-between" for appellant and his motorcycle club, and boasted that killing was better than sex. (XII CT 2729-2730; XIII CT 2843-2844.) Both were drug users, and both were entrenched in the "biker" lifestyle and familiar with the violence that accompanied that lifestyle. (*See*, *e.g.*, III CT 598; IV CT 896; V CT 1021, 1052; IX CT 2049, 2067, 2139; XII CT 2730.)

In contrast, it was clear that the prosecution intended to sympathetically portray Sharley Ann German to the jury as a young mother, and housewife, who knitted blankets,

fixed special meals for her husband and son, and struggled to keep a marital relationship with her adulterous and abusive husband. ((I CT 21-22; *see also* I CT 29 [describing People's exhibit 1, two photographs of Sharley Ann's crocheting project]; II CT 318-319.) She was murdered in her own home, her throat cut and shot in the head, and her body left for her son to find when he returned from school. (I CT 31.) According to the state, the murder was masterminded by Sharley Ann's greedy husband, who contracted the killing so he could receive life insurance benefits and sole possession of the marital assets, then threw Sharley Ann's clothes in the garbage and, with the life insurance proceeds, bought a red Corvette with personalized plates reading "Cricket," his girlfriend's nickname. (I CT 47; II CT 233.)

In the words of one court, "[o]ne would have to be almost saintly not to be aroused by such evidence." (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 941.) Sharley Ann was a particularly vulnerable victim, and it should have been clear to the trial court that empathy for her would provoke strong emotional reactions in jurors, who plainly could relate more easily to her than to either Parr or Robertson. Sharley Ann German's murder could only have inflamed the jury against appellant with respect to the crimes against Parr and Robertson, and a jury could not have been expected to try all three charged crimes fairly in a joint trial. (See *People v. Mason* (1991) 52 Cal.3d 909, 934 ["error to consolidate an inflammatory offense with one that is not under

circumstances where the jury cannot be expected to try both fairly."].)

3. The spillover effect of joinder bolstered the Sharley Ann German murder charge.

A third factor to consider in determining if state law has been violated is whether a weak case has been joined with a strong case, such that there is a "spillover" effect which may alter the outcome of some or all of the charges. (*People v. Jenkins*, *supra*, 22 Cal.4th at p 948.) The "concern lies in the danger that the jury . . . w[ill] aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453.) Thus, the evidence of each count must be "overwhelming" (*People v. Odle* (1988) 45 Cal.3d 386, 404) or "extremely strong" (*People v. Lucky* (1988) 45 Cal.3d 259, 278) before a reviewing court can be confident that joinder was not prejudicial. The evidence before the trial court when ruling on appellant's severance motion did not meet that standard.

The state presented a relatively strong preliminary hearing case that appellant was somehow involved in the Parr and Robertson killings, a fact appellant subsequently acknowledged at trial when he testified he was present when both were killed and helped

dispose of their bodies. In addition to appellant's alleged statements about Parr's killing, the state presented testimony at the preliminary hearing appellant did not like Parr and that there were past hostilities between the two. (IV CT 867-888, 946-949; IX CT 2048-2049; XI CT 2599-2600; XIII CT 2827-2836.) There was testimony appellant and Rex Sheffield wanted Parr's motorcycle, appellant invited Parr to Laurel Bieling's house and on the way, told Brandi Hohman he was going to steal Parr's motorcycle, and appellant and Sheffield took Parr into Bieling's backyard, after which he was never again seen alive. (IV CT 891-892, 912-914, 927; X CT 2333.) There was also evidence appellant subsequently had possession of Parr's motorcycle, and he helped bury Parr's body in his backyard where it was later found. (III CT 690, 699, 776-787; IV CT 933-934, 938-942, 976-984; XIII CT 2835-2836.)

In addition to appellant's alleged statement about the Robertson killing, the state presented evidence of a deteriorating relationship between appellant and Robertson, including an incident on the day Robertson was killed, during which Brandi Hohman claimed appellant picked up a shotgun and appeared as if he was going to shoot Robertson. (V CT 1020-1023, 1099-1103; X CT 2451; XI CT 2544-2545; XV CT 3117-3118) There was testimony appellant believed that Robertson was a "snitch," and evidence Robertson was last seen leaving J.W.'s Bar with appellant and Sheffield in a station wagon. (V CT 1033-1034, 1055-1056, 1059-1060.) There was evidence

suggesting Robertson was killed in the station wagon, and his body was subsequently found near the area where the car had broken down. (III CT 744, 771-772.) There also was evidence appellant and Sheffield returned to appellant's motel room later that night, then left the room in a panic when they realized Robertson had an extra key to that room that "must [still] be on his body." (V CT 1070-1071, 1078-1079.)

In contrast, while the state presented a great deal of evidence relating to the Sharley Ann German homicide, including Geary German's actions before and after that killing, the only preliminary hearing evidence tying appellant to that killing were his alleged statements to Hohman, and to Laurel Bieling and Theodore Grandstedt. Unlike appellant's alleged statements about Parr and Robertson, any statements appellant allegedly made about the Sharley Ann German homicide were weakened by evidence presented at the preliminary hearing that appellant was out of California when Sharley Ann was killed. (XVII CT 3733, 3743-3747, 3752-3759.)

Moreover, Bieling simply claimed appellant told her about Sharley Ann being killed, and never claimed he was the one who committed that killing. (XII CT 2652-2653.) As she explained, any different information she may have given to the police was based on what others, not appellant, had told her. (XII CT 2655-2660.) The evidence from Grandstedt was problematic for the prosecution, for while officer Trejo testified

Grandstedt was interviewed and said appellant told him he killed Sharley Ann, Grandstedt himself denied appellant told him this and claimed his mental faculties were damaged as a result of a head injury and extensive drug abuse. (XV CT 3183, 3188-3189, 3263-3274.)

The evidence of the Parr and Robertson killings could only have bolstered the Sharley Ann German case. On this record, it should have been apparent to the trial court that the totality of the evidence could alter the outcome of the Sharley Ann German case because joining that case with the Parr and Robertson cases would, in the jurors' minds, make the German case "considerably stronger than [if] viewed separately." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.)

4. Because this was a capital case, the court was required to exercise particular care in ordering joinder.

The final factor to be considered in determining if there is error under state law is whether the joinder was ordered in a capital case. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 948.) In capital cases, trial courts must "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.) Accordingly, the task before the trial court was to assess the likely prejudicial effect of joining the counts against appellant, and

balance that against the need for conservation of judicial resources -- the only justification for joinder.

Rather than give this assessment the "scrutiny and care" applicable to a capital trial, the court simply disregarded what it saw as a "real possibility of prejudice" that the jury would add up counts against appellant and let the evidence of one murder eliminate the possible reasonable doubt as to another because it believed this prejudice could be "diminished" by pre-instruction. (RT 3/5/91 at 147-148.) That cursory treatment was clearly inadequate given "questions of life and death were at stake." (*People v. Smallwood, supra*, 42 Cal.3d at pp. 430-431.)

Even had the trial court preinstructed the jury on the need to keep the evidence of each count entirely separate, which it did not do, the court ignored the difficulties of compartmentalizing such evidence. Joining charges creates a high risk of prejudicing the jurors' perceptions of (1) the defendant and (2) the evidence against him. (*People v. Bean, supra,* 46 Cal.3d at p. 935; *People v. Smallwood, supra*, 42 Cal.3d at p. 428.) The Court has long recognized the difficulty of asking jurors to compartmentalize such evidence, even in the face of an instruction. (*See, e.g., People v. Albertson* (1944) 23 Cal.2d 550, 577.) The difficulty jurors have in compartmentalizing evidence clearly was heightened in appellant's case where, because the charges were joined, the evidence and

testimony were voluminous, as the trial court was aware from the fact that the preliminary hearing alone took up 19 volumes and more than 4,100 pages of transcript. (RT 3/5/91 at 141.) In the face of this risk of prejudice, the trial court should have recognized that any benefit to be obtained from joining the three separate murders at a single trial did not outweigh the burden it imposed on appellant's rights. (*See People v. Smallwood, supra*, 42 Cal.3d at p. 430 [trial court required to weigh the advantages of joinder against its serious potential for prejudice].)

Of the 34 prosecution witnesses who testified at the preliminary hearing, only four testified about more than one of the charged counts. Dr. Massoud Vameghi, the Santa Clara County corner, gave separate testimony about Sharley Ann German's and Parr's causes of death (II CT 446-466, 466-509; XV CT 3381-3387), neither of which would have been admissible in a separate trial on the unrelated count. Camolyn Ramsfield gave testimony first relating to Parr's death (XIV CT 3048-3083) and then to Robertson's (XIV CT 3083-3141), none of which would have been admissible in a separate trial on the Sharley Ann German murder. Laurel Bieling was questioned about all three murders, but her brief testimony that appellant told her about Sharley Ann being killed and never claimed he was the one who committed that killing would not have been admissible in separate trials on the charges relating to Parr and Robertson. (XII CT 2652-2660.)

Brandi Hohman also testified about all three killings, but the only knowledge she claimed of the Sharley Ann German homicide was what she alleged appellant told her long after the fact, when he compared shooting Sharley Ann to shooting Robertson. (*See* V CT 1135-1141.) As noted, while appellant's statement itself may have been allowed to come in during separate trials on the two offenses, it would by no means justify the enormous amount of evidence detailing the two killings that would be allowed in a joint trial. Thus, only a small portion of Hohman's testimony would have been repeated at a separate trial on the Sharley Ann German homicide, and "there simply was no significant judicial economy to be gained from joinder." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430; *see also Williams v. Superior Court, supra,* 36 Cal.3d at p. 451 [where there is little duplication of the evidence "it would be error to permit [judicial economy] to override more important and fundamental issues of justice."]) In the Court's words, "'[t]he only real convenience served by permitting joint trial of unrelated offenses against the wishes of [appellant] [was] the convenience of the prosecution in securing a conviction.'" (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430.) Because the degree of prejudice from a joint trial was inevitably high, and the saving in time and expense from separate trials would have been minimal, the trial court prejudicially abused its discretion by denying appellant's severance motion.

C. The Trial Court's Refusal To Sever Counts Denied Mr. O'Malley His Federal Constitutional Rights To Due Process And A Fair Trial, To Trial By An Unbiased Jury And To A Reliable Determination Of Guilt.

Putting aside state law, joinder of counts violates the federal constitution when it prejudices a defendant's right to a fair trial. (*See, e.g., United States v. Lane* (1985) 474 U.S. 438, 446 n.8; *Park v. California* (9th Cir. 2000) 202 F.3d 1073, 1084; *People v. Musselwhite, supra*, 17 Cal.4th at pp. 1243-1244.) In making this determination, the most important factor is whether joinder of counts allows otherwise inadmissible other-crimes evidence to be introduced. (*See, e.g., Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

Where joinder does permit such evidence to be introduced, a reviewing court must look to see (1) if the jurors were given instructions which specifically advised them "not [to] consider evidence of one set of offenses as evidence establishing the other" and (2) when such instructions were given. (*Bean v. Calderon, supra*, 163 F.3d at p. 1084; *United States v. Lewis, supra*, 787 F.2d at p. 1323.) Moreover, even if otherwise inadmissible evidence was introduced, there will be no due process violation where the evidence of each crime is "simple and distinct" so that a properly instructed jury could compartmentalize the evidence. (*Bean v. Calderon, supra*, 163 F.3d at p. 1085; *Drew v. United States* (D.C.Cir. 1964) 331 F.2d 85, 91.) An acquittal on one of the charged

crimes is strong evidence that -- in fact -- the other crimes evidence *was* "simple and distinct" such that the jury successfully compartmentalized the evidence. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503-1504.)

Application of these factors here shows the trial court's ruling violated the constitution. As discussed in some detail above, evidence of the Sharley Ann German homicide was not admissible in either the Parr trial or the Robertson trial. Nor were the Parr and Robertson homicides cross-admissible with one another.

Here, despite stating that it would eliminate the potential prejudice by a pre-instruction advising the jury on the limited use of this evidence, the trial court did not give any pre-instructions which advised the jury of the need to consider each count separately without regard to evidence presented on other counts. (See 12 RT 2681-2689.) Instead, the lone remotely-related instruction came at the very end of the guilt trial, when the court simply instructed the jury that each count was distinct and "[y]ou must decide each count separately." (53 RT 10825-10826.)

This brief instruction did nothing to ameliorate the prejudice inherent in joinder. In the long-standing words of the Court, "[i]t does not reflect in any degree upon the

intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict." (*People v. Albertson, supra,* 23 Cal.2d 550, 577.) Instructing jurors to ignore other crimes evidence when deciding a particular count "is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.)

Moreover, "[a]part from the intrinsic shortcomings of such instructions" in general (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084), the specific instruction here merely told the jurors to decide each count separately. (53 RT 10825-10826.) It did not tell the jurors they should not consider evidence of one offense as evidence establishing the others. And any impact this instruction could possibly have had was diminished by the fact it was given "in the waning moments of the trial" (*Bean*, *supra*, 163 F.3d at 1084), after the jury had heard more than three months of combined testimony and argument on the murders, and the court had read nearly an hour of other instructions in a courtroom so hot that the court worried the heat would put the jurors to sleep . (*See* 13 RT 2822 - 54 RT 10747; 54 RT 10783-10784.) Any remaining utility of this simple four-sentence instruction was eliminated by the prosecutor's argument, which specifically encouraged the jury to consider evidence on one count when considering another. (*See, e.g.*, RT 11068, 11105-11107; *Bean*, *supra*, 163 F.3d at p. 1084 [jurors

could not reasonably be expected to compartmentalize evidence where the prosecution encouraged them to consider charges in concert].)

As discussed in the statement of facts, O'Malley readily acknowledged he was present when both Parr and Robertson were killed, and defended against these charges on the basis that while he assisted Sheffield in covering up these crimes, it was Sheffield, not he, who committed the actual killings. He denied, however, any knowledge of the Sharley Ann German homicide, and defended against this charge by presenting (1) significant alibi evidence he was out of California at the time and (2) third party culpability evidence that another person was the likely killer.

The evidence posed two distinct issues for the jury to decide: (1) was appellant guilty of the lesser charge of being an accessory to the Parr and Robertson murders and (2) was appellant completely innocent of the Sharley Ann German murder. Joining the charges made it difficult, if not impossible, for the jurors to view these cases and defenses separately, especially in light of the lack of adequate instructions and prosecutor's insistence they view the evidence in concert. Joinder of the charges prejudiced appellant's chances for acquittal, and for convictions on lesser offenses, and his trial must therefore be deemed grossly unfair, and in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to be tried by an unbiased jury,

and to a reliable guilt phase verdict. Reversal is required.

IV. THE COUNT THREE ROBBERY CONVICTION, ALONG WITH THE COUNT FOUR MURDER AND ROBBERY SPECIAL CIRCUMSTANCE CONVICTIONS, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT ON ASSAULT AS A LESSER INCLUDED OFFENSE.

A. The Relevant Facts.

Count three charged Mr. O'Malley with robbing Herbert Parr of his motorcycle. (25 CT 5216.) Count four charged the murder of Parr and alleged the murder occurred during the commission of a robbery. (25 CT 5217.) The jury was instructed it could convict Mr. O'Malley of murder if it found the murder occurred during the course of a robbery. (25 CT 5628-5629, 5634.)

As the trial court found, however, there was substantial evidence to show that at the time of the crime, Mr. O'Malley was intoxicated by drugs, alcohol or both. Mr. O'Malley himself testified that shortly before Parr was killed, he (O'Malley) consumed both tequila and methamphetamine. (40 RT 8400-8402.) In addition, the state's star witness, Brandi Hohman, testified Mr. O'Malley also ingested crack cocaine on the night of the Parr homicide. (26 RT 5528.)

With respect to the robbery and special circumstance charges, the trial court instructed on the elements of robbery. (25 CT 5662.) The court specifically told the jury

that to convict of robbery, it would have to find Mr. O'Malley had the "specific intent permanently to deprive [the victim] of the property." (25 CT 5662.) Recognizing the significant evidence of intoxication, the court also properly instructed the jury it could consider whether Mr. O'Malley was intoxicated in determining if he had the requisite "specific intent" necessary for the robbery convictions. (25 CT 5671.)

The court did not, however, instruct the jury it could convict Mr. O'Malley of a lesser included offense should it find his intoxication negated the ability to form the specific intent to steal needed for robbery. As more fully discussed below, the absence of such instructions placed the jury in an all-or-nothing position with respect to the robbery count, thus violating Mr. O'Malley's state and federal constitutional rights to have the jury reliably determine every material issue presented by the facts and constituted prejudicial error.

B. The Trial Court Erred In Failing To Instruct On Assault As A Lesser Included Offense To The Charged Robbery.

Trial courts must instruct a jury on all necessarily included offenses whenever the evidence could justify a conviction of the lesser offense. (*People v. Wickersham* (1982) 32 Cal.3d 307, 325, *overruled on other grounds*, *People v. Barton* (1995) 12 Cal.4th 186.) Here, because assault was a lesser included offense to the robbery charged in this case,

and because there was substantial evidence showing Mr. O'Malley was only guilty of assault, instructions on this lesser offense were required *sua sponte*.

1. Assault was a lesser included offense to the robbery as charged in the information.

There are two distinct methods of determining whether an uncharged offense is necessarily included in a charged greater offense. First, an uncharged offense is necessarily included in a greater offense if under the statutory definition of the greater offense it cannot be committed without committing the lesser offense. (*People v. Geiger* (1985) 35 Cal.3d 510, 517, n.4, *overruled on other grounds in People v. Birks* (1998) 19 Cal.4th 108.) Second, and of more importance here, a lesser offense is included in a charged offense if the language of the particular accusatory pleading encompasses all the elements of the lesser offense. (*People v. Marshall* (1957) 48 Cal.2d 394, 406.)

For example, the offense of pandering proscribes any person from making a living based on prostitution. (Penal Code section 266h.) When a prosecutor charges pandering in statutory terms, contributing to the delinquency of a minor is **not** a lesser included offense. (*People v. Mathis* (1985) 173 Cal.App.3d 1251, 1257.) However, when the prosecutor charges pandering and alleges the victim was a minor, contributing to the delinquency of a minor **is** a lesser included offense and the trial court must instruct

accordingly. (*Id.*; *see also People v. Story* (1985) 168 Cal.App.3d 849, 854; *People v. Troyn* (1964) 229 Cal.App.2d 181, 184-185.)

Similarly, the offense of burglary proscribes an entry with the intent to commit a felony. (Pen. Code, § 459.) When a prosecutor charges burglary in statutory terms, trespass is **not** a lesser included offense. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369; *People v. Pendelton* (1979) 25 Cal.3d 371, 381-382.) When a prosecutor charges burglary and also alleges the entry was "willful and unlawful," trespass **is** a lesser included offense. (*People v. Wetmore* (1978) 22 Cal.3d 318, 327, n.8; *People v. Hulderman* (1976) 64 Cal.App.3d 375, 379.)

In *People v. Barrick* (1982) 33 Cal.3d 115 the Court applied this approach in a case analytically identical to this one. There, defendant was charged with unlawfully taking a vehicle in violation of Vehicle Code section 10851. Section 10851 provided a "person who drives **or** takes" a car without the owner's consent, and with the intent to steal, was guilty of vehicle theft. At the time, Penal Code section 499b provided that any person who drove another's car without consent, but without the intent to steal, was simply guilty of joyriding. Because one could "take" a car without driving it, the Court had long held joyriding was **not** a lesser included offense to vehicle theft under the statutory elements test. (*People v. Thomas* (1962) 58 Cal.2d 121, 127-130.)

In *Barrick*, however, the prosecutor did not charge the defendant in the language of section 10851 with driving **or** taking the victim's car. Instead, the prosecutor chose to charge defendant with "driving **and** taking" the victim's car. (33 Cal.3d at pp. 134-135, emphasis added.) Under these circumstances, this Court held defendant **did** have to drive the car, and joyriding **was** therefore a lesser included offense under the accusatory pleading test. (33 Cal.3d at pp. 133-135.)

This case is analytically identical to *Barrick*. Here, Mr. O'Malley was charged with robbery. By statute, robbery requires the taking of personal property by "force **or** fear." (Section 211, emphasis added.) The fear which may serve as a predicate for a robbery conviction includes "[t]he fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (Section 212.)

The statutory definition of assault requires "[a]n unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Clearly, the fear of an immediate injury to the victim's property, which will support a robbery conviction under the "fear" prong of section 211, does not necessarily involve an attempt to commit a "violent injury on the person of another" within section 240. Accordingly, under the statutory definition test, assault is **not** a lesser included offense of robbery.

(*People v. Wolcott* (1983) 34 Cal.3d 92, 99-100.)

In this case, however, the accusatory pleading did not charge Mr. O'Malley with robbery "by means of force **or** fear." Rather, and as in *Barrick*, the pleading as filed in this case used the conjunctive "and," charging him with robbery "by means of force **and** fear." (24 CT 5216, emphasis added.) Thus, as charged in this case, an element of force **was** essential to the robbery conviction.

As noted above, assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." The term "violence" in connection with an assault is synonymous with "physical force." (*People v. Whalen* (1954) 124 Cal.App.2d 713, 720.) Pursuant to *Barrick*, then, the language of the accusatory pleading in this case required that Mr. O'Malley be found to have used force in committing the count three robbery. And if there was evidence to support a finding that when Mr. O'Malley used force, he did not harbor an intent to permanently deprive, then assault was a lesser included offense on which the jury should have been instructed. *(See People v. Marshall, supra*, 48 Cal.2d at p. 406.)[16]

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[16] In *People v. Sakarias* (2000) 22 Cal.4th 596 this Court noted, but left open, the question whether assault was a lesser included offense to robbery under the accusatory pleading test when the robbery was charged by "force and fear." (*Id.* at p. 622, n.4.) Similarly, in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127, the Court assumed without deciding assault was a lesser offense to a robbery charged by "force and fear."

2. There was substantial evidence upon which the jury could have convicted Mr. O'Malley of assault.

Instructions on a lesser included offense should be given whenever a "defendant proffers evidence enough to deserve consideration by the jury, i.e. evidence from which a jury composed of reasonable men could have concluded that [the particular facts underlying the instruction did exist] . . . . Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685.) As this Court has explained, this rule "simply frees the court from any obligation to present theories to the jury which the jury could not reasonably find to exist." (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 324-325.)

In this case, Mr. O'Malley was charged with robbery. As noted, robbery requires that the defendant harbor the specific intent to deprive the owner of his property permanently. (Pen. Code § 211.)

As the cases have long made clear, a defendant's intoxication can negate the specific intent necessary for robbery. (*See, e.g.*, *People v. Visciotti* (1992) 2 Cal.4th 1, 67; *People v. Page* (1980) 104 Cal.App.3d 569, 575-576; *People v. Crawford* (1979) 88 Cal.App.3d 742, 754-755.) Moreover, where substantial evidence suggests that defendant lacked the specific intent required for robbery, instructions on assault may be required.

(*See People v. Masters* (1982) 134 Cal.App.3d 509, 517-518; *People v. Carter* (1969) 275 Cal.App.2d 815, 822; *People v. Duncan* (1945) 72 Cal.App.2d 423, 425; *People v. Driscoll* (1942) 53 Cal.App.2d 590, 593. *Cf. People v. Butler* (1967) 65 Cal.2d 569, 573, n.2 [noting that robbery without specific intent may constitute assault].)

Pursuant to these authorities, absent the specific intent to steal, Mr. O'Malley's conduct could nevertheless constitute assault. Under these circumstances, if there was sufficient evidence for the jury to believe Mr. O'Malley was intoxicated at the time of the shooting, "a jury composed of reasonable men could have concluded that the particular facts underlying the [lesser offense] did exist." (*People v. Flannel*, *supra*, 25 Cal.3d at pp. 684-685.)

As discussed above, the trial court heard the intoxication evidence, saw the witnesses testify and ruled the evidence was sufficient to justify intoxication instructions. Accordingly, the trial court explicitly instructed the jury it could consider the evidence of intoxication in determining if Mr. O'Malley harbored the requisite specific intent needed for a robbery conviction. (25 CT 5671.) This evidence of intoxication would certainly have allowed a "jury composed of reasonable men" to conclude although Mr. O'Malley was involved in assaulting Parr, he did not harbor a specific intent to deprive him of his property permanently. Given the language of the accusatory pleading, and the evidence

of intoxication presented in the case, the trial court erred in failing to instruct the jury on assault. Such instructions were especially appropriate in light of this Court's admonition that "doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Flannel*, *supra*, 25 Cal.3d at p. 685.) The failure to instruct on assault was error.

Mr. O'Malley recognizes the People are entitled to an appellate determination of the sufficiency of evidence to warrant assault instructions in the first instance. *(People v. Frierson*, *supra*, 25 Cal.3d at p. 157.) Nevertheless, in making this determination the courts have long held that when a trial court evaluates the credibility of witnesses and holds there is an evidentiary basis for a certain instruction, the court's underlying factual evaluation is entitled to great weight on appeal. (*See*, *e.g.*, *People v. McElvy* (1987) 194 Cal.App.3d 694, 705. *Accord People v. Castillo* (1969) 70 Cal.2d 264, 270; *People v. Page*, *supra*, 104 Cal.App.3d at p. 575.)

This rule applies here. The trial court saw and heard the evidence of drug and alcohol use on the night of the Parr homicide and ruled this evidence sufficient to require instructions on intoxication. That determination -- based as it was on the trial court's ability to see and hear the evidence -- is entitled to great weight and compels a conclusion assault instructions were required.

C. The Trial Court's Failure To Instruct On Assault Requires Reversal Of The Robbery Conviction.

For many years, a trial court's failure to instruct on a lesser included offense required reversal unless the factual question presented by the missing instruction was resolved adversely to the defendant under other instructions. (*See, e.g., People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352.) "Such an error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would have convicted the defendant of the lesser included offense." (*Id.* at p. 352.) This was known as the *Sedeno* standard of prejudice, named after the case of *People v. Sedeno* (1974) 10 Cal.3d 703.

Here, the jury was never given an opportunity to determine the material factual question -- whether Mr. O'Malley was guilty of assault rather than robbery because he was too intoxicated to harbor an intent to steal. None of the other instructions given to the jury permitted it -- outside the context of an all-or-nothing decision -- to consider this issue. Or, put another way, if the jury found that intoxication negated the intent to steal it would have been required to acquit Mr. O'Malley of robbery entirely, as well as felony-murder based on robbery. Under the *Sedeno* standard, because this factual question was not presented or resolved under other instructions, the error requires reversal.

Mr. O'Malley recognizes that in the non-capital context, the *Sedeno* standard has been rejected as the test for evaluating a trial court's failure to instruct on lesser included offenses and elements of the offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 165, 178 [rejecting the *Sedeno* standard in connection with the failure to instruct on lesser included offenses "in a non-capital case."].) Instead, in non-capital cases this Court has adopted the *Watson* standard of review, requiring the defendant to show a reasonable probability of a more favorable result. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 178.)

However, in several *capital* cases decided since *Breverman*, the Court has continued to apply the *Sedeno* standard of prejudice to a trial court's failure to instruct on lesser included offenses. (*See*, *e.g.*, *People v. Blair* (2005) 36 Cal.4th 686, 747; *People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086 [failure to instruct on lesser offense]; *People v. Lewis* (2001) 25 Cal.4th 610, 646 [same]. *But see People v. Sakarias*, *supra*, 22 Cal.4th at pp. 620-621 [applying *Watson*].)

Of course, as discussed above, application of the *Sedeno* standard requires reversal of the robbery conviction in this case. And certainly *Sedeno* should be applied in the capital context, because the failure to instruct on appropriate lesser-included offenses in a capital case violates Due Process and the Eighth Amendment as well. (*Beck v. Alabama*

(1980) 447 U.S. 625.) But even assuming the Court applied *Watson* to such errors, it is "'reasonably probable' that the defendant would have achieved a more favorable result had the error not occurred." (*See People v. Watson* (1956) 46 Cal.2d 818, 836.) Here is why.

The question impacted by the failure to instruct on intoxication-based assault is whether Mr. O'Malley harbored an intent to "permanently" steal. As noted above, the jury deliberated over seven days and asked for five separate readings of trial testimony. Moreover, the jury returned with a question which, as discussed in Argument VI, *supra*, suggested that as to the Parr homicide, it was considering finding that Mr. O'Malley might have conspired only to assault. (Argument VI, *supra*, at pp. 136-140; 25 CT 5568.) In light of the jury's question, even under the *Watson* test for prejudice, the failure to instruct on assault as a lesser to robbery cannot be held harmless. And because the robbery conviction itself must be reversed, the robbery-based special circumstance allegation must also be reversed. (*See e.g.*, *People v. Sanders* (1990) 51 Cal.3d 471, 517; *People v. Garrison* (1989) 47 Cal.3d 746, 788-789.)

D. Because The Felony-Murder Conviction Was Premised Upon The Robbery, Reversal Of The Robbery Conviction Also Requires That The Murder Conviction Be Set Aside.

The jury was given two theories of first degree murder: (1) felony murder and (2) premeditated murder with malice aforethought. (25 CT 5628.) The prosecutor argued both theories. (54 RT 11138-11139 [premeditation]; 54 RT 11139-11141 [felony-murder].) The jury reached a general verdict of first degree murder, without specifying the theory on which it relied. (25 CT 5576.)

Significantly, however, the felony-murder theory of first degree murder on which the jury was instructed was based on robbery. As discussed above, however, the underlying robbery conviction in this case must be reversed because of the failure to instruct on assault. In this situation -- when a defendant is charged with felony-murder based on a robbery but the trial court fails to give appropriate lesser offense instructions on the robbery -- reversal is required not only of the robbery conviction itself, but the felony-murder based upon the robbery as well. (*See, e.g., People v. Ramkeesoon, supra,* 39 Cal.3d at p. 352; *People v. Butler, supra,* 65 Cal.2d at p. 573.)

V. BECAUSE THE TRIAL COURT'S PROVISION OF CALJIC 2.11.5 FUNDAMENTALLY UNDERCUT THE DEFENSE PRESENTED TO THE HOMICIDES CHARGED IN COUNTS ONE, FOUR AND SIX, REVERSAL IS REQUIRED.

A. Introduction.

Count one of the amended information charged Mr. O'Malley with murdering Sharley German. (24 CT 5215.) Counts four and six charged the murders of Herbert Parr and Michael Robertson respectively. (24 CT 5216-5218.)

It is fair to say that the main witness against Mr. O'Malley as to all three charges was Brandi Hohman. After all, Hohman testified that Mr. O'Malley confessed to all three killings. (26 RT 5573; 27 RT 5791; 28 RT 5851, 5860-5961.)

There was, however, good reason to question Hohman's credibility. She had initially been arrested and charged as an accessory to murder. (29 RT 5919-5922.) She was granted immunity, placed in the State's witness protection program, and paid over $28,000 in cash and money orders. (1 Second Augmented CT at 72-79; 29 RT 5938, 5941-5944; 30 RT 6338-6340.)

At trial, Hohman cooperated fully with the prosecutor. Her testimony took more

than six days, and covered nearly 1,000 pages of transcript. (26 RT 5447-30 RT 6423.) As the prosecutor himself admitted prior to trial, Hohman was "the chief witness" against appellant, and she was "critical [and] crucial to this case." (RT 3/5/91 at 94.)

As part of the defense case, Mr. O'Malley also testified at some length. He denied complicity in the murders and explained that Hohman lied to protect herself after having initially been charged as an accessory to murder. (45 RT 9409.) In addition, Mr. O'Malley presented third-party culpability evidence as to each of the three murder charges, introducing evidence that Connie Ramos may have been the person who killed Ms. German and that Rex Sheffield was the killer in counts four and six.

In order for the jury to fairly evaluate the defense theory as to Hohman's credibility, it was essential the jury discuss and consider exactly why she testified against Mr. O'Malley, and why she had not been prosecuted. Similarly, in order for the jury to evaluate Mr. O'Malley's third-party culpability evidence, the jury had to consider the potential culpability of persons who -- to the jury's knowledge -- had not been charged.

As discussed more fully below, however, the trial court provided a jury instruction which fundamentally undercut both these defense theories. Thus, although the trial court properly recognized (and advised the jury) there was evidence showing other persons

may have been involved in the crimes, the court instructed the jury not to "discuss or give any consideration as to why the other person or person is not being prosecuted in this trial or whether he or she has been or will be prosecuted." (25 CT 5598; 53 RT 10790.) As discussed in detail below, this instruction precluded the jury from properly assessing both Hohman's credibility and the third party culpability defense as well. Reversal is required.

B. The Relevant Facts.

As noted above, Hohman testified Mr. O'Malley confessed to all three killings. (26 RT 5573; 27 RT 5791; 28 RT 5851, 5860-5961.) If the jury accepted her testimony, a conviction was certain. The prosecutor repeatedly urged the jury to do just that. (*See*, *e.g.*, 53 RT 10994-10995, 11004-11005, 11024-11028, 11035-11037, 11054-11055, 11072; 54 RT 11089-11091, 11107-11108.)

As also noted above, Hohman had initially been (1) arrested and charged as an accessory to murder, (2) granted immunity, and (3) paid over $28,000 in cash and money orders. (29 RT 5919-5922, 5938, 5941-5944; 30 RT 6338-6340; 1 Second Augmented Clerk's Transcript at 72-79.) In his own testimony, Mr. O'Malley asked the jury to find that Hohman was lying to protect herself after having initially been charged as an

accessory. (45 RT 9409.)

Mr. O'Malley also presented a third-party culpability defense. For example, as to the count one charges, the jury heard evidence about hostilities between the German and Ramos families. (14 RT 2867-2868.) Connie Ramos was a neighbor of the Germans. (15 RT 3137.) Just months before Sharley's murder, Connie's husband Frank Ramos was killed in the German's garage. (15 RT 3151.) Both Geary German and Rex Sheffield served time for Frank's killing. (15 RT 3151.) Rex was convicted of manslaughter and Geary for being an accessory. (16 RT 3064-3068.) Moreover, not only had Ramos vandalized property belonging to Ms. German a few days before the murder, but someone from the Ramos family had threatened Ms. German's life two to four weeks before her death. (15 RT 3171-3173; 33 RT 7007-7008.)

The jury also heard that Connie Ramos gave conflicting accounts of her whereabouts when Ms. German was killed. When police first interrogated Ramos only three days after the murder -- believing she had a motive for the killing -- Ramos gave them an alibi which was subsequently contradicted by her own sister. (32 RT 6901-6902; 33 RT 6994, 7016, 7022; 39 RT 8168-69.) In a second interrogation, Ramos gave a different rendition of where she was on the day Ms. German was killed. (39 RT 8168-8169.)

Finally, the jury also heard evidence about a Crime Stoppers tip police received from a woman who had been walking her dog by the German house on the morning Ms. German was killed. (39 RT 8226.) The caller saw a light blue Ford Pinto park across from Sharley Ann's house and a woman with large sunglasses get out of the car and knock on Sharley Ann's door. (39 RT 8226-8227, 8239.) The woman appeared to force her way into the German home, and the caller heard voices of two women yelling inside the house. (39 RT 8227, 8239.) The woman from the Ford Pinto came out of the house a few minutes later with a rust colored towel wrapped around her hand. (*Ibid.*) She threw the towel into the car and got in and drove away. (*Ibid.*) The description given by the caller fit Connie Ramos, including her sunglasses and her car. (33 RT 6989-6990, 6996; 39 RT 8208, 8237, 8242-8243; see also 33 RT 6938-6939.)[17]

As to counts four and six, Mr. O'Malley testified that although he was present when Herbert Parr was killed, he had no role in the offense whatever. Instead, Rex Sheffield, acting alone, killed and robbed Parr. (40 RT 8403-8405.) Similarly, Mr. O'Malley testified it was Sheffield who killed Robertson. (40 RT 8572-8580, 49 RT 10142, 10150-10154.)

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[17] Police obtained a warrant to search Connie Ramos' home (33 RT 6989-6990, 6996; 39 RT 8208) and found an orange colored towel in her car. (33 RT 6997.) The police also seized, among other things, four Buck knives from the home. (19 RT 3722-3725, 3744.) The knives were analyzed and there was a presumptive test showing that one had blood on it. (19 RT 3745; 31 RT 6528.)

Plainly, Hohman's testimony that Mr. O'Malley confessed to the three killings was utterly irreconcilable with Mr. O'Malley's own testimony and the rest of the defense evidence. If the jury believed Mr. O'Malley, it would have to acquit of murder. If it believed Hohman, it would have to convict.

As discussed above, as to Hohman the defense theory was that the jury should discount her testimony by considering what she got in exchange for her testimony and why she was never prosecuted. In his closing argument, defense counsel also urged the jury to consider the evidence against Connie Ramos and Rex Sheffield. (54 RT 11190-11191, 11205, 11210-11211, 11221.)

Of course, the jury received a standard instruction from the trial court explaining the trial court would provide the jury with the law. (25 CT 5587.) The jury was specifically told if either lawyer said something in conflict with the court's instructions, "you must follow my instructions." (25 CT 5587.) The court subsequently instructed the jury as follows:

> "There has been evidence in this case indicating that a person or persons other than the defendant was or may have been involved in the crime for which the defendant is on trial.
>
> "There may be many reasons why such person or persons is not here on trial. Therefore, do not discuss or give any consideration as to why the

other person or persons is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial." (25 CT 5598; 53 RT 10790.)

On the facts of this case, the question is whether this instruction undercut the defense theory as to (1) Ms. Hohman's lack of credibility or (2) third-party culpability. It is to this question that appellant now turns.

C. The Trial Court's Instruction Undercut The Central Theories Of Defense In Violation Of The Fifth, Sixth And Eighth Amendments.

Under the state and federal constitutions, criminal defendants have a right "to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) In addition, the Sixth and Fourteenth Amendments guarantee criminal defendants not only the right to confrontation, but "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Moreover, in a capital case, criminal defendants have an Eighth Amendment right to a reliable guilt phase proceeding. (*Beck v. Alabama* (1980) 447 U.S. 625.)

Instructions which affirmatively interfere with a jury's ability to consider a defense permitted under state law violate these constitutional provisions. (*See, e.g.*,

Penry v. Lynaugh (1989) 489 U.S. 302 [at penalty phase of capital trial, defendant presents evidence of mental retardation as a basis for sentence less than death, jury instructions interfered with jury's ability to consider the evidence; held, Eighth Amendment violated]; *Hitchcock v. Dugger* (1987) 481 U.S. 393 [at penalty phase of capital trial, defendant presents evidence of non-statutory mitigating factors, jury instructions interfered with jury's ability to consider this evidence; held, Eighth Amendment violated]; *People v. Mize* (1889) 80 Cal. 41 44-45 [defendant charged with murder, defense presented evidence of self-defense, jury instructed it could find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], *overruled on other grounds in Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

Here, CALJIC 2.11.5 directly undercut the entire theory of defense in connection with Hohman's testimony. Hohman had been charged with being an accessory to murder. She was never prosecuted. Simply put, the defense theory as to Hohman was she was lying in order to obtain immunity from prosecution and the jury should consider this in assessing her credibility. Yet CALJIC 2.11.5 directly told the jury it was not to "discuss or consider" why Hohman was not being prosecuted. Indeed, the express language of CALJIC No. 2.11.5 precluded the jury from discussing or even considering the fact that

Hohman struck a deal with the State for which she testified against appellant in return for over $28,000 in cash and money orders and immunity from prosecution as an accessory to murder. Given that Hohman was the State's most important witness at trial, CALJIC 2.11.5 should not have been given, as this Court has repeatedly recognized:

> "CALJIC No. 2.11.5 should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility."

(*People v. Williams* (1997) 16 Cal.4th 153, 226. *Accord People v. Hardy* (1992) 2 Cal.4th 86, 190 [CALJIC No. 2.11.5 may prevent the jury from considering the incentive a nonprosecuted participant in the crime has to lie]; *People v. Carrera* (1989) 49 Cal.3d 291, 312; Use Note to CALJIC No. 2.11.5.)

In assessing Hohman's credibility, the jury was entitled to -- and indeed, should have -- considered Hohman's immunity from prosecution and monetary benefits from the State. (*See, e.g., People* v. Cox (1991) 52 Cal.3d 618, 668, fn. 14 [a jury should consider immunity or other favorable treatment in assessing a witness' credibility,]; *People v. Sheldon* (1989) 48 Cal.3d 935, 946 ["entirely proper for the jury to consider whether [non-prosecuted participant] avoided prosecution in return for testifying against defendant."].)

Mr. O'Malley recognizes the Court has held provision of CALJIC 2.11.5 harmless where "the full panoply of witness credibility and accomplice instructions" have been given. (*People v. Lawley* (2002) 27 Cal.4th 102, 162. *Accord People v. Cain* (1995) 10 Cal.4th 1, 35; *People v. Price* (1991) 1 Cal.4th 324, 446.) In that situation, of course, the jury has not only been advised to view the accomplice's testimony with distrust, but it has also been told it cannot rely on the uncorroborated testimony of an accomplice. Here, however, the trial court gave no instructions at all on the testimony of accomplices, and the jury was never told to view Hohman's testimony with distrust. Because Hohman was -- in the prosecutor's own words -- the state's "chief witness" against appellant, who was both "critical [and] crucial to [the state's] case,"(RT 3/5/91 at 94), the state will be unable to prove CALJIC 2.11.5 was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

This is especially true here for two reasons. First, there can be no dispute that if the trial court had precluded defense counsel from cross-examining Hohman on her motivation for testifying, this would have been "constitutional error of the first magnitude [that] no amount of showing of want of prejudice would cure[.]" (*Davis v. Alaska* (1974) 415 U.S. 308, 318 [reversing conviction where defendant was precluded from cross-examining key state witness on motivation to testify for state].) Here, the trial court permitted cross-examination, but then gave an instruction which precluded the jury from

fully considering the evidence elicited. As a practical consequence, it makes little difference to a defendant where the vice lies; the harm is that the jury does not get to consider the motivation of the state's key witness. The error cannot be harmless. (*Compare Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114 [where the Constitution precludes the state from excluding certain evidence, it equally precludes admitting the evidence under instructions which prevent the factfinder from considering it]. *Accord Penry v. Lynaugh*, *supra*, 489 U.S. 302 [same]; *Hitchcock v. Dugger*, *supra*, 481 U.S. 393 [same].)

Second, the objective record of jury deliberations shows the state cannot prove beyond a reasonable doubt the error in instructing the jury with CALJIC 2.11.5 was harmless. Even with CALJIC 2.11.5 deflecting the jury's attention from the defense theory regarding Brandi Hohman, the jurors viewed this as a close case. The jury deliberated for seven days, requesting numerous re-readings of trial testimony, requesting clarification on the law, and unanimously acquitting of the count two conspiracy. (25 CT 5553-5568, 5582, 5585.) These objective factors have long been held to reflect a closely balanced case. (*See e.g.*, *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation]; *People v. Pearch* (1991)

229 Cal.App.3d 1282, 1295 [juror questions and requests for readback show a close case]; *People v. Thomkins* (1987) 195 Cal.App.3d 244 [request for readback indicates close case]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [refusal to convict on all counts shows close case]; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41 [request for readback shows close case].)

The same result is compelled in connection with the impact of CALJIC 2.11.5 on the third-party culpability defense. As discussed above, as to each of the murder charges, Mr. O'Malley presented third-party culpability evidence. As the trial court's admission of this evidence shows, the jury was fully entitled to hear and consider third-party culpability evidence that raised a reasonable doubt as to appellant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) But CALJIC No. 2.11.5 effectively prevented the jury from doing so. While the instruction told the jurors their sole duty was to consider whether the prosecution had proven appellant's guilt, reasonable jurors would, in the context in which these words were delivered, have interpreted this charge as precluding them from "discuss[ing] or giv[ing] any consideration" to evidence "that a person or persons other than appellant" (e.g., Connie Ramos) was the guilty party.

The likelihood that the jury interpreted CALJIC No. 2.11.5 in this manner is especially great here because the jury was not provided with any specific instructions on

how it should evaluate appellant's third-party culpability evidence. Thus, even though the jurors were informed that their duty was to determine whether the state had proven Mr. O'Malley guilty, they were effectively instructed that, in making this determination, they were not to discuss or consider third-party culpability evidence which may have raised a reasonable doubt as to appellant's guilt. For many of the same reasons as discussed above, the state will be unable to prove this error harmless beyond a reasonable doubt. Reversal is required.

VI. THE TRIAL COURT VIOLATED DEFENDANT'S FEDERAL AND STATE DUE PROCESS AND JURY TRIAL RIGHTS BY INSTRUCTING THE JURY THAT IT COULD CONVICT OF MURDER ON A NATURAL AND PROBABLE CONSEQUENCE THEORY WITHOUT PROVIDING ANY INSTRUCTIONS AS TO A PREDICATE OFFENSE.

Counts four and six of the information charged Mr. O'Malley with the murders of Parr and Robertson respectively. (23 CT 5217, 5218.) Because there was evidence showing that Rex Sheffield was also involved in both of these killings, and that Mr. O'Malley may only have been liable vicariously, the court defined aiding and abetting for the jury. (25 CT 5636.) The court recognized the jury could find Mr. O'Malley guilty of murder as "the actual killer or a co-conspirator or an aider or abettor . . . ." (25 CT 5632. *See also* 25 CT 5635.)

The trial court went on to instruct the jury it could convict Mr. O'Malley of the count four and six murders under the natural and probable consequence doctrine. First, the court broadly instructed "a member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy." (25 CT 5655.) The court then told the jury it could convict Mr. O'Malley of murder as to counts four and six if it found: (1) defendant was "guilty as a member of a conspiracy to commit the crime originally contemplated"and (2) "the

crime[s] alleged in Counts 4 & 6 [were] a natural and probable consequence of the originally contemplated criminal objective of the conspiracy." (25 CT 5655.)

Unfortunately, however, the court never defined for the jury which "act of a co-conspirator" or which "originally contemplated criminal objective" could serve as a predicate for application of the natural and probable consequence doctrine. As this Court has repeatedly made clear, such an omission is plain error. (*People v. Prieto* (2003) 30 Cal.4th 226, 252; *People v. Prettyman* (1996) 14 Cal.4th 248, 266-267.) When a trial court determines there is sufficient evidence to give a natural and probable consequence instruction, the court must also instruct the jury on the predicate acts on which the jury may rely as a basis for applying the natural and probable consequence doctrine. (*People v. Prettyman, supra*, 14 Cal.4th at p. 269 & n.9.)

In *Prettyman*, the Court went on to reject defendant's argument that a failure to instruct on the predicate acts withdrew an element of the offense from the jury's consideration. (*Id.* at pp. 270-272.) Instead, the Court ruled that the failure to instruct on predicate acts gave rise to "a risk that the jury will `indulge in unguided speculation' . . . in making the requisite factual findings." (*Id.* at p. 272.) The Court examined the record to determine if there was a reasonable likelihood that the natural and probable consequence instruction had resulted in "unguided speculation" or had been applied "in a

way that violates the Constitution." (*Id.* at pp. 272-273.)

In this case, the record affirmatively shows the gap in the trial court's natural and probable consequence instruction -- its failure to instruct on the predicate acts -- permitted the jury to "indulge in unguided speculation" as to application of the natural and probable consequence doctrine. In fact, after several days of deliberation the jury asked a question which established not only that it was applying the natural and probable consequence doctrine, but that it had manufactured predicate acts on its own:

> "*If the jury decided that there was a conspiracy to commit a crime other than murder and the natural result of that crime was murder,* is the Defendant guilty of conspiracy [to commit that other crime] even though that other crime is not specified in the charges. (The Information document) Reference Count #2. *The other crime would be assault.*" (25 CT 5568.)

Two points are clear from the jury's question. First, the italicized portion of the jury's actual question shows that the jury had filled the gap in the trial court's natural and probable cause instruction, and created a homespun predicate act of assault on which to premise a natural and probable consequence conviction of murder. That is conveyed precisely by the jury's suggestion it had "decided that there was a conspiracy to commit a crime other than murder and the natural result of that crime was murder . . . . The other crime would be assault." (25 CT 5568.)

Second, the jury's actual question shows that in addition to relying on the natural and probable consequence doctrine in connection with the murder charges, the jury was also considering finding Mr. O'Malley guilty of a conspiracy to commit the homespun predicate act which the jury itself had manufactured. Indeed, that is the substance of the jury's actual question: "is the Defendant guilty of conspiracy [to commit that other crime] even though that other crime is not specified in the charges[?]" (25 CT 5568.)

The trial court's response certainly resolved the actual question which the jury asked. In no uncertain terms the trial court properly instructed the jury it could *not* convict Mr. O'Malley of this new, uncharged conspiracy. (25 CT 5568; 55 RT 11347, 11349.) However, the question itself shows not only that the trial court's failure to instruct on predicate acts left the jury free to "indulge in unguided speculation," but that is exactly what the jury did.

The record shows more. Not only does the jury's question show it engaged in "unguided speculation" in connection with the natural and probable consequence instruction, it also shows the instruction was applied "in a way that violates the Constitution." (*Prettyman*, 14 Cal.4th at pp. 272-273.) Mr. O'Malley was given no notice of the predicate acts on which the jury may have relied to convict him of murder. Without notice, his lawyer was unable to provide competent representation as to the

theory on which the jury may have relied. Moreover, without instructions on the predicate acts, it is impossible to determine exactly what elements the jury may have believed were part of the predicate acts. Permitting the jury to rely on the natural and probable consequence doctrine to convict of murder -- where defendant was given no notice of the predicate acts and the jury was never even instructed on them -- is patently improper.

In sum, the jury not only engaged in "unguided speculation" in creating a homespun act on which to base a natural and probable consequence conviction, but this unguided speculation resulted in a process which deprived Mr. O'Malley of his federal and state constitutional rights to notice, to competent counsel, and to a reliable

determination of capital guilt in violation of the Fifth, Sixth and Eighth Amendments. Under any standard of prejudice, reversal is required.[18]

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[18] Appellant has no wish to lengthen this brief by repeating arguments the Court has already rejected. For purposes of preservation, however, that portion of *Prettyman* which concluded this error was not of federal constitutional dimension absent an affirmative showing that the incomplete natural and probable consequence instruction had been unconstitutionally applied is wrong and should be overruled. Because a defendant cannot be exposed to additional punishment under a natural and probable consequence theory absent a jury finding that the homicide was a natural and probable consequence of a particular target offense, proof of the target offense is a factual element which exposes the defendant to significant punishment. Accordingly, it is an element of the offense and must be proved to the jury beyond a reasonable doubt. (*See Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [proof of a particular fact which exposes the defendant to greater punishment than that available in the absence of such proof is an element of the offense which the Fifth and Sixth Amendments require be proven beyond a reasonable doubt to a jury]; *In re Winship* (1970) 397 U.S. 358, 363-364.) Failure to instruct on such an element is federal constitutional error even aside from the fact that the record in this case affirmatively shows the jury applied to instruction in an unconstitutional way.

VII. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY IT COULD RELY ON UNCHARGED ACTS, PROVEN ONLY BY A PREPONDERANCE OF THE EVIDENCE, TO CONVICT OF (1) THE CONSPIRACY CHARGED IN COUNT FIVE AND (2) THE MURDER CHARGED IN COUNT SIX.

A. Introduction.

Count five of the information charged Mr. O'Malley with conspiring to murder Robertson. (25 CT 5624.) The trial court defined conspiracy to murder as "an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder." (25 CT 5653.) The court properly instructed the jury that in order to convict of this offense, it had to find -- among other elements -- the existence of an unlawful agreement. (25 CT 5653.)

At trial, and over objection, the state introduced against Mr. O'Malley uncharged criminal conduct involving Christopher Walsh. Of particular note, this evidence showed Mr. O'Malley had assaulted Christopher Walsh to steal his motorcycle. (13 RT 2635-2636; 20 RT 3831-3868.)

The trial court instructed the jury in accord with standard CALJIC instructions on uncharged acts, telling the jury that the uncharged acts had only to be proven "by a preponderance of the evidence." (25 CT 5610.) Unfortunately, however, the court left in

a part of the standard instruction which should never be given in a case where the existence of a conspiracy is an element of one or more charged offenses. The court told the jury that once proven by a preponderance of the evidence, the uncharged acts evidence could be considered "if it tends to show . . . the existence of a conspiracy." (25 CT 5608.) In other words, the jury was told it could rely on uncharged acts evidence proven only by a preponderance of the evidence to find true the existence of a conspiracy element of the count five conspiracy charge.

As discussed more fully below, there are two distinct vices in the combination of instructions given by the trial court. First, these instructions permitted the jury to find an element of counts five true by relying on evidence which had been proven only by a preponderance of the evidence. This violated appellant's state and federal constitutional rights to proof beyond a reasonable doubt and a fair jury trial. Second, the court's instructions permitted the jury to infer an element of the count five charge from predicate facts which had no logical nexus to establishing that element. This violated appellant's state and federal constitutional rights to due process and a fair trial as well as his right to a jury trial. Considered either singly or together, these errors require reversal of the count five conspiracy charges.

As discussed below, this error also requires reversal of the murder charges in count

six (charging the murder of Robertson). The jury was given two theories on which it could rely to convict in connection with this charge. First, the jury was told it could convict on this charge by finding a premeditated killing with malice aforethought. (25 CT 5628.) Second, the jury was told it could convict of murder if it found (1) Mr. O'Malley guilty of conspiracy to commit an offense and (2) the murder in count six was "a natural and probable consequence of the originally contemplated criminal objective of the conspiracy." (25 CT 5655.) Because the conspiracy instructions were fundamentally flawed, the murder conviction which may have rested on a conspiracy theory cannot stand.

Mr. O'Malley will begin with a discussion of the substantive conspiracy charge and then turn to the murder charge.

B. The Court's Instruction Unconstitutionally Permitted The Jury To Find An Element Of The Charged Conspiracy By A Preponderance Of The Evidence.

The Fifth Amendment requires that in criminal cases the state prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *(In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury make the

determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Together, these rights require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Jury instructions violate these constitutional principles when they relieve the state of the burden of proof beyond a reasonable doubt of every element of the crime charged. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 520-524. *Accord Carella v. California* (1989) 491 U.S. 263, 265; *Francis v. Franklin* (1985) 471 U.S. 307, 313.) The standard for determining whether instructions violate the constitutional requirement of proof beyond a reasonable doubt is well established. Generally, an instruction is improper if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, 22.)

Here, the jury was told one of the elements of conspiracy which the state had to prove was the existence of the conspiracy. (25 CT 5653.) The jury was also told (1) uncharged acts need only be proven by a preponderance of the evidence and (2) if proven, uncharged acts could be considered in determining the existence of the conspiracy. (25

CT 5608.) This combination of instructions unequivocally told the jury it could find the conspiracy element true by relying on facts proven only by a preponderance of the evidence.

The remaining question is one of prejudice. Misinstruction on the burden of proof is a structural error, and reversal is required without a showing of prejudice. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) The conspiracy conviction must be reversed.

C. The Trial Court Violated Mr. O'Malley's Federal And State Constitutional Rights By Permitting The Jury To Infer An Element Of Conspiracy Based On A Finding Of Uncharged Acts.

There is an alternative way of looking at this error. It too requires reversal of the conspiracy charge. As noted above, the Fifth and Sixth Amendment require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.) A state may not make certain facts elements of a criminal offense and then "us[e] evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt" of that element. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 313; *Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 520-524.) "Such directions subvert the presumption of innocence

accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California*, *supra*, 491 U.S. at p. 265.)

There are two types of presumptions. A mandatory presumption requires the jury to infer an ultimate fact from proof of a predicate fact. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A permissive presumption permits, but does not require, the jury to infer the ultimate fact from the predicate fact. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 314.) In both situations, the vice is identical; presumptions which permit or require a jury to presume an element of the offense from proof of certain predicate facts "render[] irrelevant the evidence on that issue" and make it impossible to determine "[i]f the jury may have failed to consider evidence" on the issue by relying on the presumption. (*Connecticut v. Johnson* (1983) 460 U.S. 73, 85-86.)

Here, Mr. O'Malley was charged with conspiracy to murder. Under state law, this required the prosecution to prove the existence of a conspiracy, that is, an unlawful agreement. (XXV5 CT 5653.) The Fifth and Sixth Amendments require this element be proven to a jury beyond a reasonable doubt. In this case, however, the jury was told it could find "the existence of a conspiracy" by finding uncharged acts. Putting aside that the state had only been required to prove these act by a preponderance of the evidence (discussed in Argument VII-B, *supra*), the trial court's instruction was separately

improper because it allowed the jury to infer an element of the conspiracy charge from predicate facts with no logical relationship to the fact to be inferred. (*See, e.g., People v. Pic'l* (1981) 114 Cal.App.3d 824, 857 [defendant charged with conspiracy, uncharged acts admitted, trial court instructs jury such evidence could be considered if it "tended to show [the] existence of [a] conspiracy"; held, instruction should not have referenced the existence of a conspiracy]. *Compare In re Romano* (1966) 64 Cal.2d 826, 829 [defendant charged with conspiracy, uncharged acts admitted, trial court gives jury an instruction which does *not* permit jury to use the evidence to infer the existence of a conspiracy]; *People v. Theodore* (1953) 121 Cal.App.2d 17, 26 [same].)

While permissive inferences (or presumptions) are less intrusive than mandatory presumptions, they are nevertheless disfavored because they "tend to take the focus away from the elements that must be proved." (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 (Rymer, J. concurring).) Permissive presumptions are constitutional only if it can be said "with substantial assurance" the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County Court v. Allen, supra*, 442 U.S. at p. 166, n. 28.) A permissive inference violates Due Process whenever "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin, supra*, 471 U.S. at p. 316.)

In *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, the Ninth Circuit Court of Appeals applied these principles in a case analogous to this one. There defendant was charged with vehicular assault. Under Washington state law, one element the state had to prove to obtain a conviction was that defendant drove in a reckless manner. As to this element, however, the jury was given a permissive presumption allowing it to infer defendant had driven in a reckless manner solely from evidence he was speeding. The court found even though "it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." (*Id.* at p. 316.) Thus, the instruction was constitutionally deficient and defendant's conviction was reversed. (*Id.*)

The permissive inference here has even less to recommend it than the inference in *Schwendeman*. With respect to the conspiracy charge, it cannot be said with "substantial assurance that the inferred fact of [the existence of a conspiracy to kill Robertson] more likely than not flowed from the proved fact of [the uncharged offense of theft from Walsh]." In short, the instruction given to the jury in this case violates Due Process precisely because the suggested conclusion (that defendant entered a conspiracy) "is not one that reason and common sense justify" in light of the predicate facts on which the presumption is based (uncharged acts). (*Francis v. Franklin, supra*, 471 U.S. at p. 316.)

Because of the federal constitutional dimension to this error, the *Chapman* standard applies, requiring the People "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; *see Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 [applying *Chapman* to improper permissive presumption]; *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1038 [same].)

In assessing whether the error was harmless, the question is *not* whether there is sufficient evidence from which the jury could have found the ultimate fact under other instructions. (*See, e.g., Hanna v. Riveland*, *supra*, 87 F.3d at p. 1039; *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Instead, the question is whether the state can prove beyond a reasonable doubt that the jury did not rely on the predicate fact -- that is, did not ignore other evidence -- in deciding the ultimate fact. (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.)

Here, as to the conspiracy charge, the jury was effectively told it could infer the existence of a conspiracy from the predicate fact of uncharged acts. As in *Schwendeman*, "[b]y focusing the jury on the evidence of [uncharged acts] alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which [Mr. O'Malley] was convicted without considering all the evidence presented at trial."

(*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316; *see Yates v. Evatt* (1991) 500 U.S. 391, 405-406 ["[S]ome presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed."].) For example, the defense theory -- of course -- was that Mr. O'Malley did not enter any conspiracy. As to the overt acts alleged in support of the conspiracy, and as the prosecutor recognized during his closing argument, Mr. O'Malley's position was that although several of the acts occurred they had nothing to do with a conspiracy. (54 RT 11149-11151.) The prosecutor recognized that whether Mr. O'Malley engaged in a conspiracy, and whether any of these acts actually were performed in furtherance of a conspiracy, was a highly contested question of fact for the jury. (54 RT 11149-11151.) Of course, there was no need for the jury to resolve any of these facts if it could simply infer a conspiracy from the prior uncharged acts.

Mr. O'Malley recognizes in light of the deferential standards of appellate review, there was sufficient evidence from which a jury could have found the presumed fact regarding the existence of a conspiracy. It remains true, however, the improper instruction "permitted the jury to find [all] element[s] of the crime of which [Mr. O'Malley] was convicted without considering all the evidence presented at trial." Accordingly, the state cannot prove there was "no reasonable probability that the

instruction did not materially affect the verdict." (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Reversal of the conspiracy conviction is required.

D. Because The Jury Was Told It Could Convict On The Murder Charges In Count Six By Relying On A Conspiracy Theory, The Invalidity Of The Conspiracy Conviction Requires That These Murder Charges Be Reversed As Well.

Count six charged the murder of Robertson. As noted above, the jury was told it could convict on this count in two ways: (1) by finding a premeditated killing with malice aforethought or (2) by finding the killing was a natural and probable consequence of a conspiracy. (25 CT 5628, 5655.) The jury reached a general verdict, without indicating which theory it used to convict. (25 CT 5570, 5576.)

But as discussed in Arguments VII-B and C, *supra*, the conspiracy instructions were fundamentally flawed. In light of these flaws, a conspiracy theory of first degree murder cannot be sustained. Because of the general verdict, the state will be unable to establish that the jury did not rely on the flawed conspiracy theory in convicting of first degree murder. Accordingly, the count six murder charge must be reversed. (*Compare People v. Sanders* (1990) 51 Cal.3d 471, 517 [where defendant's conviction for robbery is reversed, felony-murder based on robbery must also be reversed]; *People v. Garrison* (1989) 47 Cal.3d 746, 788-789; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352.)

VIII. THE TRIAL COURT VIOLATED DUE PROCESS AND THE SIXTH AMENDMENT BY EFFECTIVELY TELLING THE JURY THAT DIRECT EVIDENCE COULD SUPPORT A FINDING OF GUILT EVEN IF IT WAS CONSISTENT WITH AN INNOCENT EXPLANATION.

A. Introduction.

The state charged Mr. O'Malley with three counts of murder, two counts of conspiracy to commit murder and one count of robbery. (XXIV CT 5393-5396.) In addition Mr. O'Malley was charged with personal use of a knife, personal use of a firearm, and robbery, multiple murder and financial gain special circumstances. (XXIV CT 5393-5396.)

During its case-in-chief, the state called more than 50 witnesses to prove these six counts and enhancing allegations. It is fair to say that in its case against Mr. O'Malley, the state presented both direct and circumstantial evidence.

The direct evidence, if believed, was extremely incriminating. As discussed above, according to police officers, Theodore Grandstedt said Mr. O'Malley confessed to the German homicide. (19 RT 3791-3793.) Robert Fulton and Marlene Fulton also testified Mr. O'Malley confessed to this crime. (17 RT 3426, 3435-3439; 18 RT 3525.) Brandi Hohman testified Mr. O'Malley not only confessed to the German homicide, but the other

charged homicides as well. (26 RT 5501, 5511, 5573; 27 RT 5791; 28 RT 5860.)

The defense had a different explanation for this evidence. The defense presented evidence showing that Mr. O'Malley had a history of "boasting" about having committed murders (and other crimes) which, in fact, he did not commit. (17 RT 3458; 28 RT 5997, 5998, 5999; 38 RT 8007; 39 RT 8270.) In other words, under the defense theory, there was an entirely innocent explanation for this direct evidence of guilt.[19]

Unfortunately, however, the trial court gave instructions which effectively told the jurors (1) direct evidence did *not* have to be proven beyond a reasonable doubt and (2) they could rely on direct evidence to convict *even if that evidence was consistent with an innocent explanation.* As more fully discussed below, on the unusual record of this case -- where the state placed great reliance on direct evidence and where that evidence did in fact have an innocent explanation -- the court's instruction violated Mr. O'Malley's rights under state and federal law and requires reversal of his convictions.

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[19] This explanation was so important to the defense case that the jury questionnaire was specifically designed to elicit the views of potential jurors as to a person who "brags about doing something wrong" who did not actually do it. (*See, e.g.*, 13 Aug. CT 3076.)

B. Under The Unique Circumstances Of This Case, The Trial Court's Provision Of CALJIC 2.01 Was Unconstitutional And Requires Reversal.

As noted above, the Due Process Clause of the Fifth Amendment requires the state to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship, supra,* 397 U.S. 358; *Patterson v. New York, supra,* 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury, not the trial court, make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278.)

Jury instructions violate these constitutional principles if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska, supra,* 511 U.S. at pp. 6, 22.) In assessing whether "there is a reasonable likelihood that the jury has applied the challenged instructions" in an improper manner, a reviewing court must consider the entire context in which the instruction is given. (*Boyde v. California, supra,* 494 U.S. at pp. 380, 383-384.) Where there is a "reasonable likelihood" that the jury has applied a reasonable doubt instruction incorrectly, the error is deemed structural and reversal is required without a showing of prejudice. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 280.)

In this case, the trial court provided general instructions on both the presumption of innocence and the requirement of proof beyond a reasonable doubt. (53 RT 10798-10799.) Recognizing the state had presented circumstantial evidence in its case against Mr. O'Malley, the trial court advised the jury of two cautionary principles which implemented both the presumption of innocence, and the requirement of proof beyond a reasonable doubt, in connection with circumstantial evidence. First, the jury was told that if the state relied on circumstantial evidence to establish guilt that evidence had to be proved beyond a reasonable doubt. (53 RT 10788.) Second, and of more importance for purposes of this case, the jury was told it could not convict based on circumstantial evidence if that evidence was consistent with "any other rational conclusion":

> "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of a crime, but cannot be reconciled with any other rational conclusion." (53 RT 10788.)

The trial court expanded on this instruction, advising the jurors that in evaluating the circumstantial evidence as to each count, if there were two explanations for that evidence -- one pointing to guilt and one to innocence -- they had to adopt the explanation pointing to innocence:

> "[I]f the circumstantial evidence as to any particular count is susceptible of

> two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt." (53 RT 10788.)

Later, the trial court reiterated these same cautionary principles as to circumstantial evidence introduced to prove the special circumstance allegations. (53 RT 10810-10811.)

It is true, of course, that these two cautionary principles -- requiring (1) evidence be proved beyond a reasonable doubt and (2) the jury to acquit if there is a reasonable interpretation of the evidence that points to innocence -- apply to circumstantial evidence. And it is both obvious, and logical, that by explicitly limiting the quoted principles to *circumstantial* evidence, the instructions logically told the jurors that these principles did *not* apply to direct evidence. (*See, e.g., People v. Vann* (1974) 12 Cal.3d 220, 226-227 ["An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality."]; *People v. Crawford* (1997) 58 Cal.App.4th 815, 824-825. *See generally People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App.3d 460, 474. *See also People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.].)

This logical reading of the circumstantial evidence instructions is wrong. California courts have long recognized these cautionary principles apply to all cases, not just cases involving direct evidence. Thus, while it is true a determination of guilt resting upon circumstantial evidence requires proof beyond a reasonable doubt, so too does a determination of guilt based on direct evidence. (*People v. Vann*, *supra*, 12 Cal.3d at p. 226.) Similarly, the principle that where two reasonable interpretations of the evidence exist the one favorable to the defendant must be adopted by the jury is *not* limited to cases involving circumstantial evidence, but applies to *all* cases, including those which depend on direct evidence. (*See People v. Naumcheff* (1952) 114 Cal.App.2d 278, 281-82 [in case consisting primarily of direct evidence, jury instructed that "[i]f from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty."]; *People v. Foster* (1926) 198 Cal. 112, 127 [defendant charged with robbery; state presents direct evidence of his guilt in the form of eyewitness testimony, jury properly instructed "that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant.'"].)

In this case, as noted above, jurors were given a general instruction advising them

of the presumption of innocence and the requirement of proof beyond a reasonable doubt. But the instructions which explained how these concepts were to be applied specifically told the jurors they could *not* convict where the circumstantial evidence was "susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence . . . ." (53 RT 10788.) There is a reasonable likelihood that this instruction told the jury it *could* convict based on direct evidence that was "susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence." (*People v. Vann, supra*, 12 Cal.3d at pp. 226-227; *People v. Crawford, supra*, 58 Cal.App.4th at pp. 824-825.)

Mr. O'Malley recognizes that in virtually all cases involving direct evidence -- such as eyewitness testimony that a defendant committed a murder -- there could be no possible harm from limiting the cautionary principles to circumstantial evidence. After all, it is extremely unlikely there could ever be a second, innocent "reasonable interpretation" for eyewitness testimony defendant committed a murder. Similarly, even as to the type of direct evidence in this case -- confessions -- it will be the very rarest of cases in which there is an alternative "reasonable interpretation" of such direct evidence.

But this is such a case. Here, as the jury voir dire reflects, a central part of the defense case involved explaining why Mr. O'Malley would brag about crimes he did not

commit. (13 Aug. CT 3076.) And, in fact, during trial defense counsel elicited exactly this kind of evidence.

For example, during his cross-examination of prosecution witness Robert Fulton, defense counsel elicited the fact that in the same conversation where Mr. O'Malley claimed to have killed Sharley German, he also claimed to have killed a man in prison "back East." (17 RT 3458.) In fact, however, Mr. O'Malley had never even been to prison. (39 RT 8270.)

Similarly, during his cross-examination of Brandi Hohman, defense counsel elicited the fact that in the same conversation in which Mr. O'Malley admitted guilt, he claimed to have killed (1) three Hell's Angels, (2) a drug dealer in New York that turned out to be a Connecticut state trooper and (3) a man named Benny. (28 RT 5997-5998; 41 RT 8687-8688.) In addition, Mr. O'Malley boasted he had nailed a man named Dennis Giacomo to the floor, dismembered him, mailed body parts to his mother and carved initials in his chest. (29 RT 5999.) In fact, however, he had done no such things. (38 RT 8007.)

In other words, there was substantial evidence showing an entirely innocent explanation for Mr. O'Malley's claims to have committed these crimes: he was boasting of things he did not do, just as he often did. This is that extremely rare case where direct

evidence on which the state relies to prove its case has a reasonable explanation which does *not* point to guilt. In this circumstance, because there is a reasonable likelihood that the jury applied the instructions so as to permit it to return a guilty verdict based on direct evidence even if that evidence was reconcilable with innocence, the burden of proof beyond a reasonable doubt was undercut in violation of Mr. O'Malley's Fifth and Sixth Amendment right to a fair jury trial. Reversal is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

IX. BECAUSE THE TRIAL COURT PRECLUDED MR. O'MALLEY FROM PRESENTING CRITICAL EVIDENCE IN SUPPORT OF THE ONLY DEFENSE PRESENTED TO THE HOMICIDES CHARGED IN COUNTS ONE, FOUR, AND SIX, REVERSAL IS REQUIRED.

A. Introduction.

The state charged Mr. O'Malley with three counts of murder. (24 CT 5215-5218.) Count one charged Mr. O'Malley with the murder of Sharley German. (24 CT 5215.) Count four and six charged Mr. O'Malley with the murders of Herbert Parr and Michael Robertson. (24 CT 5216-5218.)

The state's theory as to these three murders was simple. With respect to the Sharley German homicide, the state theorized that German's husband Geary hired Mr. O'Malley to kill his wife. (53 RT 10857-10858, 10861.) With respect to the Parr and Robertson homicides, the state theorized that Mr. O'Malley and Rex Sheffield both participated in their murders. (53 RT 11014, 11067.)

The defense theory, on the other hand, was that Mr. O'Malley was not guilty of murder at all. Mr. O'Malley testified he was not involved in the Sharley German murder. (40 RT 8694.) And while present at the Parr and Robertson murders, he was not the killer, had not known a killing was going to occur, and did not aid the killing. (50 RT 10391-

10392.) Mr. O'Malley, instead, presented third-party culpability evidence as to each of the three murder charges, introducing evidence that Connie Ramos may have been the person who killed Ms. German and that Rex Sheffield alone was the killer of Parr and Robertson. (32 RT 6901-6902; 33 RT 6994, 7016, 7022; 39 RT 8168-8169; 8226-8227, 8239; 40 RT 8403-8405, 8572-8580; 49 RT 10142, 10150-10154.) Moreover, Mr. O'Malley testified that he believed that he was being framed for the murders by his motorcycle club, the Freedom Riders. (50 RT 10290, 10319-10321, 10335, 10358-10359.) Thus, the essential defense theory was two-fold; (1) Mr. O'Malley was not the killer with respect to any of the three counts, (2) Mr. O'Malley was being framed for the murders.

To support this theory, Mr. O'Malley also sought to introduce evidence that after his arrest, his defense investigator had been threatened and told to stop working on his case. The defense investigator was Bob Furlan. (34 RT 7267.) He worked at Immendorf Investigations. (34 RT 7267.) At the time of his work in this case, Mr. Furlan lived in San Bruno and drove a Honda. (33 RT 7150-7151; 34 RT 7274.)

Lonnie Garey, the receptionist at Immendorf Investigations, testified that on February 17, 1989, she received a "very scary" phone call from "someone who disguised their voice." (33 RT 7141, 7151.) The man on the phone told her to tell "the guy with the big nose . . . in the Honda . . . he better fucking get off it." (33 RT 7150) The man also

said, "we are conveniently located in San Bruno." (33 RT 7150.) According to Ms. Garey, Mr. Furlan was working exclusively on Mr. O'Malley's case at the time. (33 RT 7150-7151.) Ms. Garey was "very frightened" by the call. (33 RT 7152.) Based on this phone call, the women in the office, including Garey, had someone escort them to the parking lot after work from then on. (33 RT 7152.) After this first call, Garey continued to receive "threatening phone calls" until the office set up a private line for calls regarding Mr. O'Malley's case which by-passed the receptionist desk and went directly to an investigator. (33 RT 7154, 7162.)

Mr. Furlan confirmed that he was working exclusively on Mr. O'Malley's case for the months surrounding the calls. (34 RT 7267.) Mr. Furlan testified that around the time of the first call he had been interviewing members of O'Malley's motorcycle gang. (34 RT 7267-7268.) Rex Sheffield's wife Gail arrived for an interview "accompanied by two large white male adults." (34 RT 7268.) The two males looked at him "hard." (34 RT 7274.) Their presence -- given that Gail was co-defendant Rex Sheffield's wife -- made Furlan "anxious." (34 RT 7269.) Mr. Furlan drove his Honda to this interview. (34 RT 7274.) It was after this interview that Ms. Garey received the threat directed at Mr. Furlan mentioning his Honda. (34 RT 7270.) Based on the threats, Mr. Furlan installed a security system in his home and acquired a license to carry a concealed weapon. (34 RT 7270.) Mr. Furlan was sure the threats came from "someone connected with the

[O'Malley] case." (34 RT 7282.) It was his belief that it was someone connected with the Freedom Riders. (34 RT 7271.) Immendorf Investigations reported the threats to the district attorney. (34 RT 7283.)

On the state's motion, however, the trial court excluded the threat evidence. (33 RT 7164.) According to the trial court "there is no relevancy as to this testimony as it relates to this case . . . ." (33 RT 7286.)

As more fully discussed below, the exclusion of the threat evidence was improper. Mr. O'Malley's defense in this case was that third parties (Connie Ramos and Rex Sheffield) committed all three murders and that Mr. O'Malley was being framed for the murders. Evidence that a third party threatened to harm Mr. O'Malley's defense investigator if he continued working on the case directly corroborated this defense. Because the trial court's ruling prevented the jury from considering evidence directly on this critical issue, the ruling violated Mr. O'Malley's federal and state constitutional rights to present a defense and to a fair trial. Reversal is required.

B. Because Mr. O'Malley's Defense Was That A Third Party Committed The Homicides, The Trial Court's Exclusion Of Testimony That A Third Party Threatened To Harm Mr. O'Malley's Investigator If He Continued To Work On Mr. O'Malley's Case Violated O'Malley's Rights To Present A Defense And A Fair Trial.

The Fifth Amendment provides that no person may be deprived of liberty without "due process of law." Under this constitutional guarantee, while a defendant is not entitled to a perfect trial, he is entitled to a fair one. (*Estes v. Texas* (1965) 381 U.S. 532.) In gauging the fairness of a trial, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Thus, the right to present evidence "has long been recognized as essential to due process." (*Id.* at p. 294.)

The Sixth Amendment provides that defendants in criminal cases shall "have compulsory process for obtaining witnesses in his favor . . . ." The Sixth Amendment requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

Applying this well established authority, the Supreme Court has repeatedly made clear that the erroneous exclusion of a defendant's evidence may violate the defendant's

Fifth Amendment right to a fair trial as well as his Sixth Amendment right to present a defense. (*See, e.g., Davis v. Alaska* (1974) 415 U.S. 308, 319-320; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers v. Mississippi*, 410 U.S. at p. 302.) As the Ninth Circuit has recently noted in granting habeas relief to a California defendant based on a trial court's exclusion of evidence, "[t]he Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." (*Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.)

The Supreme Court has applied these very principles to a trial court's exclusion of evidence which corroborates a central defense presented to the jury. (*See Crane v. Kentucky* (1986) 476 U.S. 683.) There, after defendant was arrested for murder, he was interrogated by police. Ultimately, defendant confessed. At trial, defendant denied complicity in the murder. Central to this defense was his argument that the confession he gave to police was unreliable and should not be believed. Defendant offered evidence about the circumstances of the interrogation which called into question the credibility of some of the incriminating statements defendant had made during the interrogation. (476 U.S. at p. 684.) The trial court excluded the testimony.

On appeal, the Supreme Court reversed, observing first that the Constitution, via

either the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation clauses of the Sixth Amendment, guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Id.* at p. 690, *quoting California v. Trombetta* (1984) 467 U.S. 479, 485.) "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." (*Id.*) Unless there is a valid state justification, the exclusion of this exculpatory evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Id.* at pp. 690-691 [citations omitted].)

Applying these principles to the case before it, the Court held that the evidence which gave context to defendant's confession could not be excluded consistent with the Constitution. (*Id.* at p. 691.) This was especially true where a central theme of the defense case was that defendant's earlier admissions of guilt should not be believed. (*Id.*)

Not surprisingly, courts throughout the country have followed the principles expressed in *Chambers* and *Washington*, and applied in *Crane*, holding that a trial court's exclusion of critical evidence which corroborates a defense presented to the fact finder is unconstitutional. (*See, e.g., Lyons v. Johnson* (2d Cir. 1996) 99 F.3d 499 [exclusion of

evidence violated Due Process where it would have corroborated a theory of defense presented to the fact finder through the testimony of other witnesses]; *Dey v. Scully* (E.D.N.Y. 1997) 952 F.Supp. 957 [same]. *Cf. Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [where a defendant's culpability hinges on the testimony of a prosecution witness, the erroneous exclusion of evidence bearing on the credibility of that witness violates the Constitution]; *Justice v. Hoke* (2d. Cir. 1996) 90 F.3d 43, 47-49 [same]; *Franklin v. Duncan* (N.D.Cal. 1995) 884 F.Supp. 1435, 1455 [same].

The constitutional principle applied in *Crane*, and followed throughout the country since, controls this case. Here, the theory of defense was that Mr. O'Malley was innocent and that third parties committed all three murders. (54 RT 11161-11241.) Moreover, someone (possibly the third party killer or someone acting on the killer's behalf) wanted to frame Mr. O'Malley. (54 RT 11214, 11221-22.) Consistent with the defense theory, trial counsel presented third-party culpability evidence. (32 RT 6901-6902; 33 RT 6994, 7016, 7022; 39 RT 8168-8169; 8226-8227, 8239; 40 RT 8403-8405, 8572-8580; 49 RT 10142, 10150-10154.) Also consistent with the defense theory, Mr. O'Malley testified that he believed someone from the Freedom Riders was trying to frame him for the murders. (45 RT 9380-9381; 49 RT 10055; 50 RT 10358-10359.)

Yet, just as in *Crane*, the trial court here prevented Mr. O'Malley from introducing

critical evidence on this very issue. The trial court excluded testimony from Ms. Garey and Mr. Furlan that (1) a third party threatened Mr. Furlan because of his investigation on Mr. O'Malley's behalf and (2) the threat occurred after interviewing members of the Freedom Riders motorcycle club. Mr. O'Malley was entitled to introduce witness testimony that directly supported the theory of defense. Here, Mr. O'Malley's evidence was directly relevant to show that a third party was trying to intimidate Mr. O'Malley's defense team and hinder his defense. The trial court erred in excluding this evidence; because that evidence was critical, the exclusion not only violated state law, but the Fifth and Sixth Amendments as well.[20]

C. Because Mr. O'Malley's Sole Defense At Trial Was That A Third Party Committed The Charged Murders, The Trial Court's Erroneous Exclusion Of Testimony Directly Supporting The Defense Presented Warrants Reversal.

To the extent the trial court's exclusion of the threat evidence violated Mr. O'Malley's rights under state law, reversal would be required if there is reasonable probability that the error affected the outcome of Mr. O'Malley's trial. (*See People v.*

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[20] For many of the same reasons, the trial court's exclusion of the threat evidence violated state law as well. Article I, section 28(d) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal proceeding." Here, the defense theory was that a third party committed the murders. The threat evidence was directly relevant to show that a third party did not want Mr. O'Malley to prove his innocence by possibly presenting third-party culpability evidence. Therefore, the trial court's exclusion of this evidence violated state law.

Watson (1956) 46 Cal.2d 818.) Of course, because the trial court's exclusion of this evidence violated Mr. O'Malley's Fifth, Sixth and Fourteenth Amendment rights as well, it is subject to the more rigorous *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) Ultimately, however, there is no need to perform separate analysis under state and federal law; even if this Court were to apply the *Watson* standard of prejudice reversal would still be required on the facts of this case.

As previously explained, and with respect to the German homicide, the critical disputed issue in this case was whether Mr. O'Malley was the killer. With respect to the Parr and Robertson homicides, the critical disputed issue was whether Mr. O'Malley participated in the murders. According to the defense theory, Mr. O'Malley was in no way involved in the German homicide and was not the killer in the Parr and Robertson homicides. (54 RT 11161-11241.) Instead, Mr. O'Malley presented evidence to show that Connie Ramos may have killed Ms. German and that Rex Sheffield killed Parr and Robertson without O'Malley's foreknowledge or assistance. (32 RT 6901-6902; 33 RT 6994, 7016, 7022; 39 RT 8168-8169; 8226-8227, 8239; 40 RT 8403-8405, 8572-8580; 49 RT 10142, 10150-10154.) Moreover, Mr. O'Malley testified that he was afraid of the Freedom Riders and believed they were trying to trying to frame him for the murders. (45 RT 9380-9381; 49 RT 10055; 50 RT 10358-10359.) He had even left California because

of this belief. (50 RT 10290.) Yet, the trial court's erroneous exclusion of the threat evidence prevented the defense from presenting critical evidence on this very issue.

Moreover, as the prosecutor hammered home again and again in closing argument, this was a "credibility contest" between Mr. O'Malley and the state's witnesses. (53 RT 10839, 10891, 10958, 10965, 11033, 11047-48; 54 RT 11098, 11110-11111, 11122, 11253.) The prosecutor urged the jury to reject Mr. O'Malley's testimony that he was innocent of the charges and was instead being framed. (54 RT 11253, 11109-10.) Thus, the excluded evidence not only supported the defense theory of the case, it corroborated Mr. O'Malley's testimony and credibility as well.

Finally, the objective record of jury deliberations show the state will be unable to prove the error harmless. The jury deliberated for seven days, requesting numerous re-readings of trial testimony, requesting clarification on the law, and unanimously acquitting of the count two conspiracy. (25 CT 5553-5555, 5556-5567, 5585.) These objective factors have long been held to reflect a closely balanced case. (*See e.g.*, *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror

questions and requests for readback show a close case]; *People v. Thomkins* (1987) 195 Cal.App.3d 244 [request for readback indicates close case]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [refusal to convict on all counts shows close case]; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41 [request for readback shows close case].)

SPECIAL CIRCUMSTANCE ISSUES

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT IF IT FOUND DEFENDANT WAS AN AIDER AND ABETTOR, IT DID NOT HAVE TO FIND AN INTENT TO KILL.

Count four of the information charged Mr. O'Malley with the August 15, 1987 murder of Herbert Parr. (XXIV CT 5395.) This count added a robbery special circumstance allegation. (XXIV CT 5395.) The prosecutor's theory was that Mr. O'Malley and Rex Sheffield stabbed and killed Mr. Parr in an attempt to steal his motorcycle.

In his closing argument, the prosecutor conceded that there was "no evidence to suggest whether or not Mr. O'Malley did all of the stabbing on his own, whether Mr. Sheffield did all the stabbing on his own, or whether the two of them, acting in concert, did all of the stabbing." (53 RT 11108.) Accordingly, as to the substantive charge of murder, the jury was instructed it could convict Mr. O'Malley of murder by finding (1) he actually killed Parr during the commission of a robbery (53 RT 10804-10805) or (2) he aided the robbery during which Parr was killed. (53 RT 10807-10808.)

As noted, Mr. O'Malley was also charged with a robbery special circumstance in

connection with this count. (XXIV CT 5395.) Pursuant to *People v. Anderson* (1987) 43 Cal.3d 1104, 1139 a robbery special circumstance may not be found true as to an accomplice (as opposed to an actual killer) unless the jury finds defendant acted with an intent to kill. Recognizing the possibility that jurors would find Mr. O'Malley was not the actual killer, the trial court explained to the jury when it was required to find an intent to kill. The trial court instructed the jury that it needed to find an intent to kill in order to find true the robbery special circumstance if it was "unable to decide" whether Mr. O'Malley was the actual killer or an aider and abettor:

> "If you find beyond a reasonable doubt that the defendant in count[] four . . . was either the actual killer or an aider and abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill participated as a co-conspirator with or aided and abetted an actor in the commission of the murder in the first degree, in order to find the special circumstance to be true." (53 RT 10809.)

This instruction was improper. By specifically telling the jury it needed to find an intent to kill only if it was "unable to decide" whether Mr. O'Malley was the actual killer or an aider and abettor, the court plainly implied that no such intent finding was required if the jury *could* decide the question and found Mr. O'Malley was an accomplice. (*See People v. Vann, supra*, 12 Cal.3d at 226-227; *People v. Castillo, supra*, 16 Cal.4th at p. 1020 [conc. opn. of Brown, J.]; *People v. Dewberry, supra*, 51 Cal.2d at p. 557; *People v. Crawford, supra*, 58 Cal.App.4th at pp. 824-825; *People v. Salas, supra*, 58 Cal.App.3d at

pp. 474-475.) At the very least, there is a "reasonable likelihood the jury was confused and misconstrued or misapplied" the instruction in this way. (*People v. Harrison* (2005) 35 Cal.4th 208, 252, citing *People v. Clair* (1992) 2 Cal.4th 629, 662-663.)

Such an inference plainly violated state law; as noted above, this Court has long made clear that an accomplice may not be convicted of a robbery special circumstance absent an intent to kill. (*See, e.g., People v. Anderson, supra*, 43 Cal.3d at p. 1139.) Moreover, the failure to properly instruct on an element of the special circumstance allegation also violated Mr. O'Malley's rights to due process, and a reliable jury trial under the Fifth, Sixth, Eighth and Fourteenth Amendments and requires application of the *Chapman* standard of prejudice requiring reversal unless the state can prove the error harmless beyond a reasonable doubt. (*See, e.g., People v. Carter* (2005) 36 Cal.4th 1114, 1187; *People v. Osband* (1996) 13 Cal.4th 622, 681. *See generally Ring v. Arizona* (2002) 536 U.S. 584 [Sixth Amendment applies to special circumstance allegations].)

The state will be unable to prove the error harmless here. As an initial matter, there was plainly insufficient evidence to establish that Mr. O'Malley was the actual killer in the Parr homicide. Indeed, the prosecutor himself conceded this very point. (53 RT 11108.) It is also worth noting that in contrast to the murder allegations of counts one and six, the prosecutor did *not* allege any personal weapon use allegations in connection with this

count which could have served as a basis to conclude the jury relied on an actual killer theory. (*Compare* XXIV CT 5393 and 5396 *with* XXIV CT 5395.) Moreover, Mr. O'Malley specifically contested the intent to kill element -- testifying that he had nothing to do with Parr's stabbing -- and raised more than sufficient evidence to support his position. (40 RT 8405-8407; *Neder v. United States* (1999) 527 U.S. 1, 11 [instructional error not harmless where the factual question posed by the instruction was contested and the defendant presented sufficient evidence to support a finding in his favor.].) On this record, the state will be unable to establish beyond a reasonable doubt that the court's erroneous instruction did not contribute to the special circumstance verdict.

XI. BECAUSE THE ROBBERY SPECIAL CIRCUMSTANCE IN THIS CASE PERMITTED THE JURY TO IMPOSE DEATH FOR AN ACCIDENTAL OR UNFORESEEABLE KILLING, THE DEATH PENALTY IS UNCONSTITUTIONAL.

The jury found true three distinct special circumstance allegations which made Mr. O'Malley death eligible in this case. In light of the guilty verdicts in connection with the murder charges in counts one, four and six, the jury found true a multiple murder special circumstance allegation. (XXV CT 5585.) In connection with the count one charge, the jury found true a financial-gain special. (XXV CT 5585.) And in connection with the count four murder, the jury found true a robbery special circumstance allegation. (XXV CT 5585.)

As discussed in Arguments V, VI and VII, *supra*, the murder conviction in count six (the conviction for murder of Michael Robertson) must be overturned. The trial court's uncharged offense instructions permitted the jury to rely on uncharged acts, proven only by a preponderance of the evidence, to find a conspiracy and convict of the count six murder. (Argument VII, *supra*, at 141-151.) In addition, the court provided a natural and probable consequence theory of first degree murder as to count six without instructing at all on a predicate offense. (Argument VI, *supra*, at 136-140.) And the trial court gave an instruction which eviscerated the main defense to testimony from Brandi Hohman, characterized by the prosecutor himself as the "chief witness" against Mr. O'Malley.

(Argument V, *supra*, at 123-135.) For any combination of these reasons, the murder conviction in count six must be reversed.

So too, for the reasons discussed in Arguments V and XVIII above, must the count one murder conviction (the conviction for murder of Sharley Ann German) be reversed. The trial court's instructional error as to Brandi Hohman infected this count as well. (Argument V, *supra*, at 123-135.) In addition, as discussed more fully below, the trial court improperly refused to grant a new trial as to this count based on evidence which defense counsel discovered after trial. (Argument XVIII, *supra*, at 270-282.) For any combination of these reasons, the murder conviction in count one must be reversed and, with it, the financial gain special circumstance finding.

If the count one and count six murders are reversed, the only remaining murder conviction would be the count four charge (relating to Herbert Parr). In that situation, neither the multiple murder special circumstance allegation nor the financial gain special circumstance would be left to support the death sentence. Instead, the only special circumstance remaining to render Mr. O'Malley death eligible would be the robbery special circumstance attached to the count four murder conviction.

Of course, as discussed above, there are several reasons to reverse the count four

robbery and robbery special circumstance conviction as well. (*See e.g.* Arguments IV, V, IX.) But even putting these aside, under the facts of this case, a death eligibility finding based solely on the robbery special circumstance would be unconstitutional.

As discussed more fully below, where a defendant is the actual killer in a felony-murder case, California law does not require the state to prove any culpable mental state at all in order to render the defendant death-eligible under the state's felony-murder special circumstance allegations. To the contrary, under California law a felony-murder defendant is death-eligible even if the killing is accidental or unforeseeable. Pursuant to authority from the United States Supreme Court, and courts throughout the country, this is unconstitutional. To the extent the death eligibility finding in this case is premised on the robbery felony-murder special circumstance allegation, it must be reversed.

A. Under California Law, A Defendant Can Be Convicted Of First-Degree Felony Murder, And Found Death-Eligible Under California's Felony-Murder Special Circumstance Allegations, If The Killing Is Negligent, Accidental Or Even Wholly Unforeseeable.

Under California law, the state cannot generally obtain a first degree murder conviction without proving that the defendant both premeditated and had the subjective mental state of malice. However, in the case of a killing committed during a robbery or any other felony listed in Penal Code section 189, the state can convict a defendant of first

degree felony-murder without proof of any *mens rea* with regard to the killing . California's first degree felony-murder rule "includes not only [premeditated murders], but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* (1983) 34 Cal.3d 441, 477. This rule is reflected in the standard jury instructions for felony-murder, given in this case. (CALJIC 8.21; XXV CT 5634.)

Under California law, this strict rule of culpability applies not only to the question of guilt, but to the question of death-eligibility as well. Thus, a defendant who is the actual killer in a felony-murder is eligible for death even if the state does not prove that the defendant had any distinct *mens rea* as to the killing. (*See, e.g., People v. Smithy* (1999) 20 Cal.4th 936 [rejecting defendant's argument that there had to be a finding that actual killer intended to kill the victim or, at a minimum, acted with reckless indifference to human life]; *People v. Earp* (1999) 20 Cal.4th 826, 905, n.15 [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264 [rejecting the defendant's argument that to prove a felony-murder special circumstance, the prosecution

was required to prove malice].) Moreover, as this Court has long made clear, if a defendant is the actual killer in a felony-murder, he is also death-eligible under the felony-murder special circumstance. (*See People v. Hayes* (1990) 52 Cal.3d 577, 631-32 [the reach of the special circumstances is as broad as the reach of felony-murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)

In other words, where the defendant is the actual killer, California's felony-murder rule permits a jury to find him guilty of murder even if the killing was negligent, accidental or even wholly unforeseeable. California's felony-murder special circumstances then permit the jury to go further, and find the defendant eligible for death, *without proof that defendant harbored any culpable mental state as to the murder itself.* As Justice Broussard has noted, under the California scheme "a person can be executed for an accidental or negligent killing." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1152 [Broussard, J., dissenting].)

This lack of any mens rea requirement for death eligibility stands in sharp contrast to the rule applied where the defendant is **not** the actual killer, but is an aider and abettor. In that situation, California law is clear that a defendant is not eligible for death unless the state proves a culpable mental state as to the murder -- either an intent to kill or, at least, a

reckless indifference to human life. (*See, e.g., People v. Anderson, supra*, 43 Cal.3d at p. 1147; Penal Code section 190.2, subdivision (d).)

The question then becomes whether such a broad special circumstance -- rendering defendants death eligible even where there has been no finding of a culpable mental state as to the actual killer -- violates the Eighth Amendment. If the murder convictions in counts one and six -- on which the multiple murder special circumstance is based -- are reversed, this becomes a critical question. It is to that question Mr. O'Malley now turns.

B. As Applied To An Actual Killer, The Robbery Special Circumstance Violates The Eighth Amendment Because It Permits Imposition Of Death Without Proof Of Any Culpable Mens Rea As To The Killing.

In a series of cases beginning with *Gregg v. Georgia* (1976) 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in two general circumstances. First, the Court has held death disproportionate for a particular type of crime. (*See Coker v. Georgia* (1977) 433 U.S. 584 [death penalty disproportionate for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty disproportionate for aider and abettor to felony-murder].) Second, the Court has held death disproportionate for a particular type of defendant. (*See, e.g., Atkins v. Virginia*

(2002) 536 U.S. 304 [death penalty disproportionate for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty disproportionate for defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183.)

The Court first addressed the proportionality of the death penalty for felony-murders in two cases: *Enmund v. Florida*, *supra*, 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred imposition of the death penalty on an aider and abettor -- the "getaway driver" to an armed robbery murder -- because he neither took life, attempted to take life, nor intended to take life. (458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty in connection with an aider and abettor to felony-murder. The Court held that it was not, and that the Eighth Amendment would be satisfied by proof that such a defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (481 U.S. at p. 158.)

Both *Tison* and *Enmund* involved felony-murder defendants who were not actual killers, but only aiders and abettors. The question here is whether *Tison* established a minimum *mens rea* solely for aiders and abettors, or whether it also established a minimum *mens rea* requirement also applicable to actual killers. That question was decided in *Hopkins v. Reeves* (1998) 524 U.S. 88.

In *Reeves* defendant was the actual killer in a felony-murder. He contended that the state court had erred in refusing to instruct on lesser offenses which focused on his mental state: second degree murder and manslaughter. In defending the trial court's refusal to provide such instructions, the state argued that the lesser offenses were inapplicable because felony-murder under Nebraska law did not require any culpable mental state as to the murder itself. In response, defendant relied on *Enmund* and *Tison* for the proposition that because proof of a more culpable mental state was required by the federal Constitution, the lesser instructions were required. Although *Hopkins*, involved an actual killer (as opposed to an aider and abettor), the Supreme Court made quite clear that state still had to establish that defendant satisfied the minimum *mens rea* required under *Enmund/Tison* at some point in the case. (524 U.S. at pp. 99-100. *See also Graham v. Collins* (1993) 506 U.S. 461, 501 [Stevens, J., concurring][stating that an accidental homicide (like the one in *Furman*) may no longer support a death sentence.].)

Lower federal courts to consider the issue -- both before and after *Reeves* -- have uniformly read *Tison* to establish a minimum *mens rea* applicable to *all* defendants. (*See, e.g., Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-85, rev'd on other grounds, 524 U.S. 88 (1998); *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329 (9th Cir. 1996); *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439. *See also State v. Middlebrooks* (Tenn 1992) 840 S.W.2d 317, 345.)

Even if it was not clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia*, *supra*, the Court emphasized, that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (536 U.S. at p. 312.) An analysis of legislation in the felony-murder area confirms the unconstitutionality of a scheme that permits a death sentence for felony-murder without any culpable intent as to the murder itself.

Of the 38 death penalty states, there are at most 5 states -- California, Florida, Georgia, Maryland, and Mississippi -- where a defendant may be death-eligible for felony-

murder *simpliciter*. That at least 45 states (33 death penalty states and 12 non-death penalty states) and the federal government[21] reject felony-murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).[22]

Not only is the imposition of the death penalty on one who has killed negligently or accidentally contrary to evolving standards of decency, it fails to serve either of the penological purposes -- retribution and deterrence of capital crimes by prospective offenders -- identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Arizona*, *supra*, 458 U.S. at pp. 798-799.) With

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[21] *See* 18 U.S.C. § 3591(a)(2).

[22] One recent discussion of this issue lists **eight** states including California which permit a death sentence for felony-murder *simpliciter* – California, Florida, Georgia, Maryland, Mississippi, Nevada, Montana and North Carolina. S. Shatz and N. Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319 n.201 (1997). But Montana (by statute) and North Carolina (by court decision) now require a showing of some *mens rea* in addition to the felony-murder in order to make a defendant death-eligible. (*See* Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-303; *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665.) And the Nevada supreme court has recently invalidated felony-murder *simpliciter* as a basis for death eligibility. (*McConnell v. State* (Nev. 2004) 2004 WL 3001140.) Thus, there are only five state (including California) that now permit a death sentence for felony-murder *simpliciter*.

respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Ibid. See also Tison v. Arizona*, *supra*, 481 U.S. at p. 156 ["the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished."].) Plainly, treating negligent and accidental killers on a par with intentional and recklessly indifferent killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Supreme Court has recognized, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." (*Enmund v. Arizona*, *supra*, 458 U.S. at pp. 798-99. *Accord Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never himself foresaw.

In short, because imposition of the death penalty for felony-murder *simpliciter* is contrary to the judgment of the overwhelming majority of the states, it does not comport with contemporary values. Because it serves no penological purpose it "is nothing more than the purposeless and needless imposition of pain and suffering." Here, the felony-

murder special circumstance instructions given to the jury permitted it to find Mr. O'Malley death eligible without making any finding at all as to whether he harbored a culpable mental state as to the killing. Accordingly, the robbery special circumstances is unconstitutional as applied in this case to make Mr. O'Malley eligible for death. If the multiple murder and financial gain special circumstances are reversed, the death sentence cannot stand based on the robbery special circumstance.

PENALTY PHASE ISSUES

XII. THE TRIAL COURT VIOLATED MR. O'MALLEY'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT FORCED TRIAL COUNSEL TO CONTINUE REPRESENTING HIM IN THE PENALTY PHASE EVEN THOUGH, BECAUSE OF A STATED CONFLICT, COUNSEL HAD INFORMED THE COURT HIS ABILITY TO EFFECTIVELY PRESENT MITIGATING EVIDENCE AND ARGUE FOR LIFE WOULD BE ADVERSELY EFFECTED.

A. Introduction.

Jury deliberations in the guilt phase began on August 19, 1991. (XXV CT 5553.) On the second day of deliberations, defense counsel informed the court he had received a threat to his wife's life should defendant be convicted. (55 RT 11312-11313.) In light of the threat, counsel made clear it would be "almost impossible" for him to effectively represent Mr. O'Malley in the penalty phase should the jury convict. (Sealed RT 8/20/91 at 11314-11315.)[23] In a subsequent hearing a week later -- also held before the jury reached a verdict in the guilt phase -- defense counsel repeated he "had a very serious problem" in effectively representing O'Malley at any penalty phase. (Sealed RT 8/27/91

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[23] "Sealed RT" refers to a volume containing transcripts from sealed proceedings of April 30, 1991, May 1, 1991, August 19, 1991, August 20, 1991, August 27, 1991, September 11, 1991 and September 4, 1991. Where Mr. O'Malley cites to a sealed transcript, he will include a reference to the date so respondent will know which particular sealed transcripts to request.

at 11329-11330.)

After the jury found O'Malley guilty, counsel moved to withdraw. At a September 11, 1991, in-camera hearing, counsel stated he still could not ethically represent O'Malley. (Sealed RT 9/11/91 at 11364-11365.) Counsel forthrightly admitted he would have difficulty "present[ing] mitigating factors to the jury . . . ." (Sealed RT 9/11/91 at 11364-11365.) He admitted he "would not be able to participate as an effective advocate in literally arguing that his life be spared to this jury . . . ." (Sealed RT 9/11/91 at 11381.)

To its credit, the trial court performed an inquiry in response to counsel's concerns. In some detail, the court questioned counsel about (1) whether he believed that O'Malley himself had anything to do with the threats and (2) what disagreements he had with O'Malley about tactics during the trial. (Sealed RT 8/27/91 at 11330-11336; Sealed RT 9/11/91 at 11365-11379.) The trial court went on to make findings about how well prepared counsel was and how he knew the case better than anyone else. (55 RT 11402.) Unfortunately, however, the court did not make any inquiry at all into whether counsel would be able to effectively present mitigating evidence and zealously argue that O'Malley should be given life rather than death. (Sealed RT 8/27/91 at 11327-11338; Sealed RT 9/11/91 at 11364-11381.)

Reversal of the death judgment is required. As more fully discussed below, counsel gave the court notice of a conflict of interest which, in counsel's own view, would prevent him from acting as a zealous advocate in the penalty phase. As such, the court was obligated to determine whether the risk presented by the conflict required replacement counsel. Here, the trial court's inquiry was manifestly inadequate to assess the risk presented by the potential conflict. Reversal is required.

B. The Relevant Facts.

As noted above, on the second day of guilt phase deliberations and after O'Malley had been returned to the jail, defense counsel James Campbell informed the court that he had received a threat to his wife's life should O'Malley be convicted. (55 RT 11312-11313.) At an in camera hearing, Campbell explained the threat had come from someone other than appellant, and had been conveyed to Ms. Calderon, the defense paralegal. (Sealed RT 8/20/91 at 11314-11315; 55 RT 11399.)

Campbell made clear it was "very unsettling to have someone make that kind of a statement" and said that "after representing this guy for three years, and going through living hell, for something like this to be said to me is just beyond belief." (Sealed RT 8/20/91 at 11314, 11316.) Campbell was obviously of two minds about the threat;

although he said he did not take the threat seriously because he believed it was "more an emotional statement than anything else," he told the court should the jury find the special circumstance allegations true, "it would be almost impossible" for him to do anything to help O'Malley in his penalty trial. (Sealed RT 8/20/91 at 11314-11315.)

Several days later, and while the jury was still in guilt phase deliberations, the court held another in-camera hearing in O'Malley's absence but with Campbell and Calderon present. (Sealed RT 8/27/91 at 11327-11338.) They advised the court that on August 19, after the jury had begun deliberations, Calderon drove appellant's wife, Karen O'Malley, home. (Sealed RT 8/27/91 at 11327-11328, 11332.) Karen was upset and crying, and she told Calderon, "if I lose my husband then James [Campbell] is going to lose his wife." (Sealed RT 8/27/91 at 11332, 11333.) Campbell said that while he believed this "probably" was not a genuine theat, it was nevertheless something that would cause a prudent person concern given the nature of appellant's case. (Sealed RT 8/27/91 at 11328.)

Campbell admitted if he determined it was just Karen O'Malley saying something in frustration or out of emotion, he was willing to dismiss it. (*Ibid.*) But Campbell explained he was *unable* to make such a determination; he did *not* know whether Karen was acting on her own, or had discussed this matter with Mr. O'Malley. (Sealed RT

8/27/91 at 11329.) Campbell said he had no doubt if he asked, Mr. O'Malley would deny any knowledge of the threat. (*Ibid.*) Nevertheless, Campbell found it "very unusual" that since the threat, he had had no contact with appellant, who generally called on a daily basis. (Sealed RT 8/27/91 at 11330.) Campbell believed this meant appellant and Karen discussed the threat, and it showed "there's certainly a problem." (*Ibid.*)

Campbell noted on the morning the threat was made, appellant wanted him to reopen his closing argument. (Sealed RT 8/27/91 at 11331.) Appellant was "real upset" over things he believed Campbell missed during closing argument. (Sealed RT 8/27/91 at 11336.) Campbell's understanding was appellant had discussed this with Karen over the preceding weekend, and the matter "came to a head" shortly before the threat was made when Campbell told appellant he would not reopen his penalty argument. (Sealed RT 8/27/91 at 11331-11332.) Campbell said although appellant acted in the courtroom as though he accepted the decision not to reopen, "there's no telling what his real attitude toward it is." (Sealed RT 8/27/91 at 11332.)[24]

Campbell explained after representing appellant for three years, he felt they were very close. (Sealed RT 8/27/91 at 11329.) He therefore found the threat "shocking" and

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[24] Ms. Calderon confirmed that prior to making the threat, Karen O'Malley was upset about Campbell's decision not to reopen his closing argument. (Sealed RT 8/27/91 at 11332-11333.)

"disturbing," and it presented a "very serious problem" in terms of his continuing on the case if the jury found the special circumstance allegations true. (Sealed RT 8/27/91 at 11329.) Campbell said he would try to act in a professional manner but believed it would be "very difficult" for him to dismiss the threat from his mind and continue to act as a dedicated advocate for appellant. (Sealed RT 8/27/91 at 11330.)

On September 9, 1991, the jury found appellant guilty of the charged murders and found the three charged special circumstances true. (55 RT 11352-11357; 25 CT 5569-5585.) The court scheduled the penalty trial to begin the following Monday, September 16. (55 RT 11358-11359.)

On September 11, 1991, Campbell formally moved to withdraw and requested another in-camera hearing. (55 RT 11362-11363.) At the ensuing hearing, Campbell said Mr. O'Malley had denied any knowledge of the threat, as Campbell thought he would. (Sealed RT 9/11/91 at 11364.) Counsel was again somewhat equivocal about the threat; although he did not necessarily believe it had "substance," he frankly admitted that as a subjective matter, he (counsel) could not ignore it. (Sealed RT 9/11/91 at 11364, 11365.) Counsel was not equivocal at all in terms of assessing the impact of the threat on his ability to represent Mr. O'Malley in the penalty phase:

> "I think that the very fact of it [the threat] being made is something that does interfere with the effectiveness of myself in terms of now going forward in the penalty phase and literally arguing and advocating for his life."
>
> "I question whether or not . . . [the threat] would take away from my ability to present mitigating factors to the jury in the presentation stage of the case and then literally at the close of that somewhere stand up and argue for his life." (Sealed RT 9/11/91 at 11364-65.)

According to Campbell, "I'm just in a situation where I just feel that deep down inside that I just don't think this is a case I would be able to proceed on ethically at this point based on what has occurred. And I don't know any way possible that I could – that I could remedy that and cure that." (Sealed RT 9/11/91 at 11364-11365.)

The court questioned Campbell about various disagreements he had with appellant over the course of trial and about appellant's request to reopen the penalty argument, and Campbell explained his tactical reasons for not requesting to reopen . (Sealed RT 9/11/91 at 11366-11373, 11375-11380.) The prosecutor was then brought into the courtroom and Campbell repeated his formal request to withdraw. (Sealed RT 9/11/91 at 11381.) Counsel again expressed his view he could not effectively represent Mr. O'Malley at the penalty phase:

> "[I]t is my opinion that I would not able to present[] evidence on his behalf in mitigation of either of the two punishments; in other words, argue for life without the possibility of parole versus the death penalty. I certainly would

> not be able to participate as an effective advocate in literally arguing that his life be spared to this jury . . . ." (Sealed RT 9/11/91 at 11381.)

The court asked Mr. O'Malley what he wanted, and Mr. O'Malley replied, "I would like to have him as my attorney still." (Sealed RT 9/11/91 at 11381.) Later that day, and based on the hearing it had conducted, the court denied counsel's motion to withdraw. As for counsel himself, the court found he had always been well-prepared on the case and knew the case "inside and out;" there was no one more qualified to argue for appellant's life than Campbell. (55 RT 11402.) In addition, the court noted counsel's ethical obligation to do as much as possible for his client and a duty to put his personal feelings and beliefs aside. (55 RT 11403.) As for the threat, the court found there was no evidence either it (1) was genuine or (2) could be attributed to appellant. (55 RT 11402-11403.) Finally, the court found O'Malley still had faith in his lawyer and had made a proper choice to keep him. (55 RT 11404.)

Of course, at the in-camera hearings, counsel had repeatedly expressed concern as to his ability to (1) effectively present mitigating evidence on Mr. O'Malley's behalf and (2) follow up with an effective argument for life as opposed to death. The trial court did not inquire at all into either area, and the trial court made no findings in either area.

C. Because Trial Counsel Had A Conflict Of Interest Which Prevented Him From Discharging The Duties Required Of Defense Counsel In A Capital Penalty Phase -- Including Presenting Mitigating Evidence And Arguing For Life -- Mr. O'Malley Was Deprived Of His Federal And State Rights To Effective Assistance Of Counsel.

1. The federal and state standards for assessing whether there has been a conflict of interest.

Under both the federal and state constitutions, a criminal defendant is entitled to appointment of loyal, conflict-free counsel. (*Holloway v. Arkansas* (1978) 435 U.S. 475; *Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 579; *People v. Bonin* (1989) 47 Cal.3d 808, 833-834.) The right to counsel "contemplates the services of an attorney devoted solely to the interests of his client," and thus an attorney "free from conflicts of interest." (*Von Molte v. United States* (1948) 332 U.S. 708, 725; *United States v. Hurt* (D.C. Cir. 1976) 543 F.2d 162, 165-166; *People v. Bonin*, *supra*, 47 Cal.3d at p. 834.) In the absence of a knowing and intelligent waiver, the existence of an actual conflict of interest that undermines the loyalty and performance of counsel violates both the federal and state constitutions. (*Wood v. Georgia* (1981) 450 U.S. 261, 272; *Holloway v. Arkansas*, *supra*, 435 U.S. 475; *People v. Mroczko* (1983) 35 Cal.3d 86, 103-105.)

Thus, under both state and federal law, to obtain relief because of a conflict of interest, a defendant must first establish there was an actual conflict. Although a conflict

frequently arises in a multiple or dual representation context, a conflict of interest can arise "in a variety of situations." (*Osbourne v. Shillinger* (10th Cir. 1988) 861 F.2d 612, 624.) A conflict occurs "whenever counsel is so situated that the caliber of his services may be substantially diluted." (*People v.* Hardy (1992) 2 Cal.4th 86, 136; *United States v. Hurt, supra*, 543 F.2d at p. 166.) Conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" (*People v. Cox* (1991) 53 Cal.3d 618, 653, *quoting People v. Bonin, supra*, 47 Cal.3d at p. 835. *See Campbell v. Rice* (9th Cir. 2001) 265 F.3d 878, 883.) The effect of a conflict includes not just what counsel does, but what counsel refrains from doing. (*Holloway v. Arkansas, supra*, 435 U.S. at p. 490; *People v. Easley, supra*, 46 Cal.3d at p. 725.) As one court has noted, conflicts can induce "subtle restraints" difficult to "pinpoint or define." (*United States v. Hurt, supra*, 543 F.2d at p. 168.)

Because of the varied, subjective and sometimes subtle nature of conflicts of interest, "trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel" in determining whether a conflict exists. (*Cuyler v. Sullivan, supra,* 446 U.S. at p. 347.) As the Supreme Court has observed, it is trial counsel who "'is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" (*Holloway v. Arkansas,*

supra, 435 U.S. at p. 485.)

Not surprisingly, this Court has reached the same conclusion. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 137.) So too have other California courts. "Regardless of how others might react, only the trial lawyer can realistically appraise whether the conflict may have an impact on the quality of the representation or whether counsel's self-interest might stand in the way." (*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 594. *Accord United States v. Hurt*, *supra*, 543 F.2d at pp. 164 and n.7 [defense counsel asked to be relieved because of conflict]; *Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, 1321 [defense lawyer expressed misgivings about continuing his representation].)

Once a conflict has been established, the question becomes one of remedy. The standard for obtaining relief under the Sixth Amendment based upon a conflict of interest depends on whether defendant objected to the conflict at trial. Where a defendant objects, and the trial court improperly requires the continuation of conflicted representation, reversal is automatic. (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 488; *People v. Clark* (1993) 5 Cal.4th 950, 995.) Where the defendant does not object at trial, he must show "that an actual conflict of interest adversely affected his lawyer's performance." (*Clark*, 5 Cal.4th at pp. 995-966.)

The standard for obtaining relief under the California Constitution is more favorable to the defendant. (*People v. Clark*, *supra*, 5 Cal.4th at p. 995; *People v. Mroczko*, *supra*, 35 Cal.3d at pp.104-105.) Under California law, reversal is required "if the record supports 'informed speculation' that appellant's right to effective representation was prejudicially affected." (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 104-105; *accord People v. Cox*, *supra*, 53 Cal.3d at p. 654.)

In this case, it does not matter which of these standards is applied. Under either standard, reversal is required.

2. There was a conflict of interest within the meaning of the Sixth and Fourteenth Amendments.

The first question to be resolved is whether a conflict existed in this case. As noted above, a conflict occurs when "an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (*People v. Cox*, *supra*, 53 Cal.3d at p. 653.) As also noted above, the starting point for this analysis is what defense counsel himself told the court.

All courts to have addressed this question have made clear that as an officer of the court, defense counsel is plainly in the best position to evaluate whether a disabling

conflict exists. "[O]nly the trial lawyer can realistically appraise whether the conflict may have an impact on the quality of the representation or whether counsel's self-interest might stand in the way." (*Aceves v. Superior Court*, *supra*, 51 Cal.App.4th at p. 594.)

Here, Mr. Campbell made clear the threat to his wife's life would adversely impact both his ability to effectively present mitigating evidence, and his ability to argue for life rather than death. Given that these are critical roles played by defense counsel at the sentencing phase of a capital trial, it seems clear that a conflict of interest existed.

To be sure, the trial court in this case did not simply ignore defense counsel's stated conflict. Nor could it have; when a trial court knows of the possibility of a conflict of interest on the part of defense counsel, it is required to inquire into the matter. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272.) The trial court is obligated (1) to conduct an adequate inquiry and (2) to act in response to what it learns. (*Id.* at pp. 272-273; *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 484; *People v. Bonin*, *supra*, 47 Cal.3d at p. 836.) The court's obligation to inquire increases where serious crimes are charged: "In discharging its duty, [a trial court] must act 'with a caution increasing in degree as the offenses dealt with increase in gravity.'" (*Bonin*, 47 Cal.3d at p. 837, *quoting Glasser v. United States*, *supra*, 315 U.S. at p. 71.)

The purpose of the trial court's inquiry is to "ascertain whether the risk [of conflicted counsel is] too remote to warrant [new] counsel." (*Holloway, supra*, 435 U.S. at p. 484.) Accordingly, the inquiry must be both "searching" and "targeted at the conflict issue." (*Selsor v. Kaiser* (10th Cir. 1996) 81 F.3d 1492, 1501) Absent a "convincing showing that counsel's protestations . . . are groundless," the trial court must appoint new counsel. (*Ibid.*; *Holloway v. Arkansas, supra,* 435 U.S. at p. 484.) Where the trial judge fails to make an adequate inquiry, prejudice is presumed and reversal of the defendant's conviction is automatic. (*Mickens v. Taylor* (2004) 535 U.S. 162, 167, 173. *Accord id.* at p. 187 n.11 (Stevens, J., dissenting); *Holloway v. Arkansas, supra*, 435 U.S. at pp. 488-490; *People v. Clark*, 5 Cal.4th at p. 994 ["Where a trial court requires the continuation of conflicted representation over a timely objection, reversal is automatic."]; *Atley v. Ault* (8th Cir. 1999) 191 F.3d 865, 870 [prejudice presumed and reversal automatic under *Holloway* where the trial court fails to adequately inquire into a possible conflict].) As the Supreme Court noted in *Mickens*, a conflict which counsel tried to avoid by timely objection "undermine[s] the adversarial process" and "creates an automatic reversal." (*Mickens v. Taylor, supra,* 535 U.S. at p. 167.)

Here, the trial court failed to make a "searching" inquiry which was "targeted" at the risks of allowing Mr. Campbell to continue as counsel. Indeed, it made no inquiry at all in this area.

In this regard, counsel alerted the court in general terms to the impact of requiring him to continue as counsel. Counsel explained "it would be almost impossible" for him to effectively represent Mr. O'Malley at the penalty phase. (Sealed RT 8/20/91 at 11314-11315.) The threats presented a "very serious problem" in terms of continuing on the case. (Sealed RT 8/27/91 at 11329.) He admitted that because of the threat, it would be "very difficult" for him to act as a dedicated advocate for appellant. (Sealed RT 8/27/91 at 11330.) Counsel did his best to explain his feelings to the court:

> "I'm just in a situation where I just feel that deep down inside that I just don't think this is a case I would be able to proceed on ethically at this point based on what has occurred. And I don't know any way possible that I could – that I could remedy that and cure that." (Sealed RT 8/27/91 at 11364-11365.)

But counsel went further than these general comments in describing the impact of the threat on his ability to represent Mr. O'Malley. Indeed, counsel specifically alerted the court to the precise risks of requiring him to continue. Mr. Campbell made clear repeatedly because of the threat to his wife's life, he would have trouble effectively presenting mitigating evidence on Mr. O'Malley's behalf and arguing for life:

> "I think that the very fact of it [the threat] being made is something that does interfere with the effectiveness of myself in terms of now going forward in the penalty phase and literally arguing and advocating for his life." (Sealed RT 9/11/91 at 11364-65.)

> "I question whether or not . . . [the threat] would take away from my ability to present mitigating factors to the jury in the presentation stage of the case and then literally at the close of that somewhere stand up and argue for his life ." (Sealed RT 9/11/91 at 11364-65.)
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> "[I]t is my opinion that I would not able to present[] evidence on his behalf in mitigation of either of the two punishments; in other words, argue for life without the possibility of parole versus the death penalty. I certainly would not be able to participate as an effective advocate in literally arguing that his life be spared to this jury . . . ." (Sealed RT 9/11/91 at 11381.)

In response to these specific concerns, the trial court questioned counsel about (1) whether he believed appellant had anything to do with the threat and (2) what disagreements he had with appellant over tactical decisions made during the course of trial. (Sealed RT 8/27/91 at 11330-11336; Sealed RT 9/11/91 at 11365-11379.) The court also questioned paralegal Calderon about Karen O'Malley's state of mind at the time she made the threat. (Sealed RT 8/27/91 at 11332-11333.)

The court did not ask a single question about whether counsel could (or would) effectively present mitigating evidence on defendant's behalf. (Sealed RT 8/27/91 at 11327-11338; Sealed RT 9/11/91 at 11364-11381.) It did not ask a single question about his mitigation investigation. (Sealed RT 8/27/91 at 11327-11338; Sealed RT 9/11/91 at 11364-11381.) It did not ask a single question as to whether counsel could (or would) present a zealous argument for life on defendant's behalf. (Sealed RT 8/27/91 at 11327-11338; Sealed RT 9/11/91 at 11364-11381.) After this penetrating inquiry, the trial court

required counsel to continue his representation. (55 RT 11404.)

The trial court's findings, upon which it based its denial of Campbell's motion to withdraw, reflect the limited nature of its inquiry. The court found Campbell had always been ready and well-prepared, he knew the case "inside and out" and had a better grasp of it than anyone else could. (55 RT 11402.) With all due respect, however, given the representations Campbell made to the trial court, the question was not what Campbell had done in the past, but what he would continue to do in the future. The court made no inquiry at all into this area. Indeed, the court knew nothing at all about Campbell's penalty-phase knowledge or preparation, or his willingness to effectively present penalty phase evidence and argument on defendant's behalf.

The trial court found "[t]here's no one more qualified to argue for Mr. O'Malley's life than Mr. Campbell." (55 RT 11402.) But this finding completely ignores counsel's stated belief he could not effectively present mitigating factors and urge the jury to spare appellant's life. (Sealed RT 9/11/91 at 11364-11365, 11381.) Again, the court never delved into Campbell's frank concessions as to these matters .

The court found Campbell had an ethical obligation to do as much as possible for appellant and a duty to put his personal feelings and beliefs aside. (55 RT 11403.) The court said Campbell had indicated that he could do this. (55 RT 11404.) Far from saying

he could set aside his feelings, however, Campbell candidly stated only that while he would *try* to act in a professional manner, he believed it would be "very difficult" for him to dismiss the threat from his mind and continue to act as an effective advocate for appellant. (Sealed RT 8/27/91 at 11330.) Although he realized he had an ethical duty to disregard anything that might interfere with his representation of appellant, Campbell "deep down inside" believed the threat was something that would interfere with his effectiveness in going forward in the penalty phase of trial and advocating for appellant's life. (Sealed RT 9/11/91 at 11364-11365.) Campbell warned,"I just feel that deep down inside that I just don't think this is a case I would be able to proceed on ethically at this point based on what has occurred. And I don't know any way possible that I could – that I could remedy that and cure that." (Sealed RT 9/11/91 at 11366.) And, in requesting to withdraw because of this conflict, Campbell explicitly told the trial judge that in his opinion, he could *not* continue to effectively advocate for appellant. (Sealed RT 9/11/91 at 11381.)

Campbell, as the attorney charged with representing appellant and as an officer of the court, was plainly in the best position to evaluate his attitude and feelings about the threat, and his ability to fully and actively advocate for the life of his client. On this record, having been alerted to the conflict, the trial court was obligated to made a "targeted" inquiry to determine the risks of requiring O'Malley to go to a penalty phase

with a lawyer who -- by his own admission -- was concerned about his ability to effectively present mitigating evidence and argument. The trial court's inquiry was manifestly inadequate to determine whether counsel could properly represent O'Malley. Because the trial court forced O'Malley to penalty phase trial with a lawyer operating under a plain conflict of interest, the Sixth and Fourteenth Amendments, as well as the parallel provisions of the state Constitution, require reversal of the penalty phase.[25]

3. Mr. O'Malley did not waive his right to conflict free counsel.

As noted, after Campbell moved to withdraw, the court asked appellant what he desired, and appellant replied, "I would like to have him as my attorney still." (Sealed RT 11381.) Respondent may argue that this statement constitutes a waiver of any conflict

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[25] The trial court stated its own view that Karen O'Malley's threat was not true and was neither connected to appellant nor believed by counsel. (55 RT 11402-11403.) But the trial court completely ignored counsel's uncontradicted representations that counsel's own inquiry as to the threat left him believing that Karen O'Malley *had* discussed it with Mr. O'Malley and -- as a result -- "there's certainly a problem." (Sealed RT 8/27/91 at 11330.) The court also ignored counsel's own conclusion the threat "interfere[d] with the effectiveness of myself in terms of now going forward in the penalty phase and literally arguing and advocating for his life." (Sealed RT 9/11/91 at 11364-11365.)

In light of defense counsel's comments, the proper subject of inquiry should have been whether Campbell could put aside his stated feelings and continue to advocate for appellant's life by (1) effectively introducing mitigation and (2) arguing zealously for a life sentence. (Sealed RT 8/27/91 at 11329-11330.) Yet again, although Campbell cautioned the court he believed it would be "very difficult" for him to dismiss the threat from his mind and continue to act as a zealous advocate (Sealed RT 8/27/91 at 11330), the court never inquired into how the threat would actually affect Campbell's penalty-phase representation.

Campbell harbored.

It is, of course, true that a defendant may waive the right to conflict free counsel. But such a waiver must be unambiguous, "without strings," and made "with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Bonin, supra,* 47 Cal.3d at p. 837, *citing People v. Mroczko, supra,* 35 Cal.3d at p. 110, *Brady v. United States* (1970) 397 U.S. 742, 748; *see also People v. McDermott* (2002) 28 Cal.4th 946, 990.) While the trial court need not undertake any "particular form of inquiry" before it accepts such a waiver, "at a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People v. Mroczko, supra,* 35 Cal.3d at p. 110; *see also Glasser v. United States, supra,* 315 U.S. at p. 71.)

"This inquiry is to be made directly of defendants to assure that they have been adequately appraised of the nature and consequences of any conflicts faced by counsel." (*Mroczko* 35 Cal.3d at p. 112.) A defendant's statement he would like to continue with current counsel is *not* a sufficient waiver when it is not accompanied by on-the-record advice as to the dangers of continuing with the conflicted representation. (*See People v.*

Bonin, supra, 47 Cal.3d at pp. 840-841 [defendant said he wanted attorneys to represent him at trial; held, waiver of right to conflict-free counsel invalid because "defendant did not even purport to make a personal, on-the-record waiver . . . [and because his statement in favor of the attorneys] was not made in light of a constitutionally adequate, on-the-record advisement of the possible dangers and consequences of conflicted representation."]; *People v. Easley, supra*, 46 Cal.3d at p. 730 [no waiver of right to conflict-free counsel where "defendant was never asked for a waiver. . . [nor was he] ever advised of the full range of dangers and possible consequences of the conflicted representation in his case"].)

A reviewing court indulges "every reasonable presumption against the waiver of unimpaired assistance of counsel." (*People v. Bonin, supra,* 47 Cal.3d at p. 840, *citing People v. Mroczko, supra*, 35 Cal.3d at p. 110, *Glasser v. United States, supra,* 315 U.S. at p. 70.) In this case, the record does not come close to rebutting the presumption.

Here, Mr. O'Malley "did not even purport to make a personal, on-the-record waiver of his constitutional right to the assistance of conflict-free counsel." (*People v. Bonin, supra,* 47 Cal.3d at p. 840.) "It is true that [appellant] stated he wanted [Campbell] to represent him at [the penalty] trial. His statement, however, is without significance here since it was not made in light of a constitutionally adequate on-the-record advisement of the possible dangers and consequences of conflicted representation." (*Id.* at p. 841.) The

court never offered appellant the opportunity to discuss the matter with independent counsel, never informed him of his right to conflict-free counsel, never asked him for a waiver, and never advised him of the full range of dangers and possible consequences of the conflicted representation in his case. (*See, e.g., People v. Easley, supra*, 46 Cal.3d at p. 730; *People v. McDermott, supra,* 28 Cal.4th at p. 990.)

Indeed, the manner in which the trial court inquired into whether appellant wanted Campbell to continue representing him is affirmatively troubling. On the one hand, the court was careful to inform O'Malley of a potential risk of proceeding with new counsel. Just prior to taking a recess so appellant could discuss the matter with Campbell and review the transcripts of prior in-camera hearings from which he was excluded, the trial court noted the prosecutor had just filed a notice of his intent to use victim impact evidence in the penalty phase of trial. (Sealed RT 9/11/91 at 11374.) The court cautioned O'Malley that while it was inclined to exclude such evidence as untimely, if a new attorney had to be brought into the case, a new notice of intent to use such evidence might be timely. (Sealed RT 9/11/91 at 11374-11375.) The court admonished Campbell he and appellant might want to discuss this during the recess. (Sealed RT 9/11/91 at 11375.)

On the other hand, however, the record is entirely barren of any advice whatever regarding the risks of proceeding with current counsel who -- by his own admission -- would have trouble effectively presenting mitigating evidence and an argument for life.

Thus, while the court advised O'Malley of the potential risk of proceeding with *new* counsel, it said nothing at all about the potential risks of appearing with *current* counsel. This one-sided presentation of the risks may very well have contributed to appellant's response that he "would like to have [Campbell] as my attorney still." (Sealed RT 11381. *See, e.g., People v. Mroczko, supra*, 35 Cal.3d at p. 111.) O'Malley did not waive his right to conflict free counsel.

D Because Trial Counsel Had A Conflict Of Interest Which Prevented Him From Discharging The Duties Required Of Defense Counsel In A Capital Penalty Phase -- Including Effectively Presenting Mitigating Evidence And Arguing For Life -- Mr. O'Malley Was Deprived Of His Federal And State Rights To A Reliable Penalty Phase.

The Supreme Court has long noted that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures which increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida, supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which

leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

Given the fundamental role played by defense counsel in ensuring a reliable result, the Sixth Amendment right to counsel is not satisfied by the mere presence of counsel, but by the presence of counsel "who plays the role necessary to ensure that the trial is fair." (*Strickland v. Washington* (1984) 466 U.S. 668, 685.) Where a defendant is sentenced to die in a proceeding where he was represented by an attorney who sought to withdraw precisely because he could not effectively present mitigating factors to the jury or urge the jury to spare defendant's life, the reliability requirements of the Eighth Amendment are uniquely threatened. This is especially true here, where the trial court failed to conduct an inquiry targeted to determine whether counsel could or would effectively present mitigation and argue for life. As the Supreme Court noted in *Holloway*, the risk in allowing counsel to go forward in this situation was what the conflict prevented him from doing:

> "The evil - it bears repeating - is in what the advocate finds himself compelled to *refrain* from doing[.] . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record . . . it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." (*Holloway*, 435 U.S. at pp. 490-491.)

Because any attempt to judge the impact of Campbell's stated conflict on appellant's representation during the penalty trial would require "unguided speculation" (*Holloway, supra*, 435 U.S. at p. 491), the death verdict in this case cannot possibly satisfy the reliability requirements imposed by the Eighth Amendment. Appellant's sentence of death must therefore be reversed for this reason as well.[26]

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[26] There is no waiver issue as to the Eighth Amendment component of this claim for two reasons. First of all, it is not at all clear that a defendant can waive the reliability requirements of the Eighth Amendment. While these requirement certainly protect the defendant, they also protect the capital punishment system as a whole from imposing death in an unreliable way. But even if Mr. O'Malley could enter a voluntary and knowing waiver of his Eighth Amendment right to a reliable penalty determination, the in-court colloquy in this case would not support such a waiver. (Sealed RT 9/11/91 at 11381.)

XIII. THE TRIAL COURT VIOLATED MR. O'MALLEY'S RIGHT TO COUNSEL OF CHOICE WHEN IT REFUSED TO ALLOW HIM TO DISCHARGE HIS RETAINED LAWYER, BUT INSTEAD TREATED HIS COMPLAINTS AS A *MARSDEN* MOTION TO DISCHARGE APPOINTED COUNSEL.

A. Introduction.

Prior to trial, Mr. O'Malley retained attorney James Campbell to represent him. (9 Augmented Reporter's Transcript ("ART") 280; 10 ART 282; 11 ART 291; 12 ART 299; 13 ART 315, 320; 15 ART 349-350; 21 ART 764-765; 55 RT 11400.) As discussed in Argument XII, *supra*, in an in-camera hearing held after the jury returned its guilt-phase verdicts, defense counsel moved to withdraw from the penalty phase. Defense counsel explained he could not effectively present mitigation on Mr. O'Malley's behalf or argue for his life. (Sealed RT 9/11/91 at 11364-11365.) He repeated this explanation in the prosecutor's presence a few moments later. (55 RT 11382.) The trial court denied the motion. (55 RT 11404.)

The penalty phase began on September 24, 1991. (26 CT 5700.) At that point, Mr. O'Malley was still being represented by his retained lawyer. Counsel told the trial court that Mr. O'Malley had a "quasi *Marsden* motion." (56 RT 11533.) *Marsden* is, of course, a short-form reference to *People v. Marsden* (1970) 2 Cal.3d 118 and its progeny, a line of cases which articulate the showing an indigent defendant must make in order to discharge

a *court appointed* lawyer. These cases permit discharge of a court appointed lawyer only where the defendant has shown that "denial of substitution would substantially impair his constitutional right to the assistance of counsel" or that there has been a "breakdown in the attorney client relationship." (*People v. Lewis* (2006) 39 Cal.4th 970, 994; *People v. Ortiz* (1990) 51 Cal.3d 975, 980, n.1.)

The trial court listened to Mr. O'Malley's concerns and properly recognized that Mr. O'Malley was trying to discharge counsel. The court then rejected that request:

> "Mr. Campbell is not going to be relieved at this point." (Sealed RT 9/24/91 at 11541.)

As discussed below, the trial court correctly understood that appellant was trying to discharge his lawyer. However, in deciding whether to allow Mr. O'Malley to do so, the trial court erroneously applied the rules developed in the *Marsden* context to address discharge of *appointed* counsel. The *Marsden* rules had no application here at all.

Mr. O'Malley had hired counsel. He heard counsel explicitly tell the court he (counsel) could not properly present mitigating evidence or argue for Mr. O'Malley's life. In this situation, Mr. O'Malley had every right to discharge the lawyer he himself had hired. The trial court's erroneous application of the *Marsden* standard violated Mr. O'Malley's Sixth Amendment right to counsel, and his corresponding right to discharge

retained counsel, and requires reversal of the death sentence.

B. Mr. O'Malley Asked To Discharge His Retained Counsel.

In *People v. Marsden, supra*, this Court recognized "[t]he semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right. (*People v. Marsden, supra,* 2 Cal.3d at p. 124.) Accordingly, a lay defendant seeking to discharge his current counsel need not make a "proper and formal motion." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Rather, the defendant need only give some "clear indication" that he is no longer satisfied with his attorney. (*Ibid.*)

People v. Lara (2001) 86 Cal.App.4th 139 is illustrative. There, the defendant's privately retained counsel informed the trial court on the scheduled first day of trial that the defendant wanted to address the court. (*Id.* at p. 146.) After counsel informed the court he had a feeling this was a *Marsden* motion, the court cleared the courtroom for a closed hearing and invited the defendant to speak. (*Ibid.*) The defendant stated he did not feel that retained counsel was "prepared with the witnesses or anything in the case. I haven't even talked to him before now. Until I came in." (*Ibid.*) When the court asked whether the defendant and counsel disagreed about witnesses, the defendant replied, "I haven't even been able to confer with him until right now. And then he started running

everything down to me and I'm lost." (*Ibid.*) The defendant further stated he did not know what to do, and there were some things "I think should happen and he doesn't agree with[.]" (*Ibid.*)

The trial court stated it was not sure about the defendant's complaints, and asked whether he and counsel disagreed about "a matter of tactics" regarding which witnesses to call. (*Id.* at pp. 146-147.) The defendant replied he disagreed with some things which counsel told him, and also disagreed about "some other things about the witnesses and stuff. I haven't seen-talked about this case at all for eight months. And now everything in one day is coming on top of me." (*Id.* at p. 147.) In response, counsel described to the court his disagreements with the defendant over calling the defendant's accomplice as a witness, and over the defendant's desire to testify at trial. (*Ibid.*) The court then stated it believed most of the conflicts between defendant and his counsel had been resolved except for the decision to call the accomplice. (*Id.* at p. 148.) The court found this conflict was a "tactical difference and doesn't rise to the level in the type of breakdown in the attorney/client relationship that *Marsden* is looking at. And, therefore, at the present time I am going to deny your request . . . ." (*Ibid.*)

On appeal, the Attorney General conceded a *Marsden*-type hearing was inappropriate because counsel had not been appointed, but was the defendant's retained counsel of choice. (*Id.* at p. 156.) However, the Attorney General argued the defendant

never actually asked to discharge his retained attorney, but instead merely expressed disagreement with counsel about tactical matters. (*Ibid.*) The Court of Appeal disagreed and held defendant's complaints about his attorney were sufficient to implicate defendant's right to discharge his retained attorney, and either hire new counsel or request appointment of counsel. (*Id.* at p. 158.) In reaching this decision, the appellate court noted the trial court had itself interpreted the defendant's complaints as sufficient to decide whether to discharge counsel under the *Marsden* standards. (*Ibid.*) The reviewing court explicitly deferred to the trial court's "factual interpretation of the situation as involving a request by appellant to discharge his defense attorney and obtain a new attorney to represent him in this matter." (*Ibid.*)

A nearly identical situation exists here. In defendant's presence, attorney Campbell had twice told the court he could not properly represent Mr. O'Malley. The nature of Mr. O'Malley's subsequent complaints showed he no longer trusted Campbell's ability to represent him, and the trial court interpreted these complaints as sufficient to invoke the *Marsden* procedures and standard. After hearing from Mr. O'Malley, the court solicited Campbell's comments and ruled, "Mr. Campbell is not going to be relieved at this point." (Sealed RT 9/24/91 at 11541.) Just as in *Lara*, although the lay defendant did not use any magic words in articulating his complaints about counsel, the trial court plainly understood appellant's comments as a request to discharge his attorney. Just as in *Lara*, this Court

should defer to the trial court's factual determination appellant was asking to discharge Campbell and obtain a new attorney.

C. The Trial Court Erred by Applying The *Marsden* Standards To Determine Whether Mr. O'Malley Could Discharge Retained Counsel.

There are two distinct standards used to evaluate the right of a criminal defendant to discharge his own lawyer. The proper standard to apply in a given situation depends on whether the lawyer was court appointed or privately retained.

As noted above, a trial court will not discharge a court-appointed lawyer unless the defendant has shown "that denial of substitution would substantially impair his constitutional right to the assistance of counsel" or that there has been a "breakdown in the attorney client relationship." (*People v. Lewis*, *supra*, 39 Cal.4th at p. 994; *People v. Ortiz*, *supra*, 51 Cal.3d at p. 980, n.1.) But the rules are quite different where a defendant seeks to discharge retained counsel. In this situation, a *Marsden*-type showing is *not* required. Instead, because the right to retain counsel of one's choice includes the right to discharge one's counsel of choice (*People v. Ortiz, supra,* 51 Cal.3d at p. 983), "in contrast to situations involving appointed counsel, a defendant may discharge his retained counsel of choice at any time with or without cause." (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 152.)

The right to discharge retained counsel is not absolute, however, and a court has discretion to refuse such a request when the discharge would cause "significant prejudice" to the defendant, such as by forcing him to trial without adequate representation, or when the request is untimely and would result in the "'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v. Ortiz, supra,* 51 Cal.3d at pp. 982-983, *quoting People v. Crovedi* (1966) 65 Cal.2d 199, 208.) The trial court must, of course, exercise this discretion reasonably: "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." (*People v. Ortiz, supra*, 51 Cal.3d at p. 984.) Thus, in line with this Court's mandate that trial courts show a "resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration[]" (*Ortiz, supra*, at pp. 982-983), a trial court faced with a request to discharge retained counsel "must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Lara, supra*, 86 Cal.App.4th at p. 153.)

Here, although the trial court stated "[w]hether this is a real *Marsden* type situation or not, is hard to say at this point" (Sealed RT 9/24/91 at 11541), the court clearly treated Mr. O'Malley's request as a *Marsden* motion, both as a matter of process and a matter of substance. Initially, when Campbell stated he had "never had a *Marsden* type situation"

before, the court explained the attorney remains in the courtroom for a *Marsden* hearing, the hearing is conducted in camera, and the transcript of the hearing is sealed. (56 RT 11534.) The court then cleared the courtroom, but for Campbell, appellant and court personnel, and an in-camera hearing was held. (56 RT 11534.)

Moreover, as noted above, *Marsden* and its progeny hold that discharge of a court appointed lawyer is proper only where the defendant has shown "that denial of substitution would substantially impair his constitutional right to the assistance of counsel" or a "breakdown in the attorney client relationship." (*People v. Lewis*, *supra*, 39 Cal.4th at p. 994; *People v. Ortiz*, *supra*, 51 Cal.3d at 980, n.1.) Here, the trial court ruled Campbell "is not going to relieved" precisely because the *Marsden* standard had not been met:

> "It would not appear that any disagreements that [appellant] may have had over trial tactics has caused a breakdown in the attorney-client relationship that would substantially, if in any way, impair the defendant's rights to effective assistance of counsel." (Sealed RT 9/24/91 at 11541.)

Thus, the court applied both the *Marsden* procedure and the *Marsden* standard. Yet it is indisputable that this standard was inapplicable. Defense counsel Campbell had not been appointed by the court to represent appellant, he had been retained as appellant's counsel of choice. As such, the *Marsden* standard was the inappropriate yardstick by which to measure appellant's complaints against Campbell, and appellant was fully

entitled to discharge Campbell. (*People v. Ortiz, supra,* 51 Cal.3d at p. 982-984; *People v. Lara, supra*, 86 Cal.App.4th at p. 155.) "It is not clear whether the court mistakenly believed that [Campbell] was appellant's court-appointed counsel, or that a *Marsden* motion was the appropriate vehicle to consider appellant's complaints against his retained counsel. In any event, appellant was not required to meet the onerous *Marsden* factors and establish an irreconcilable conflict to discharge his privately retained defense counsel." (*People v. Lara, supra*, 86 Cal.App.4th at p.155.) The trial court erred, and violated the Sixth Amendment, when it required Mr. O'Malley to meet the "onerous *Marsden* factors" before he could discharge the lawyer he himself had hired. (*Lara, supra*, 86 Cal.App.4th at p. 155. *Accord People v. Hernandez* (2006) 139 Cal.App.4th 101, 108-109 [error for trial court to hold *Marsden* hearing to determine whether defendant could discharge his retained counsel in a criminal case].)

D. The Trial Court's Application Of The *Marsden* Standard Requires Reversal Of The Penalty Phase.

In evaluating whether a defendant may be barred from discharging his retained lawyer, a trial court must determine whether the defendant's request is timely. (*See, e.g.*, *People v. Lara*, 86 Cal.App.4th at pp. 163 [motion to discharge retained counsel brought on the first day of trial was timely where defendant expressed his concerns about counsel at the first chance he could and where neither the trial court nor the prosecutor suggested the motion was untimely].) The trial court, which will have personally observed the defendant as he asks to discharge counsel and states his supporting reasons, must determine whether the defendant is seeking new counsel to delay the proceedings. (*People v. Lara*, *supra*, 86 Cal.App.4th at pp. 162-163; *People v. Turner* (1992) 7 Cal.App.4th 913, 915-916 [upholding trial court finding that defendant's purpose in seeking new counsel was to delay the proceedings].) In addition, the trial court must determine whether any delay will be prejudicial to the prosecution and disrupt the orderly process of justice. (*People v. Lara*, *supra*, 86 Cal.App.4th at pp. 162-164.)

Here, appellant's request was made on the very first day of the penalty trial. Less than two weeks earlier (on September 11, 1991), Mr. O'Malley had first been shown transcripts of the in-camera hearings where defense counsel admitted he could not properly represent Mr. O'Malley at a penalty phase. (Sealed RT 9/11/91 at 11375.) As is

clear from the tenor of appellant's remarks at the September 24th in camera hearing, he was clearly upset that now, at the start of the penalty trial, his attorney was not prepared. (Sealed RT 9/24/91 at 11535-11538.) There is not the slightest indication appellant's purpose in seeking Campbell's removal was a desire to improperly delay the proceedings, nor is there any finding in that regard. Indeed, the genuineness of appellant's concerns is reflected in the fact that, just as in *Lara*, the prosecutor never objected to the supposed *Marsden* motion as being untimely, and the trial court considered appellant's request on its merits and without making any findings as to the request being untimely. (56 RT 11533; Sealed RT 9/24/91 at 11541-11542.) Moreover, given there had already been a postponement of several weeks after the guilt phase, there was no finding by the court, or indeed any complaint by the prosecutor, that any additional delay would be prejudicial to the prosecution or disrupt the orderly process of justice. (*See Bland v. Department of Corrections* (9th Cir. 1994) 20 F.3d 1469, 1477, *overruled on other grounds by Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017.)

Of course, Mr. O'Malley recognizes the trial court's error in treating this motion as a *Marsden* motion necessarily resulted in an incomplete record as to the facts which govern his ability to discharge retained counsel. He also recognizes the trial court is in the best position to make these fact-specific determinations. As *Lara* noted, where a trial court has applied the wrong standard and failed to make any findings on these issues, the

reviewing court is "left with an incomplete record upon which to conclude that such a motion was necessarily untimely." (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 164. *See Bland v. Department of Corrections*, *supra*, 20 F.3d at p. 1477.)

The fact of the matter is because the trial court here applied the wrong standard, it completely failed to exercise the discretion it was supposed to exercise. It completely failed to make the necessary factual findings the Sixth Amendment requires be made before a defendant is barred from discharging his retained lawyer. As the Court of Appeal concluded on this exact point in *Lara*:

> "While appellant might not have stated sufficient reasons that would have supported a *Marsden* motion, the trial court was obliged to rely on different factors in exercising its discretion as to appellant's loss of confidence in this privately retained counsel. The court clearly believed that appellant wanted to discharge his attorney and conducted the *Marsden* hearing. Given the court's misunderstanding of the nature of appellant's motion, we cannot say the court properly exercised its discretion in its treatment of appellant's attempt to discharge his retained counsel. Appellant's conviction must be reversed." (86 Cal.App.4th at p. 166.)

The Court of Appeal reached an identical result in *People v. Hernandez*, *supra*, 139 Cal.App.4th 101. There, defendant sought to discharge his retained lawyer (and have a new lawyer appointed) "immediately before jury selection was to begin in a two-defendant case." (139 Cal.App.4th at p. 109.) Although counsel was retained, the trial court held a *Marsden* hearing and denied defendant's request. (*Id.* at pp. 106-108.) The appellate

court first held the trial court erred in employing the *Marsden* standard. (*Id.* at p. 108.) The court went on to note because defendant's request to discharge counsel was made on the first day of jury selection, the trial court might have been justified in denying defendant's request had it applied the correct standard. But because the trial court had *not* applied the correct standard -- and made no findings on the issue of delay -- reversal was required:

> "In this case, there appears to have been an adequate basis to deny appellant's late request for appointed counsel. As we have seen, the request was made almost immediately before jury selection was to begin in a two-defendant case. It is almost inconceivable that the public defender (or alternate counsel) would be able and willing to defend the case without a material postponement of the trial date, a circumstance that may have justified denial of the request. But . . . the trial court made no inquiry on the point and did not refer to it in its decision to deny appellant's request. Instead, its decision appears to have been based entirely on application of a *Marsden* analysis. As we also have discussed, that does not suffice in a case such as this, when the defendant is represented by retained counsel and is or may be eligible to have appointed counsel.
>
> "Because the trial court utilized the wrong standard, it did not adequately address the issue of delay. Reversal is automatic . . . ." (139 Cal.App.4th at p. 109.)

The same is true here. Just as in *Lara* and *Hernandez*, the trial court misunderstood the nature of Mr. O'Malley's motion and failed to "properly exercise[] its discretion in its treatment of appellant's attempt to discharge his retained counsel." As in those cases, it is possible the trial court -- had it applied the correct standard -- would have made findings

on delay supporting a denial of Mr. O'Malley's request to discharge retained counsel. In light of the facts here, however, it is also possible the trial court would have recognized Mr. O'Malley's motion was entirely genuine, and made not for delay but out of a fear that his retained counsel was unable -- in his own words -- "to present mitigatng factors to the jury . . . and argue for his life." (Sealed RT 9/11/91 at 11364-11365.)

Under these circumstances, and as in *Lara* and *Hernandez*, because the trial court applied the wrong standard, it did not make the necessary findings to sustain a denial of Mr. O'Malley's motion. Reversal of the penalty phase is required.

XIV. THE TRIAL COURT VIOLATED BOTH STATE LAW AND THE EIGHTH AMENDMENT IN PRECLUDING DEFENSE COUNSEL FROM INTRODUCING EVIDENCE ON HOW THE STATE WOULD KILL MR. O'MALLEY.

A. The Relevant Facts.

At the penalty phase the jury was selecting between two options: death or life without parole. The defense called James Park as a witness. (57 RT 11764.) Mr. Park had worked for the Department of Corrections for 31 years. (57 RT 11765.) He had been associate warden at San Quentin State Prison for nine years and in charge of death row. (57 RT 11783.)

Mr. Park described in some detail the life-without-parole option. He testified about (1) assignment of LWOP prisoners to a high security prison, (57 RT 11767), (2) the layout and day-to-day operations of such prisons (57 RT 11768-11770), (3) the layout of the individual cells (57 RT 11771-11772), (4) the work and exercise routines for an LWOP prisoner (57 RT 11772-11774), (5) the separate "secured housing unit" available if prisoners get in trouble (57 RT 11774) and (6) prison security. (57 RT 11774-11775.)

Defense counsel also sought to have Mr. Park describe the other option which the jury was considering: execution. Out of the jury's presence, counsel proposed to introduce Mr. Park's testimony about "how executions are carried out." (57 RT 11784.) The

prosecutor objected. (57 RT 11784.) Defense counsel pointed out the jury had "heard what happens if he goes to LWOP and they should actually know what happens when he is executed." (57 RT 11784.) The trial court sustained the objection and excluded the testimony. (57 RT 11784-11785.)

As more fully discussed below, this ruling was improper for two reasons. First, in 1978 the electorate enacted Penal Code section 190.3 to govern admission of evidence at penalty phases in California capital cases. The critical language used in section 190.3 to describe the type of evidence admissible at capital penalty hearings was not pulled from thin air. Instead, the language had been used in the 1977 death penalty law and, in turn, other sentencing statutes as well, and had a well-recognized meaning which *permitted* consideration of the actual impact of a sentence on the defendant. Under well-established principles of statutory construction, there is a strong presumption that the electorate intended this language to have the same meaning in section 190.3 as well. The defense was entitled to rely on that intent, and the trial judge had neither power nor discretion to act as a super-legislature and preclude consideration of this fact in mitigation. Second, even if the electorate had not intended this kind of evidence to be admissible, developments in the Supreme Court's Eighth Amendment jurisprudence require that such evidence be admissible during the sentencing phase of a capital case.

Here, the trial court completely precluded the defense from relying on this

evidence. The death sentence must be reversed.

B. The California Electorate Never Intended That A Jury Deciding Whether A Defendant Should Live Or Die Should Be Shielded From Direct Evidence As To How A Death Sentence Is Carried Out.

The current law fixing the penalty for first degree murder -- Penal Code section 190.3 -- was enacted by voter initiative in November of 1978. Once a defendant has been convicted of special circumstances murder, section 190.3 provides for a separate penalty phase to determine the appropriate penalty as between life without parole and death. Section 190.3 goes on to describe the evidence admissible at the penalty phase:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Under the plain terms of this statute, the parties are permitted to introduce "any matter relevant" to three distinct areas: (1) aggravation, (2) mitigation and (3) sentence. Under the express language of section 190.3, this "includ[es] but [is] not limited to" subjects such as "the defendant's character, background, history, mental condition and

physical condition."

As discussed below, and for two separate reasons, basic principles of statutory construction compel a conclusion that how an execution is carried out is admissible under this section of the Penal Code. First, section 190.3 permits defendants to introduce "any matter relevant to . . . mitigation . . . ." At the time the 1978 law was enacted, the term "mitigation" had been used in previous sentencing statutes and had been recognized to include the impact of a sentence on the defendant. Under well accepted principles of statutory construction, the electorate is deemed to have intended "mitigation" as used in section 190.3 to have the same meaning as it had in these other statutes.

Second, section 190.3 also permits introduction of "any matter relevant to . . . sentence." Even assuming the electorate's use of the phrase "any matter relevant to . . . mitigation" was insufficient to authorize evidence of how the actual sentence would be imposed on the defendant, such information was plainly admissible as a matter relevant to sentence.

1. Because the term "mitigation" used by the electorate in section 190.3 had a then-recognized meaning permitting consideration of the impact of a sentence on the defendant, the electorate is presumed to have intended the same meaning in section 190.3.

The primary goal of statutory construction is to determine the intent of the entity that enacted the statute and so effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) Of course, this principle applies to statutes passed by the electorate through the initiative process. (*See, e.g., People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.)

In determining the intent behind any particular statute, a court looks first to the words of the statute. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at p. 387.) Where the language of a statute includes terms that already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms have been used in the same way. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216. *See Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.) This principle too applies to legislation adopted through the initiative process. (*In re Jeanice D., supra*, 28 Cal.3d at p. 216.)

In this case, as noted above, the statute governing admission of evidence at the penalty phase of a capital trial was passed by the electorate in 1978. It provides that the parties may introduce evidence "as to any matter relevant to aggravation, mitigation, and

sentence . . . ."

Significantly, the term "mitigation" was not new to the 1978 statute. In fact, prior to the 1978 law, the same term had been used repeatedly in sentencing statutes and in court rules governing sentencing.[27]

For example, at the time the electorate voted on the 1978 law, Penal Code section 1203, subdivision (b) provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (c)(3) of that section went on to provide that a grant of probation was appropriate if the trial court found "circumstances in mitigation . . . ." Similarly, Penal Code section 1170, subdivision (b) -- which governed a trial court's selection of sentence among upper, middle and lower terms of imprisonment when probation was denied -- provided for a middle term of imprisonment unless there were circumstances in "aggravation or mitigation."

There is little dispute as to the meaning of the phrase "mitigation" in the context of these other statutes. At the time the electorate enacted section 190.3 in 1978, both section 1203 and 1170, subdivision (b) had court rules drafted to implement them. Former Rule of

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[27] The sentencing Rules of Court have the force of law. (*People v. Price* (1984) 151 Cal.App.3d 803, 816 fn. 8.)

Court 414 set forth "criteria affecting probation," designed to implement the inquiry into aggravation and mitigation mandated by section 1203. Rule 414 provided that in deciding if there was mitigation for purposes of whether to grant probation, the court was required to consider a number of factors, including the actual impact of the sentence "on the defendant . . . ."

Similarly, former Rules of Court 421 and 423 set forth aggravating and mitigating factors designed to implement the inquiry into aggravation and mitigation mandated by section 1170. The advisory committee note to Rule 421 made clear that "the scope of 'circumstances in aggravation or mitigation' under section 1170(b) is . . . coextensive with the scope of inquiry under the similar phrase in section 1203." As this note shows, aggravation and mitigation have the same meaning under both section 1203 and 1170.

In describing the type of evidence admissible at a penalty phase trial, the 1978 electorate used the very same term used in sections 1203 and 1170. As noted above, at the sentencing phase of a capital trial, section 190.3 permits the admission of "any matter relevant to . . . mitigation . . . ." Pursuant to the principles of statutory construction discussed above, "the presumption is almost irresistible" the term "mitigation" as used in section 190.3 was intended to have the same meaning as the identical term had in sections 1203 and 1170. (*See In re Jeanice D., supra*, 28 Cal.3d at p. 216.) Indeed, at least one court has explicitly recognized "the mitigating and aggravating circumstances set forth in

the determinate sentencing guidelines are also proper criteria" in selecting a sentence under section 190.3. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) Because the term "mitigation" in sections 1203 and 1170 included the actual impact of a sentence "on the defendant," it should be given the same meaning in section 190.3.

In making this argument, Mr. O'Malley is aware that on a number of occasions this Court has held the specific evidence at issue here is inadmissible at a penalty phase because it does not focus on "the character and record of the individual offender and the circumstances of the particular offense." (*People v. Harris* (1981) 28 Cal.3d 935, 962. *See also People v. Fudge* (1994) 7 Cal.4th 1075, 1123-1124; *People v. Whitt* (1990) 51 Cal.3d 620, 645; *People v. Gordon* (1990) 50 Cal.3d 1223, 1265; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.)

The factual premise of these cases is entirely correct. Evidence of how an execution is carried out does not directly relate either to the background and character of the defendant or the nature of the crime. But for purposes of the state statutory question at issue here, that is quite beside the point.

Indeed, the electorate could not have been clearer. Section 190.3 makes explicit that at a penalty phase, the parties may introduce "any matter relevant to aggravation, mitigation, and sentence including, *but not limited to* the nature and circumstances of the

present offense . . . and the defendant's character, background, history, mental condition and physical condition." In other words, the electorate has specifically provided penalty phase evidence is *not* limited to evidence which relates to the defendant's character or the crime itself. Accordingly, and with all due respect, to the extent this Court's precedents exclude execution evidence because it is irrelevant to these two areas, it has ignored the plainly expressed will of the electorate that penalty phase evidence is "*not* limited to" these two areas. As discussed above, applying well-established principles of statutory construction to section 190.3 compels a conclusion that the electorate intended to permit defendants in capital cases the same ability that defendants in non-capital cases had to introduce and rely on the actual impact of a particular sentence on the defendant. The trial court's contrary ruling in this case was error.

2. Section 190.3's explicit provision that a defendant can introduce "any matter relevant to . . . sentence" independently permits a defendant to rely on the impact of a death sentence on the defendant.

Even if the phrase "mitigation" did not have a well-recognized meaning at the time section 190.3 was passed by the electorate, or even if this Court were to hold the electorate intended the term "mitigation" in section 190.3 to mean something distinct from "mitigation" in sections 1203 and 1170, the trial court's ruling in this case would still be erroneous. That is because section 190.3 does not merely permit evidence as to "aggravation" and "mitigation." Instead, by its very terms, it broadly permits evidence "as

to any matter relevant to aggravation, mitigation, *and sentence* . . . ." (Emphasis added.)

In determining what the electorate intended by authorizing evidence "as to any matter relevant to aggravation, mitigation and sentence," it is important to note that the electorate must have intended the "sentence" component of the phrase to mean something different from evidence relating to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." (*State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1046. *Accord Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)

It is also important to note the breadth of the statutory language. The statute does not purport to narrowly define the type of evidence which can be presented in connection with the sentence. Instead, the statute broadly permits "any matter" relevant to the sentence.

As discussed above, at the time section 190.3 was enacted, the law generally permitted a court to consider how a sentence would actually impact the defendant in selecting an appropriate sentence for that defendant. Assuming that use of the phrase "any matter relevant to . . . mitigation" was not intended to incorporate this same flexibility into section 190.3, such evidence would fall squarely within the phrase "any matter relevant to

. . . sentence." After all, as the case law, statutes and court rules had recognized prior to 1978, the actual impact of a sentence on the defendant was not only relevant to the sentence, *it was a factor which court rules themselves specifically required the trial court to consider.* (*See* Rule 414.) And, as noted above, section 190.3 goes on to state the evidence admissible at a penalty phase is "not limited to . . . the defendant's character, background [and] history." (Section 190.3.)

Moreover, in deciding the intent behind this particular provision of section 190.3, there is another principle of construction which is relevant. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (*See e.g.*, *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Here, given the background against which section 190.3 was enacted in 1978 (which required consideration as to the impact of a sentence on the defendant) and the electorate's use of the extremely broad phrase "any matter relevant to . . . sentence," it is certainly reasonable to conclude the electorate intended to permit defendants to rely on such evidence in capital cases as well as

non-capital.[28]

C. The Eighth Amendment Requires That Where A Jury Is Choosing Between Life Without Parole And Death, The State May Not Preclude The Defense From Introducing Accurate Information About One Of The Two Sentence Choices.

Even if the electorate did not intend execution evidence to be a proper consideration in the capital sentencing process, there is an independent reason such information is properly considered by the sentencer. As discussed below, the Eighth Amendment requirement of reliability in capital cases requires admission of such evidence.

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[28] Interpreting section 190.3 to permit sentence impact would also avoid a construction of the statute raising a serious constitutional question. In this regard, when a statue is susceptible of two or more interpretations, one of which raises constitutional questions, the court should construe it in a manner that avoids any doubt regarding its validity. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.) Here, in selecting an appropriate and reliable sentence in the *non-capital* context, California law explicitly requires the sentencer to consider the actual impact of a sentence on the defendant. (*See* former Rule 414.) Accepting the trial court's approach in this case would mean that only as to capital cases is consideration of this same information in fashioning an appropriate and reliable sentence precluded.

This approach is squarely contrary to the thrust of the Supreme Court's capital jurisprudence. Recognizing the qualitatively different punishment involved in a capital case, the Court has repeatedly concluded the protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants. (*See Ake v. Oklahoma* (1984) 470 U.S. 68, 87 [Burger, C.J., concurring]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18 [O'Connor, J., concurring]; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-06.) Accepting the trial court's approach in this case would mean the current California scheme adopts precisely the opposite approach, singling out capital defendants for *less* protection. As such, embracing the trial court's interpretation of section 190.3, subdivision (b) to preclude this evidence in capital cases would raise serious equal protection concerns. Such an interpretation of section 190.3 should be avoided.

To be sure, as Mr. O'Malley has noted, this Court rejected such an argument more than 20 years ago. (*People v. Harris*, *supra*, 28 Cal.3d at p. 962.) Subsequent cases have reached the same result, often citing *Harris*. (*See*, *e.g.*, *People v. Whitt*, *supra*, 51 Cal.3d at p. 645; *People v. Williams* (1988) 44 Cal.3d 1127, 1154.)

In the quarter century since *Harris* first addressed this issue, there have been two developments in the Supreme Court's Eighth Amendment jurisprudence which require *Harris* to be reconsidered. First, shortly after *Harris* the Supreme Court held that at the sentencing phase of a capital trial, the state is permitted to introduce accurate information about the life-without-parole sentencing option which the jury is considering. (*California v. Ramos* (1983) 463 U.S. 992, 1009.) In *Ramos*, the Supreme Court addressed whether it was permissible for the state to instruct a capital jury about the Governor's power to commute a sentence of life without parole. The Court first noted that "the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition." (463 U.S. at p. 1006.

The Court recognized the information conveyed by this instruction was not directly relevant to the defendant's character. Thus, the Court noted the instruction "places before the jury an additional element to be considered, along with many other factors, in

determining which sentence is appropriate under the circumstances of the defendant's case." (463 U.S. at p. 1006.) This "additional element" was one of the "myriad of factors" and "countless considerations" which the jury could weigh in determining whether a defendant should live or die. (463 U.S. at p. 1008.) In holding the state was entitled to provide this information to the jury, the Court noted that the instruction at issue was "merely an accurate statement of a potential sentencing alternative" which "supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." (463 U.S. at p. 1009.)

Mr. O'Malley's position is simple. If the federal Constitution permits the state to introduce accurate information about the only non-death option the jury is considering, Due Process and the Eighth Amendment requirement of reliability require the defendant be permitted to introduce accurate information about the death option. (*Cf. Payne v. Tennessee* (1991) 501 U.S. 808, 820-826 [the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state] and 833 [Scalia, J., concurring] [holding that the Eighth Amendment could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors."]; *Simmons v. South Carolina* (1994) 512 U.S. 154 [accurate information about non-death option required by Due Process].)

Ironically, perhaps the most persuasive arguments for applying *Ramos* to the

execution evidence in this case come from the California Attorney General in *Ramos* itself. In successfully urging the Supreme Court to approve provision of accurate information regarding the life without parole option, the state's thesis was "[a] convicted murderer has no constitutional right to have accurate information regarding the effect of the alternative sentence concealed from the jury." (*California v. Ramos*, 81-1893, Brief for the State of California at p. 24.) As the state correctly noted, "[i]f jury sentencing is considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system . . . surely the Constitution does not require that the jury be kept in the dark regarding the possibility of parole." (*Id.* at p. 35.) The state recognized that in selecting between life and death, the reliability of the jury's decision was enhanced by accurate information regarding *both* punishments:

> "[I]t appears reasonable to postulate that when a choice between punishments is to be made, whether by a jury or a judge, that choice may be more rationally made if the alternatives are understood. Conversely, the risk of an erroneous decision may be increased if the sentencer's perception of *either* alternative punishment is distorted." (*Id.* at p. 45, emphasis added.)

Every one of the state's arguments in *Ramos* is equally applicable to evidence about how a death sentence is carried out. If a convicted defendant has no right "to have accurate information regarding the effect of the [life without parole option] concealed from the jury," there is no logical reason why -- by a parity of reasoning -- the state should have any right to keep "accurate information regarding the effect of the [death option] concealed

from the jury." If one purpose of jury sentencing is "to maintain a link between contemporary community values and the penal system" -- and that purpose "does not require that the jury be kept in the dark regarding the possibility of parole" -- there is no logical reason why that same purpose would permit "keep[ing] the jury . . . in the dark regarding the [effect of a death sentence]." And given the state's recognition that the choice between life and death would "be more rationally made if the alternatives are understood" -- and the risk of error is "increased if the sentencer's perception of either alternative punishment is distorted" -- accurate information about exactly how the death penalty will be carried out will not only make the process more "rationale," but it will decrease the risk of error.

This is especially true in light of the second Supreme Court development since *Harris*. *Harris* pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment for mitigating evidence. (*Smith v. Texas* (2004) 543 U.S. 37 , 125 S.Ct. 400, 404; *Tennard v. Dretke* (2004)542 U.S. 274 124 S.Ct. 2562, 2570.) As these recent cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Tennard v. Dretke*, *supra*, 124 S.Ct. at p. 2571.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Smith v. Texas*, *supra*, 125 S.Ct. at p. 404.)

Execution evidence is plainly relevant under *Smith* and *Tennard*. As in *Ramos*, testimony about how an execution is carried out is simply an "accurate statement of a potential sentencing alternative" which "supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." (*Ramos*, *supra*, 463 U.S. at p. 1009.) Just as in *Ramos*, this evidence is an "additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case." (463 U.S. at p. 1006.) This Court's decision in *Harris* -- which was issued before *Ramos*, *Smith* and *Tennard* and which has been relied on as authority in subsequent cases -- should be reconsidered.

D. The Trial Court's Exclusion Of Execution Evidence Requires A New Penalty Phase.

The trial court's exclusion of this evidence does not require per se reversal of the death judgment. Since Mr. O'Malley had a state law right to introduce this evidence, the trial court's violation of that right violated due process. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [state court's denial of state created right not only violated state law, but also violated defendant's federal constitutional due process rights as well].) Because of the federal dimension to this error, it requires reversal unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.)

In addition, as discussed above, the trial court's exclusion of this evidence also violated state law. Under this Court's cases, there is disagreement about how to assess the impact of state law error at the penalty phase. On several occasions, the Court has stated the state law standard of error is the same as *Chapman*, which requires the state to establish that the error is harmless. (*See, e.g., People v. Jones* (2003) 29 Cal.4th 1229, 1264, n.11; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.) On other occasions, the Court has stated the defendant must establish that the error was prejudicial. (*See, e.g. People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222 [affirming penalty phase where defendant did not establish prejudice]; *People v. Brown* (1988) 46 Cal.3d 432, 448 [affirming presumed unless prejudice was affirmatively established].)

There is no need to resolve the question here. For two reasons, the outcome of this case does not depend on some fine assessment of which standard of review applies to the error. Applying any standard of review requires a new penalty phase.

First, this was not a case bereft of mitigation. The defense presented favorable testimony from Reverend Laurence Walton, the assistant chaplain of the Santa Clara county jail system, as to Mr. O'Malley's spiritual development. (56 RT 11504-11517.) Although Reverend Walton generally did not testify for inmates, he made an exception in this case precisely because over the two years he knew Mr. O'Malley, he found him "unique." (56 RT 11508-11509, 11518-11519.) Reverend Walton testified that Mr. O'Malley had been

and would continue to be a positive influence on others. (56 RT 11511-11513.)

Father Jim Misfud, a Catholic priest, echoed this testimony. (58 RT 11923-1-11923-8.) According to Father Misfud, Mr. O'Malley was "probably the best prisoner" he had ever seen. (58 RT 11923-4.)

There was also powerful evidence about Mr. O'Malley's troubled background. Mr. O'Malley's mother became an alcoholic after her husband (Mr. O'Malley's father) began to abuse her. (56 RT 11617, 11621.) Mr. O'Malley himself began to receive severe beatings from his father beginning at age 10. (56 RT 11617, 11621.)

Although Mr. O'Malley was only 14, his father permitted him to drink alcohol and to come and go unsupervised. (56 RT 11634.) Not surprisingly, Mr. O'Malley began to abuse alcohol as well as marijuana. (56 RT 11635.) At around this time, three of Mr. O'Malley's friends died: one by suicide, one in an automobile accident and one in a fire. (56 RT 11635-11636.) The next year, when he was only 15, Mr. O'Malley dropped out of school and began experimenting with harder drugs. (56 RT 11637.) When he was 18, he moved out of his home and left for California. (56 RT 11639.)

In addition to this evidence, Mr. O'Malley presented evidence from seven law enforcement officers about his behavior in jail after his arrest. (57 RT 11718-11748,

11845-11857; 58 RT 11893-11900.) He behaved well in jail, respected staff and other inmates and did not create any problems for jail staff. (57 RT 11718-11748, 11845-11857; 58 RT 11893-11900.) Defendant would be a benefit to the jail or inmate population. (57 RT 11733.)

Judith Perlite, the program manager for educational programs at the Santa Clara County jail, reached the same conclusion. Mr. O'Malley earned both a GED and a regular high school diploma while in the county jail. (57 RT 11750-11753.) He was instrumental in starting the educational program in the jail. (57 RT 11750.) Ms. Perlite personally saw Mr. O'Malley have a calming influence on at least one volatile inmate. (57 RT 11754.)

Second, although the case plainly had aggravating factors as well, the fact of the matter is that the jury deciding between life and death deliberated more than 20 hours over six court days. (XXV CT 5715-5722.) This type of deliberation has long been recognized as reflecting a close case. (*See, e.g., In re Sakarias* (2005) 35 Cal.4th 140, 167 [finding errors prejudicial as to penalty phase where there were several mitigating factors and where "[s]ome aspect or aspects of the case evidently gave one or more jurors considerable pause in the sentencing decision, as the penalty jury deliberated for more than 10 hours over three days . . . ."]. *See also People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v.*

Woodard (1979) 23 Cal.3d 329, 341 [six-hour deliberation].)

On the record of this case, the exclusion of this evidence was not harmless. Under any applicable standard of prejudice, a new penalty phase is required.

XV. BECAUSE THE INSTRUCTIONS AND ARGUMENT IN THIS CASE PERMITTED THE JURY TO DOUBLE COUNT TWO SPECIAL CIRCUMSTANCE ALLEGATIONS IN DECIDING WHETHER MR. O'MALLEY SHOULD DIE, A NEW PENALTY PHASE IS REQUIRED.

In connection with the count one charge (involving Sharley German), Mr. O'Malley was convicted of first degree murder and a financial gain special circumstance. (XXV CT 5583-5584.) In connection with the count four charge (involving Herbert Parr), Mr. O'Malley was again convicted of first degree murder, this time with a robbery special circumstance. (XXV CT 5576-5577.)

Prior to penalty phase closing arguments, the jury was given a standard instruction -- based directly on the language of Penal Code section 190.3, subdivision (a) -- which required it to consider "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." (59 RT 12204.) The court gave no instructions which told the jury it could not double count the special circumstances on death's side of the scale, both as special circumstances and as circumstances of the crime.

The prosecutor filled this gap with argument. In discussing the circumstances of the German homicide, he asked the jury to consider "the manner of the killing and the motive for the killing." (59 RT 12232.) After discussing how this killing occurred, he specifically

urged the jury to consider the alleged motive for the killing:

> "What was the motive? The motive was the special circumstance that you have found, financial gain. Now consider that in and of itself under factor 'A' evidence. Why did Mr. O'Malley take her life? Because it was a contract, it was, you have found, a killing for financial gain." (59 RT 12333.)

According to the prosecutor, these factors were part of the "circumstances of that crime." (59 RT 12234.) The prosecutor summarized his argument as to the circumstances of the German homicide by concluding that they were "aggravating." (59 RT 12234.)

The prosecutor noted, however, that there was more. He then separately discussed the financial gain special circumstance:

> "Now, not only is that aggravating, but when you look at the special circumstance involved, financial gain, I submit that it is reasonable to believe that killing itself is wrong, but killing for money, taking someone else's life, a gift that is so great as to be beyond description, taking someone's life for money, and I submit that that is the most heinous, it's a circumstance you can consider, evaluate it, determine what you feel that is morally worth." (59 RT 12234.)

The prosecutor concluded his discussion of the German homicide by reminding the jury it could consider both the circumstances of the crime and the financial gain special circumstance. (59 RT 12234.)

He then turned to the Herbert Parr homicide. (59 RT 12235.) Again he spoke about the manner of the killing and the motive, explaining that the crime occurred because Mr. Parr "had a nice 1987 Harley Davidson heritage motorcycle that Mr. O'Malley wanted . . . ." (59 RT 12235.) Again, the prosecutor separately told the jury it could also rely on the robbery special circumstance. (59 RT 12237.)

The double counting of the financial gain and robbery special circumstances was improper. A penalty phase jury charged with deciding whether a defendant will live or die may not double count evidence as both a special circumstance and a circumstance of the crime. (*See People v. Melton* (1988) 44 Cal.3d 713, 768 [holding that special circumstances "may not each be weighed in the penalty determination more than once for exactly the same purpose."]) In *Melton*, the Court recognized the ambiguity in the standard instruction on this very point:

> "The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the 'circumstances' of the capital crime and any attendant statutory 'special circumstances.' Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.'" (*Ibid.*)

Since *Melton*, the Court has addressed this issue on many occasions and repeatedly held that the standard penalty phase instructions are not likely to result in this type of

improper double counting "in the absence of any misleading argument by the prosecutor . . . ." (*People v. Monterroso* (2004) 34 Cal.4th 743, 790. *Accord People v. Welch* (1999) 20 Cal.4th 701, 769; *People v. Cain* (1995) 10 Cal.4th 1, 68; *People v. Proctor* (1992) 4 Cal.4th 499, 550. *See generally Boyde v. California* (1990) 494 U.S. 370, 380, 383-384 [in determining whether "there is a reasonable likelihood that the jury has applied . . . challenged instructions" in an improper manner, a reviewing court must consider the context in which the instruction is given including the arguments of counsel]; *People v. Kelly* (1992) 1 Cal.4th 495, 525 [considering argument of prosecutor in determining if there was a reasonable likelihood that jury misunderstood instructions]; *People v. Lee* (1987) 43 Cal.3d 666, 677-678 [same].)

This case involves the precise type of misleading argument referenced in *Monterroso*, *Welch*, *Cain* and *Proctor*. As discussed above, the prosecutor here relied on the financial gain and robbery special circumstances twice for the same purpose -- once as a circumstance of each crime and once as a special circumstance. On this record, it is reasonably likely that the jury did the same and double counted the special circumstances in deciding to impose death. This was improper.

To the extent this error violated Mr. O'Malley's Eighth Amendment right to a reliable penalty phase determination, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California*, *supra*, 386 U.S. at p.

24.) Viewed as state law error, however, it is not entirely clear what standard of prejudice review applies. As discussed in Argument XIV-D above, there is disagreement about how to assess state law error at the penalty phase. (*Compare People v. Jones*, *supra*, 29 Cal.4th at p. 1264, n.11 [suggesting *Chapman* standard applies to state law error at the penalty phase]; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965 [same] *with People v. Carter*, *supra*, 30 Cal.4th 1166, 1221-1222 [suggesting defendant must establish prejudice]; *People v. Brown*, *supra*, 46 Cal.3d at p. 448 [same].)

Once again, because of the record in this case there is no need to resolve which standard applies here. Under any applicable standard, a new penalty phase would be required.

As discussed in great detail in Argument XIV-D, *supra*, the penalty phase decision was obviously a difficult one for this jury. The defense called Reverend Laurence Walton and Father Jim Misfud to testify to Mr. O'Malley's spiritual development, it presented powerful evidence of Mr. O'Malley's troubled upbringing and background, and it called seven law enforcement witnesses to testify about Mr. O'Malley's behavior and conduct in jail. (56 RT 11504-11519; 56 RT 11617-11621, 11634-11539; 57 RT 11718-11748, 11845-11857; 58 RT 11893-11900, 11923-1-11923-8.) And although the case plainly had aggravating factors as well, the jury deciding whether to impose life or death deliberated more than 20 hours over six court days. (XXV CT 5715-5722.) This type of deliberation

has long been recognized as reflecting a close case. (*See, e.g., In re Sakarias, supra*, 35 Cal.4th at p. 167 [finding errors prejudicial as to penalty phase where there were several mitigating factors and where "[s]ome aspect or aspects of the case evidently gave one or more jurors considerable pause in the sentencing decision, as the penalty jury deliberated for more than 10 hours over three days . . . ."].)

On the record of this case, permitting the jury to double count special circumstances in deciding whether to impose a death sentence cannot be deemed harmless. Under any applicable standard of prejudice, a new penalty phase is required.

XVI. THE PROSECUTOR'S MISCONDUCT DURING THE PENALTY PHASE VIOLATED MR. O'MALLEY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY PHASE DETERMINATION.

As discussed above, based on all objective indications, the penalty phase in this case was a close one. After all, not only was this a case with significant mitigation, but the jury deliberated more than 20 hours in deciding whether Mr. O'Malley would live or die.

Unfortunately, in urging the jury to return with a death verdict, the prosecutor committed six distinct instances of misconduct. First, the prosecutor improperly told the jury it could double count facts both as special circumstances and as circumstances of the crime. Second, he separately urged the jury to impose death because, in contrast to the victims, the defendant had received a trial. Third, he told the jury it could reject remorse as a mitigating factor because Mr. O'Malley had exercised his right to present evidence in mitigation. Fourth, he made an emotional plea for death by asking the jurors to return a death verdict to ensure "justice for the victims." Fifth, he argued that death was required by the obligations of a free society. Finally, although the jurors had gone through a lengthy guilt-phase deliberation, the prosecutor effectively advised them that lingering doubt was not a proper consideration in the penalty phase.

On a record such as this, any one of these errors might be cause for reversal. In light

of the obviously close case presented to the jury, when these errors are considered together, a new penalty phase is required.

A. The Special Role Of The Prosecutor And The Standard Of Review.

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

A prosecutor's behavior violates federal Constitutional due process principles when it is "so egregious that it infects the trial with unfairness." (*People v. Hill*, *supra*, 17 Cal.4th at p. 818; *People v. Morales* (2001) 25 Cal.4th 34, 43) A prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hill*, *supra*, 17 Cal.4th at p. 818.) There is *no* requirement that a prosecutor's misconduct during argument be intentional. (*Id.* at p. 822.) However, there must be a reasonable likelihood that the jury will construe the prosecutor's remarks in an objectionable fashion. (*People v. Morales*,

supra, 25 Cal.4th at pp. 43-44.)

As more fully discussed below, the prosecutor's conduct in this case plainly constituted misconduct under both state and federal law. A new penalty phase is required.

B. The Prosecutor Committed Misconduct In (1) Asking The Jury To Double Count Facts In Aggravation, (2) Asking For Death Because The Defendant Received A Trial Whereas The Victims Did Not, (3) Arguing That Because His Counsel Presented Mitigating Evidence, Mr. O'Malley Lacked Remorse, (4) Urging The Jury To Impose Death To Ensure "Justice For The Victims," (5) Telling The Jurors That The Obligations Of A Free Society Demanded A Death Verdict And (6) Incorrectly Telling The Jury That Lingering Doubt Was Not A Mitigating Factor.

As discussed in Argument XV, above, this Court has long noted that a penalty phase jury charged with deciding whether a defendant will live or die may not double count evidence as both a special circumstance and a circumstance of the crime. (*See People v. Melton*, *supra*, 44 Cal.3d at p. 768.) Accordingly, it is improper for a prosecutor to urge a penalty phase jury to double count such evidence. (*See People v. Monterroso*, *supra*, 34 Cal.4th at p. 790; *People v. Welch*, *supra*, 20 Cal.4th at p. 769; *People v. Cain*, *supra*, 10 Cal.4th at p. 68.) This same rule had been recognized well before the September 1991 penalty phase in this case. (*See People v. Morris* (1991) 53 Cal.3d 152, 225; *People v. Melton*, *supra*, 44 Cal.3d at pp. 768-769.)

Here, the prosecutor made this exact argument. In connection with the Sharley

German homicide, he urged the jury to consider the financial gain evidence both as a circumstance of the crime (showing motive) and as a special circumstance. (59 RT 12232-12234.) Similarly, as to the Herbert Parr homicide, the prosecutor again urged the jury to consider the robbery evidence both as a circumstance of the crime (again to show motive) and a special circumstance. (59 RT 12234, 12237.) This was improper under *Melton* and its progeny.

But it was not the only misconduct which occurred in the penalty phase. In asking the jury for a death sentence, the prosecutor pointed to "a big difference" between "the murders that Mr. O'Malley perpetrated" and the jury "imposing the death penalty after a fair trial with the protection of each and every one of the defendant's constitutional rights, as well as after a lengthy and exhaustive consideration by you of which penalty is appropriate." (59 RT 12217.) Thus, the prosecutor argued that Mr. O'Malley "decided individually to impose the death penalty" on the three victims in the case. (59 RT 12261.) The murders were "cold and callous." (59 RT 12217.) In contrast, Mr. O'Malley received "a fair trial" with "every benefit that the law" allows. (59 RT 12217, 12261.) Mr. O'Malley received "every fairness" and "every opportunity" including "the well-qualified and able assistance of this attorney." (59 RT 12215.) The prosecutor urged the jury, in deciding whether to show mercy, to "consider the mercy that O'Malley had shown his victims." (59 RT 12259.)

Courts around the country have recognized this attempt to inflame the passions of the jury is entirely improper. (*People v. Johnson* (Ill. App. 2000) 740 N.E.2d 457, 465 [in homicide case, it was improper for the prosecutor to argue that defendants "were [the victim's] judge, his jury and his executioner."]; *Goodin v. State* (Miss. 2001) 787 So.2d 639, 653 [prosecutor commits misconduct in arguing that the victim "didn't have the Constitution out there to protect him that night, didn't have a judge to hear his case."]; *State v. Pindale* (N.J.Super. 1991) 592 A.2d 300, 311 [prosecutor commits misconduct in arguing that although defendant's rights were scrupulously honored, the defendant did not give any rights to his victims]; *Griffith v. State* (Okla. Crim. App. 1987) 734 P.2d 303, 308 [prosecutor commits misconduct in referring to the constitutional rights afforded the defendant and then asking the jury to consider "what about the rights of [the victim]. He's sentenced to death."].) It was equally improper here.

The prosecutor appealed to the passions of the jury in yet another way. The prosecutor accurately noted in the guilt phase of trial, Mr. O'Malley denied guilt, and in the penalty phase, Mr. O'Malley had presented mitigating evidence regarding his upbringing. (59 RT 12256.) According to the prosecutor, the jury could rely on the presentation of such evidence as a reason to reject sympathy and remorse as potential mitigating factors. (59 RT 12256.) This too was improper. (*See, e.g., People v. Fierro* (1991) 1 Cal.4th 173, 243-244 [at guilt phase, defense theory is that defendant is innocent, at penalty phase defendant

testifies and denies guilt, prosecutor argues lack of remorse; held, this argument was misconduct]; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168-1169 [prosecutor may not argue lack of remorse from defendant's failure to confess].)

The prosecutor also committed misconduct when, in asking the jury to return a death verdict, he described such a verdict as "justice for the victims, justice in this case." (59 RT 12259.) He asked for a death verdict on behalf of the "People of the State of California." (59 RT 12261.) The Supreme Court has recognized this "kind of pressure . . . has no place in the administration of criminal justice." (*United States v. Young* (1985) 470 U.S. 1, 18.) The Court has also specifically held the Eighth Amendment prevents the state from introducing evidence as to whether victims viewed a death penalty as appropriate in a particular case. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509, *overruled on other grounds in Payne v. Tennessee* (1991) 501 U.S. 808.)[29]

If *evidence* that victims believed death a just verdict is inadmissible, it follows that *argument* to the same effect -- without any supporting evidence -- is similarly improper. Thus, it was improper for the prosecutor to argue that "justice for the victims" required the jury to impose a death sentence in this case. (*See also United States v. Mandelbaum* (1st Cir. 1986) 803 F.2d 42, 44 ["There should be no suggestion that a jury has a duty to decide

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[29] The Supreme Court specifically left this part of *Booth* intact in *Payne*. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, n.2.)

one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality."].)

The prosecutor explained a death sentence was necessary to avoid "mak[ing] us so civilized that we will end up being automatic cheek turners with no defenses against the predators in our society . . . ." (59 RT 12256-12257.) Instead, death was required by the obligations of "a free society." (59 RT 12259-12260.) According to the prosecutor, a free society "requires of its citizens, of its jurors, vigilance, courage, the strength and resolve in making the hard decision" to impose death. (59 RT 12260.) These comments too were fundamentally improper; it is impermissible in a criminal case to wrap the flag around closing arguments. (*See, e.g., Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 951-953 [improper appeal to patriotism in prosecutor's "exhorting [jurors] to join in the war against crime" by returning a death verdict]; *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1413 [improper to characterize jurors as "soldiers in the war on crime."]. *See Evans v. State* (Nev. 2001) 28 P.3d 498 [misconduct in penalty phase argument where prosecutor asked the jurors whether they had the "intestinal fortitude" to do their "legal duty"].)

Finally, it is misconduct for a prosecutor to misstate the law. (*See, e.g., People v. Morales* (2001) 25 Cal.4th 34, 43; *People v. Hill* (1998) 17 Cal.4th 800, 829.) Here, the prosecutor told the jury because it had convicted Mr. O'Malley, "you don't need to worry about executing an innocent man." (59 RT 12216.) In fact, however, even where a jury

has unanimously convicted a defendant of capital murder, lingering doubt remains a legitimate mitigating factor the jury can consider in deciding if death is appropriate. (*See, e.g.*, *People v. Kaurish* (1990) 52 Cal.3d 648, 706; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.)

C. The Misconduct In This Case Requires A New Penalty Phase.

Generally, when prosecutorial misconduct infringes upon a defendant's constitutional rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083; *People v. Piggage* (2003) 112 Cal.App.4th 1359, 1375; *People v. Hall* (2000) 82 Cal.App.4th 813, 817.) When misconduct does not infringe a particular constitutional right, reversal is required under (1) federal law when the misconduct "infects the trial with such unfairness as to make the conviction a denial of due process" and (2) state law when it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct. (*People v. Piggage*, *supra*, 112 Cal.App.4th at p. 1374.)

The result in this case does not depend upon fine distinctions in the various standards of prejudice which can apply to this error. Mr. O'Malley was entitled to a jury that would decide his fate free of improper influences. The prosecutor repeatedly used techniques which courts have long recognized are designed precisely to inflame the

passions of a jury. And he did so in a penalty phase case which, judging by the objective indicia, was obviously close. Taken together, and under any standard of prejudice, the misconduct in this case cannot be deemed harmless. Because of the misconduct, defendant did not receive a reliable penalty phase. The Eighth Amendment, as well as the state and federal guarantees to a fair trial, have been violated. A new penalty phase is required.

D. Appellate Review Of This Issue Is Warranted Notwithstanding Trial Counsel's Failure To Object, Because The Omission Deprived Appellant Of His Constitutional Right To The Effective Assistance Of Counsel.

Defense counsel did not object to a single instance of misconduct. Respondent may argue this failure precludes appellate review of this issue. The argument should be rejected.

The Sixth Amendment to the United States Constitution provides that criminal defendants are entitled to the effective assistance of counsel at all critical stages of the proceedings against them. (*United States v. Gouveia* (1984) 467 U.S. 180, 187; *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10.) Effective counsel is necessary not just for voir dire, or the presentation of opening statements and evidence; effective counsel is just as necessary during the prosecution's closing argument. During the prosecutor's closing argument defense counsel has an obligation to object to any improper arguments which the prosecutor is making and request a curative admonition from the court. (*See, e.g., People v.*

Visciotti (1992) 2 Cal.4th 1, 79.) For this reason, the Court often addresses the merits of misconduct claims on direct appeal when, as here, defense counsel's failure to object amounted to constitutionally deficient performance. (*See, e.g., People v. Silva* (2001) 25 Cal.4th 345, 374 ["because defendant also claims that his trial attorney violated his constitutional right to the effective assistance of counsel by this failure to object, we consider whether the prosecutor's argument constituted misconduct."]. *Accord People v. Lewis* (1990) 50 Cal.3d 262, 282; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1235.)

Here, defense counsel's failure to object was not tactics. There was simply no tactical reason for defense counsel's failure to object. This Court should decide if there was prejudicial misconduct in this case.

XVII. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. O'MALLEY'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.3d 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(I) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. O'Malley has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. O'Malley identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

(1) The trial judge's instructions permitted the jury to rely on defendant's age

in deciding if he would live or die. (25 CT 5750.) This aggravating factor was unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck*, *supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (25 CT 5749.) This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(4) During the penalty phase, the state introduced evidence that Mr. O'Malley had a prior felony conviction. (56 RT 11501-11502.) This evidence was admitted pursuant to Penal Code section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (25 CT 5751.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, the trial court's failure violated Mr. O'Malley's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(5) During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (25 CT 5752.) Evidence supporting this instruction had been admitted at the guilt phase, and the jury was authorized to consider such acts at the penalty phase pursuant to Penal Code section 190.3, subdivision (b). The jurors were instructed they could not rely on this evidence unless it had been proven beyond a reasonable doubt. (25 CT 5752.) The jurors were told, however, that they could rely on this factor (b) evidence even if they had not unanimously agreed that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, *supra*, 536 U.S. 584, the trial court's failure violated Mr. O'Malley's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decision in *Lewis* should be reconsidered.

(6) Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and (2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. O'Malley's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(7) At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (25 CT 5749.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) failed to specify a burden of proof as to either mitigation or aggravation. (25 CT 5749-5750.) These errors, taken singly or in combination, violated Mr. O'Malley's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13

Cal.4th at pp. 358-359.) The Court's decisions in *Schmeck* and *Ray* should be reconsidered.

(8) Because the California death penalty scheme violates international law -- including the International Covenant of Civil and Political Rights -- Mr. O'Malley's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(9) At the guilt phase, the prosecution introduced evidence that appellant had a 1979 conviction for assault in Massachusetts. (49 RT 10171.) The prosecution also called the victim of that assault to testify about the underlying facts. (49 RT 10714-10734.) At the penalty phase, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (59 RT 12207.) The trial court's introduction of the facts on which the 1979 was premised put defendant in jeopardy a second time for the 1979 offense in violation of the Double Jeopardy clause of the state and federal constitutions. This Court has already rejected this argument. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 134-135.) For the reasons set forth by the appellant in *Bacigalupo*, *supra*, however, the Court's decision should be reconsidered.

(10) At the penalty phase, the jury was properly instructed that before it could rely on prior criminal activity as a basis for imposing death, it had to find the prior activity true beyond a reasonable doubt. (59 RT 12207.) Allowing a jury which has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker. This Court has already rejected this argument. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decision in *Hawthorne* should be reconsidered.

To the extent respondent argues any of these issues is not properly preserved because Mr. O'Malley has not presented them in sufficient detail to this Court, Mr. O'Malley will seek leave to file a supplemental brief more fully discussing these issues.

MOTION FOR NEW TRIAL ISSUES

XVIII. THE TRIAL COURT VIOLATED MR. O'MALLEY'S RIGHTS UNDER STATE AND FEDERAL LAW WHEN IT DENIED HIS NEW TRIAL MOTION DESPITE PRESENTATION OF EVIDENCE WHICH DIRECTLY SUPPORTED THE DEFENSE CASE AND FUNDAMENTALLY UNDERCUT THE STATE'S CASE AS TO THE COUNT ONE MURDER.

A. Introduction.

The state charged Mr. O'Malley with the April 25, 1986 murder of Sharley Ann German. Mr. O'Malley presented an alibi defense, introducing evidence he was traveling in Massachusetts, New Jersey and New Hampshire throughout the entire month of April 1986 and did not return to California until May 1, 1986. The state responded to this defense with evidence which -- if believed -- seemed to establish that Mr. O'Malley had returned to California on April 10, 1986, in plenty of time to commit the murder.

After trial Mr. O'Malley discovered significant evidence which not only directly supported his alibi, but which unequivocally undercut the state's theory he had returned to California on April 10 and -- even more importantly -- that he was in California on April 25. He moved for a new trial based on this evidence. The trial court denied the motion. As more fully discussed below, this ruling denied Mr. O'Malley his rights under state law as well as his federal constitutional rights to due process, a fair trial, a jury trial and a

reliable determination of guilt in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Reversal is required.

B. The Relevant Facts.

1. The alibi defense and the state's response.

As noted, count one charged Mr. O'Malley with the April 25, 1986, murder of Sharley Ann German in San Jose. (24 CT 5215.) The state's theory was that Geary German, Sharley Ann's husband, hired Mr. O'Malley to kill his wife. According to the prosecutor, Mr. O'Malley personally killed Sharley Ann by stabbing and shooting her. The jury agreed, convicting of murder and finding true personal use allegations that Mr. O'Malley used a firearm and a knife during the murder. (25 CT 5585; 55 RT 11352-11353.)

The defense to this charge was simple: Mr. O'Malley, who grew up in Wrentham, Massachusetts, was visiting friends in Wrentham when Sharley Ann was murdered. Mr. O'Malley testified that he was out of state from March of 1986 to May 1, 1986. (39 RT 8324-8328, 8332-8333; 42 RT 8928-8929; 43 RT 9008-9009, 9022.) Mr. O'Malley told the jury while he was in Massachusetts, he saw his old high school hockey coach -- Richard Lillis -- at a restaurant. (39 RT 8329-8330.) Coach Lillis was never called at trial.

Obviously, if the jury believed Mr. O'Malley was out of state on April 26, 1986, it would not have convicted Mr. O'Malley of the murder, nor found the personal use allegations true. Thus, Mr. O'Malley tried to corroborate his testimony he was in Massachusetts in late April of 1986.

First, he called Karen Shaw, Robert Thompson and Mark Webber to testify they visited with Mr. O'Malley, or he visited with them, in Wrentham and North Attleborough, Massachusetts between April 15 and April 28, 1986. (31 RT 6659, 6679-6681; 32 RT 6787-6788, 6799-6802; 34 RT 7328-7330, 7334, 7352.) Second, he called Glenn Johnson to testify that he picked Mr. O'Malley up from San Francisco airport during the last week of April, or the beginning of May, 1986. (33 RT 6912, 6915.) On cross examination, however, these witnesses testified they could not be certain as to when in April they actually saw Mr. O'Malley. (32 RT 6734, 6807-6908, 6809; 34 RT 7334, 7351; 51 RT 10496.) Thus, in his closing argument the prosecutor was able to argue these witnesses simply did not recall the correct dates. (53 RT 10880-10883.)

For his part, the prosecutor did not dispute that Mr. O'Malley visited Massachusetts in April of 1986. (53 RT 10894.) Instead, the prosecutor rebutted the defense alibi with two different types of evidence. First, the prosecutor presented telephone bill records showing a series of calls billed to Mr. O'Malley's home in early April 1986 from out-of-state. (51 RT 10520-10524.) These calls were made from Massachusetts, New Hampshire

and New Jersey. (51 RT 10520-10525.) They included collect calls made to Mr. O'Malley's home up until April 10, 1986. (51 RT 10520-10525.) The last collect call was made on April 10, and was from a pay telephone at the San Francisco Airport. (51 RT 10528.) Based on these telephone records, the state's position was that Mr. O'Malley's witnesses simply got their dates wrong, and Mr. O'Malley had returned to California on April 10. (53 RT 10901, 10910.)

In addition, the prosecutor presented testimony from Karen O'Neal. O'Neal lived in Texas and in 1986 was in the process of getting a divorce from her husband John Mercuri. Mr. O'Malley occasionally worked for Mercuri and was a friend. (42 RT 8811-8816, 8831-8832.) A court hearing had been held in Texas to address distribution of marital property. (52 RT 10658, 10689-10690.)

According to O'Neal, appellant called her on the telephone after the hearing, threatened her, and gave her a deadline to decide whether she would sign everything over to Mercuri. (52 RT 10659-10660, 10678, 10690.) O'Neal testified she decided to sign all of the marital assets over to Mercuri, and she called appellant's home in Redwood City, California to let him know of her decision. (52 RT 10660-10661.) When O'Neal called, Karen Dolan answered the phone and told her appellant was at a meeting. (52 RT 10662.) O'Neal said she left a number where she could be reached, which she assumed was her mother's phone number, and appellant called her back later that same day. (*Ibid.*)

O'Neal could not recall the date of this phone call. (52 RT 10691.) However, when the prosecutor showed O'Neal records of an April 14, 1986, phone call placed from appellant's home to O'Neal's mother's home, O'Neal testified that was the approximate time frame of appellant's call. (52 RT 10662-10666.) According to O'Neal, after receiving this phone call, she told her attorney to quickly settle the case and thereafter signed all of the marital property over to Mercuri. (52 RT 10665, 10679.) The prosecutor relied on O'Neal's testimony to show Mr. O'Malley was indeed in California on April 14, 1986. (53 RT 10901-10902, 10906-10907, 10910.)

2. The new evidence.

As noted above, Mr. O'Malley testified that while he was back in Massachusetts, he happened to run into his old high school hockey coach, Richard Lillis. (39 RT 8329-8330; 43 RT 8996.) Coach Lillis was never called as a witness at trial because defense counsel was unable to find him. (RT 11/21/91 at 7.) In the new trial motion, however, defense counsel made clear Coach Lillis had finally been located. In one significant respect, Coach Lillis's testimony was remarkable.

As discussed above, the defense had presented several witnesses who testified they saw Mr. O'Malley in Massachusetts in late April 1986. But because each of these witnesses could not be certain of the date they saw Mr. O'Malley, the prosecutor was able

to argue they were wrong, and Mr. O'Malley had returned to California on April 10. (53 RT 10880-10883.)

But Coach Lillis suffered from no such flaw. He recalled his chance meeting with Mr. O'Malley -- his former player -- in April of 1986. According to Coach Lillis, the meeting was at the Red Wing diner on Sunday, April 20, 1986. (RT 11/12/91 at 7-8.) Coach Lillis was sure of the date because *it happened to fall on his birthday.* (RT 11/21/91 at 7-8.) This evidence alone would have been devastating to the state's case; it completely undercut the state's theory that Mr. O'Malley returned to California on April 10.

But there was more. Louis Lombardi lived with Mr. O'Malley and Karen Dolan in the Spring of 1986. (18 CT 3956-3957; 30 RT 6198.) At the preliminary hearing, Lombardi testified Mr. O'Malley was out of town for several weeks that spring. (XVIII CT 3971, 3976, 3979.) Prior to trial, he told a defense investigator he had two tickets to a baseball game on April 29, 1986, but he went to the game alone because Mr. O'Malley – who usually went with him -- was out of town. (RT 11/21/91 at 4; XXVII CT 6194-6195.) He also recalled Mr. O'Malley was out of town at tax time (April 15, 1986) as well. (XXVII CT 6199-9200.) Mr. Lombardi was subpoened to testify at trial. (RT 11/21/91 at 4.)

On the day he was to testify, Lombardi changed his story. In a declaration filed with

the new trial motion, Lombardi admitted he changed his story because he was afraid to testify and did not realize the importance of his testimony to the defense case. (XXVII CT 6200-6201.) His changed story was that he was no longer sure about his dates and, in fact, Mr. O'Malley was with him at the baseball game. (RT 11/21/91 4-5; XXVII CT 6195.) In light of this new information, defense counsel did not call Lombardi as a witness. (RT 11/21/91 4-5; XXVII CT 6195.)

After the guilt phase was over, the defense re-interviewed Lombardi. He admitted he had lied to the defense on the day he was scheduled to testify. (XXVII CT 6200-6201.) In fact, Lombardi had discovered the ticket stub from the baseball game which showed the game was indeed played on April 29, 1986. (XXVII CT 6200.) He reiterated Mr. O'Malley was out of town from sometime prior to April 15 through at least April 29. (XXVII CT 6200.)

Even this was not all. As noted above, the prosecutor relied on Karen O'Neal's testimony to establish Mr. O'Malley was in California on April 14. O'Neal testified that after she received a threatening telephone call from Mr. O'Malley, she told her attorney to quickly settle the divorce and give the marital property to her husband. (52 RT 10665, 10679.) O'Neal could not recall the date of this phone call, but believed it to be around April 14. (52 RT 10662-10666, 10691.) In his closing argument the prosecutor not only relied on O'Neal's testimony to argue Mr. O'Malley was in California on April 14, but he

urged the jury to consider "the defense did not call one witness to rebut her testimony." (54 RT 11267. *See* 53 RT 10901-10910, 10939-10940; RT 54 11269.)

New evidence presented at the new trial motion directly rebutted O'Neal's testimony. Defense counsel obtained the records from O'Neal's divorce case. (RT 11/21/91 8-9.) These records showed that on April 19, 1986 -- five days *after* Mr. O'Malley had purportedly threatened her by telephone -- O'Neal executed a document in anticipation of litigation which set forth the marital assets which were to be the subject of the litigation. (RT 11/21/91 at 8-9.) Thus, on April 19, she was still contesting the marital property distribution, which means that she had not yet received the threat from O'Malley. This evidence directly undermines O'Neal's testimony as to when Mr. O'Malley called; if she told her attorney to settle the case after Mr. O'Malley called her, the fact that she was executing documents in anticipation of litigation on April 19 undermines the prosecution's claim Mr. O'Malley had called her on April 14.[30]

3. The trial court's ruling.

The trial court denied the new trial motion. (RT 11/21/91 at 17.) The court stated

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[30] The divorce records further showed it was not until May 7, 1986, that O'Neal's lawyer advised the Texas court that O'Neal wanted to settle the divorce action. (RT 11/21/91 8-9.) Since O'Neal advised her lawyer to settle the case quickly after speaking with Mr. O'Malley, this May 7 date suggests that the conversation between O'Neal and O'Malley occurred in early May, not on April 14.

its view that the trial evidence had shown Mr. O'Malley was "not back East" at the time of the German homicide. (RT 11/21/91 at 16.) Accordingly, the contrary evidence would not have made a difference in the result. (RT 11/21/91 at 16.) The court went on to add that it was "questionable" as to whether the evidence was newly discovered, although the court did not make a finding in this regard and did not purport to rest its ruling on this ground. (RT 11/21/91 at 16.) Although it did not hold a hearing to listen to testimony from either Coach Lillis or Mr. Lombardi, the court went on to make a credibility finding as to Lombardi, ruling that because he changed his testimony, his credibility was "extremely questionable." (RT 11/21/91 at 16.)

C. The Trial Court Abused Its Discretion When It Refused To Grant A New Trial In Light Of New Evidence Which Not Only Supported Mr. O'Malley's Alibi, But Directly Undercut The State's Case.

Penal Code section 1181, subdivision 8, authorizes the trial court to grant a new trial motion based on the discovery of new evidence. In ruling on such a motion, the trial court must consider whether the evidence is newly discovered (or whether the defendant could have discovered the evidence sooner with reasonable diligence), and whether the new evidence "be such as to render a different result probable on a retrial of the cause." (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) The motion "should be undoubtedly granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of newly discovered

evidence the result would probably be, or should be, different on a retrial." (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481.)

While the grant or denial of a motion for a new trial on the ground of newly discovered evidence lies in the sound discretion of the trial court (*People v. Love* (1959) 51 Cal.2d 751, 757-758), it is an abuse of discretion to deny such a motion where "the newly discovered evidence contradicts the strongest evidence introduced against the defendant." (*People v. Martinez, supra*, 36 Cal.3d at p. 823. *See People v. Williams* (1962) 57 Cal.2d 263, 274-275; *People v. Cooper* (1979) 95 Cal.App.3d 844, 852; *People v. Gilbert* (1944) 62 Cal.App.2d 933, 938.) Moreover, "[o]nce a trial court determines that a 'defendant did not have a 'fair trial on the merits, and that by reason of the newly discovered evidence the result could reasonably and probably be different on a retrial,' . . . it should not seek to sustain an erroneous judgment imposing criminal penalties on the defendant as a way of punishing defense counsel's lack of diligence." (*People v. Martinez, supra*, 36 Cal.3d at p. 825.) Thus, "the standard of diligence may be relaxed when the newly discovered evidence would probably lead to a different result on retrial." (*Ibid.* [trial court denied new trial motion by finding that defense counsel was not diligent; held, although finding of non-diligence was correct, trial court nevertheless abused its discretion in denying new trial motion where new evidence undercut the state's case and "would probably lead to a different result on retrial.")

Application of these principles here compels a conclusion the trial court erred in refusing to grant the new trial motion. In connection with the count-one charge, the defense theory was Mr. O'Malley was in Massachusetts at the time of the crime. In light of the many witnesses who confirmed Mr. O'Malley's presence in Massachusetts in April of 1986, the strongest parts of the state's case were (1) the phone records suggesting Mr. O'Malley returned to California on April 10 and (2) Karen O'Neal's testimony buttressing those telephone records.

The new evidence from Coach Lillis and Lombardi -- along with the divorce records -- fundamentally contradicts the state's case and squarely supports Mr. O'Malley's alibi. Indeed, Coach Lillis's testimony not only directly refutes the state's theory about an April 10 return to California, it just as directly corroborates the recollections of Karen Shaw, Robert Thompson, Mark Webber and Glenn Johnson about when Mr. O'Malley was in Massachusetts. The same is true with respect to both the divorce records and testimony from Lombardi; both support Mr. O'Malley's testimony he was in Massachusetts in late April and both undercut the state's theory Mr. O'Malley returned to California on April 10. Because the new evidence contradicts the strongest evidence introduced against the defendant, the new trial motion should have been granted. (*People v. Martinez*, *supra*, 36

Cal.3d at p. 823.)[31]

There is a federal constitutional dimension as well to the trial court's error. As this Court has noted, the new trial remedy for new evidence pointing to innocence is a requirement of Due Process. (*People v. Martinez*, *supra*, 36 Cal.3d at p. 826.) A state trial court violates federal Due Process where it denies a new trial motion where the new evidence is likely to produce a different result at a second trial. (*See Quigg v. Crist* (9th Cir. 1980) 616 F.2d 1107, 1112.) In addition, as noted above, capital defendants have an Eighth Amendment right to a reliable guilt phase proceeding. (*Beck v. Alabama*, *supra*, 447 U.S. 625.)

Here, these rights are plainly implicated. The prosecutor urged the jury to reject Mr. O'Malley's alibi defense, arguing he had returned to California on April 10. The new evidence establishes the prosecutor was wrong. Instead, it directly corroborates the defense witnesses presented, including Mr. O'Malley himself. The count one conviction, and the

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[31] Because the new evidence "would probably lead to a different result on retrial" of the count one homicide, there is no need to dwell on whether counsel was diligent in uncovering the evidence. (*People v. Martinez*, *supra*, 36 Cal.3d at p. 825.) But it is worth noting counsel tried to locate Coach Lillis prior to and during trial and was simply unable to do so. (RT 11/21/91 at 7.) And although witness Lombardi had been located, he was not called as a witness because -- on the day he was scheduled to testify -- he lied to the defense about what he knew. Under these circumstance, counsel cannot be faulted for not presenting Lombardi at trial. (*See People v. Hairgrove* (1971) 18 Cal.App.3d 606 [witness falsely denied his complicity in crime to police; held, defense counsel showed no lack of diligence in failing to call witness to testify and admit complicity in crime].)

related special circumstance and personal use findings must be reversed. As this Court noted nearly half a century ago:

> "[I]t has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served." (*People v. Love*, *supra*, 51 Cal.2d at p. 758.)

That is exactly the case here as well. Reversal is required.

XIX. THE CUMULATIVE EFFECT OF ERRORS IN THIS CASE REQUIRES REVERSAL OF THE GUILT AND PENALTY PHASES.

As discussed in some detail above, there are numerous errors in this case which even when considered in isolation from one another, require reversal of both the guilt and penalty phase verdicts of Mr. O'Malley's trial. However, assuming arguendo these errors alone are insufficient to require reversal of the guilt and penalty phases verdicts, this Court must also consider the cumulative impact of these errors.

In this regard, this Court has long recognized that even where individual errors themselves do not require reversal in a criminal case, the cumulative impact of these errors may itself require reversal. (*See, e.g., People v. Holt* (1984) 37 Cal.3d 436, 459-460; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Underwood* (1964) 61 Cal.2d 113, 125.) The federal courts have also recognized that the cumulative impact of individual errors may itself violate due process. (*See, e.g., Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 [cumulative effect of three significant trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [collecting cases considering prejudicial effect of multiple errors].)

That is exactly the case here. Even if none of the errors discussed above separately

require relief, when considered in conjunction with one another in any combination, the cumulative impact of these errors itself violates state law, as well as Mr. O'Malley's federal due process right to a fair jury trial and his Eighth Amendment right to a reliable determination of guilty and penalty. Reversal is required.

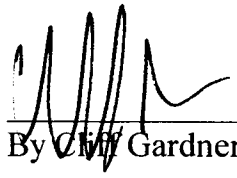
CONCLUSION

For all these reasons, the convictions and death sentence must be reversed.

DATED: 11/27/07

Respectfully submitted,

CLIFF GARDNER
LAZULI WHITT

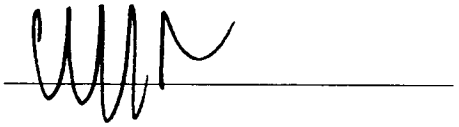


By Cliff Gardner

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule 8.630 (b)(2), I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 65,366 words in the brief.

Dated: 11/27/07.



Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 19 Embarcadero Cove, Oakland, California 94606. I am not a party to this action.

On November 27, 2007 I served the within

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upon the parties named below by depositing a true copy in a United States mailbox in Oakland, California, in a sealed envelope, postage prepaid, and addressed as follows:

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

Executed on November 27, 2007, in Oakland, California.

L. Whitt

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