IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ] | |
| Plaintiff and Respondent, | ] | CASE NO. S030553 |
| v. | ] | |
| | ] | (Los Angeles Superior Court No. TA 006961) |
| GEORGE BRETT WILLIAMS | ] | |
| Defendant and Appellant. | ] | |



AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
SUPERIOR COURT LOS ANGELES COUNTY
HON. MADGE WATAI

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# APPELLANT'S OPENING BRIEF

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(510) 208-7711

*Attorney for Appellant*
*Under Appointment by the California Supreme Court*

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## INTRODUCTION

*"I was caught with my pants down."*

> Defense Counsel Ronald LeMieux, addressing the fact that he failed to interview or subpoena the witness whom he made the centerpiece of his opening statement to the jury, and neglected to seek a continuance of trial to locate this person. (52 RT 3757).

One month before the start of jury selection in this case, attorney Douglas McCann was convicted of a criminal offense. Shortly after Mr. Williams' trial, Mr. McCann was disciplined by the State Bar of California and was later disbarred.

Before, during and after Mr. Williams' trial, attorney Ronald LeMieux was forced to defend himself against a lengthy State Bar investigation concerning, among other things, neglecting case and client responsibilities. In 1993, Mr. LeMieux was disciplined by the State Bar. A subsequent State Bar investigation resulted in LeMieux's suspension from the practice of law.

While the vast majority of attorneys practicing law in California do not incur State Bar disciplinary records, these two attorneys did. They also had something else in common: they each represented the 26 year-old George Brett Williams during his trial or pretrial proceedings.[1]

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[1] Amazingly enough, in 1998, an attorney who represented Mr. Williams in his pretrial proceedings, Stanley Granville (CT 183, 476.), was also sanctioned by the California State Bar.

Statisticians can debate the odds that three lawyers representing Mr. Williams in his capital trial would all require State Bar discipline. Regardless of the odds, and as might be expected, the consequences for Mr. Williams were catastrophic. With respect to the guilt trial, his attorney:

- Made an opening statement that hinged the entire defense on the testimony of a witness whom the defense never interviewed, contacted, or even subpoenaed, and who ultimately did not testify;
- Did not take a single note during the State's case; and
- Failed to conduct any discovery, review any of the physical evidence, or file any motions (beyond a declaration of indigency) prior to trial.

Not surprisingly, this level of representation continued at the penalty phase – which lasted all of one afternoon – where Mr.Williams' attorney failed to:

- Erroneously believed that there would be an automatic 30-day break between the guilt and penalty trials, and failed to seek a continuance when he learned of his error;
- Neglected to review the State's penalty phase evidence in aggravation until the night before the start of the State's penalty case, and even then did not seek a continuance after discovering that the prosecutor had mistakenly given him an illegible copy of the State's aggravating evidence; and
- Failed to investigate any mitigating evidence and simply cold-called three of Mr. Williams' relatives to testify at the penalty trial.

In virtually every aspect of the case, Mr. Williams' trial attorney failed to grasp his duties to his client and neglected to fulfill the most basic obligations of defense counsel. Counsel also misunderstood the root cause

of his difficulties: it was not that he got caught with his pants down, but that he never pulled his pants up in the first place. The abdication by Mr. Williams' trial counsel of the most basic duties of capital representation tainted the entire proceedings, undermined the reliability of both the guilt and penalty verdicts, and tarnished the integrity of the criminal justice system.

## STATEMENT OF THE CASE

The State charged Mr. Williams, Dino Lee, Dauras Cyprian and Patrick Linton with identical crimes. The four count Information against Mr. Williams read as follows: Counts I and II charged a January 2, 1990, murder, in violation of Penal Code §187, of victims Willie Thomas and Jack Barron, respectively. The State further charged two special circumstance allegations: (1) a robbery special circumstance in violation of section 190.2(a)(17), applied to both counts I and II, and (2) a multiple murder special circumstance, in violation of Penal Code §190.2(a)(3). Counts III and IV of the Information charged robbery in violation of Penal Code §211, with respect to each of the victims. All four counts included an enhancement allegation that Mr. Williams used a firearm in the commission of the crimes, in violation of section 12022.5. (CT 127-130; 731-32)

Each of Mr. Williams' co-defendants cut a deal and pled guilty to lesser charges.

Co-defendant Dino Lee agreed to testify for the state, and pled guilty to a single count of second degree murder. Lee had all remaining counts and enhancement allegations dismissed and received a sentence of 15 years to life. (16 RT 1365.) In addition, the prosecution agreed that Lee would (1) be eligible for probation in 7-1/2 to 8 years, (2) receive day-for-day credit for the time he had already spent in the Los Angeles County Jail (rather than 1 day credit for every 2 days in County custody, as is customary), and (3) receive concurrent time for a violation of his probation.

In January 1991 co-defendants Dauras Cyprian and Patrick Linton both pled no contest to one count of second degree murder and one count of second degree robbery of Thomas, admitted the allegation of principal armed with a firearm, and received sentences of 16 years to life. The remaining charges against Cyprian and Linton were dismissed. (26 RT 2869, 2779-80.)

That left Mr. Williams, against whom the State sought death. Mr. Williams pled not guilty and denied the enhancing allegations. (CT 131, 146; 733; RT on Appeal (Aug. 20, 1990) at pp. A-101 to A-101-299.)

In early February 1991, attorney Ronald LeMieux offered Mr. Williams to try the entirety of his capital case for a pre-determined, fixed fee of $15,000. (CT 472.) After LeMieux became counsel of record, trial was set for August 1991. In July 1991, LeMieux retained attorney Douglas

McCann to select Mr. Williams' jury, and agreed to pay McCann a lump sum fee of $5,000 for his services. (CT 479; 562-63.)

On July 17, 1991, less than one month from the scheduled trial, the court asked LeMieux whether he planned to file any motions in limine. LeMieux responded, "I haven't discovered any motions in limine I would be making . . . . I don't contemplate any." (RT of proceedings held July 17, 1991, at p. 6.) On July 24, 1991, McCann was arrested for spouse abuse, a charge to which he subsequently pled guilty, and for which he was disciplined by the State Bar.

Jury selection in Mr. Williams' case began less than a month after McCann's arrest. McCann handled the jury selection proceedings by himself. (CT 234; 3 RT.) LeMieux did not even enter the courtroom during voir dire. (See 52 RT 3739.)

Both sides made their opening statements on September 16, 1991. (16 RT.) In his opening statement, LeMieux told the jury that there was an "an absolutely essential material witness for the defense." (16 RT 1267.) This witness was Detective Tony Moreno. (16 RT 1267.)

The State began its case-in-chief that same day. (CT 268; 16 RT). The State's guilt phase prosecution involved the testimony of 25 witnesses, spanned 10 court days, and concluded on October 2, 1991. (CT 296; 26 RT.) For its part, the defense called four witnesses (two of whom had

already testified for the State) whose combined testimony lasted less than five hours, beginning and ending on October 2, 1991. (CT 296; 26 RT 2721-2868.) The defense, however, never called Tony Moreno.

After the close of evidence, defense counsel requested a continuance over the weekend so that he could prepare his closing argument. (27 RT 2893-2895.) The trial court denied counsel's request. (27 RT 2897.) Counsel for both sides delivered their closing arguments on Friday, October 4, 1991. (CT 297-298; 26 RT 2897, 27 RT 2893-95, 28 RT.)

Guilt phase jury deliberations began Friday afternoon, October 4, 1991. The jury deliberated all day on Monday, October 7, requesting a read back of testimony from several witnesses. (CT 298-301; 29 RT 3116, 3118.) On Tuesday, October 8, 1991, at 1:55 p.m. the jury found Mr. Williams guilty as charged. (CT 390-391, 381-385, 733; 30 RT 3120-24.)

Immediately following the announcement of the verdicts, LeMieux informed the court that Mr. Williams wished to dismiss him as counsel and proceed pro per. (30 RT 3125.) According to LeMieux, Mr. Williams based his desire to dismiss him, in large part, on LeMieux's failure to call Moreno as a witness. (30 RT 3126.)[2]

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[2] Mr. Williams' account was substantially different. According to Mr. Williams, after the jury announced its guilty verdict LeMieux "went outside . . . and he told my parents something . . . came back . . . and told me that he couldn't represent me no more because my parents didn't have $5,000 to pay him for a penalty phase. . . . [H]e said the best thing to do is to ask to go pro per . . . . He told me what to say, so I asked the judge and

The following day, October 9, 1991, the trial court heard Mr. Williams' motion to proceed pro per. (CT 393; 31 RT.) The trial court informed Mr. Williams that Mr. LeMieux's representation at guilt phase had been "masterful," (31 RT 3146) and assured Mr. Williams that Mr. LeMieux was "prepared" to try the penalty phase (31 RT 3146-47) and that he would "properly represent[]" him. (31 RT 3153.) As a result, Mr. Williams withdrew his motion to dismiss his counsel and to proceed pro per. (31 RT 3153.)

LeMieux, for his part, believed he would have "at least" 30 days between the return of the guilt and special circumstance verdicts and the start of the penalty trial. (CT 547-548.)

Mr. Williams' penalty phase trial began the next day, Thursday, October 10, 1991. (CT 394.) The State presented the testimony of eight witnesses over a two-day period. (CT 394-395; 32 RT-33 RT.) When the State's first witness took the stand, LeMieux had yet to review the aggravating evidence the State planned to present. (32 RT 3174.) The defense's mitigation case began and concluded on the afternoon of Tuesday, October 15, 1991, and consisted only of the testimony of Mr. Williams' two sisters and his mother. (CT 396.)

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the judge explained . . . that she wasn't going to dismiss him as my counsel." (53 RT 4030-4031.) At a subsequent hearing, LeMieux did not deny asking for additional fees. (53 RT 3802.)

The jury began its penalty deliberations at 9:35 a.m. on October 17, 1991. (CT 398; 36 RT.) Later that day, the jury asked whether a retrial would occur if the jury was unable to "come to a conclusion." (36 RT 3492.) The jury then deliberated all of Friday, October 18, 1991. (CT 399.) On Monday, October 21, 1991, at 11:30 a.m., the jury returned its verdict of death. (CT 410-411, 734; 38 RT 3496.)

After receiving three extensions of time within which to file a new trial motion, LeMieux informed the Court he had a "full blown suspicion" that his performance at trial was inadequate. (38 RT 3498, 39 RT 3500, 40 RT 3517, 41 RT 3530.) Noting that there was a "very serious conflict" in his raising the issue of his own ineffectiveness, LeMieux urged the Court to "appoint an attorney to conduct a Pope hearing on behalf of Mr. Williams . . ." (Id.) The trial court agreed, appointing attorney Douglas Otto "to assist [Mr. LeMieux] in the preparation of a motion for new trial." (CT 426, 428; 42 RT 3549.)

On September 25, 1992, it became evident to the court that for medical and psychiatric reasons LeMieux could not complete his part of the work for the hearing on the motion for new trial. (46 RT 3571.) On October 30, 1992, the court accepted LeMieux's full withdrawal from Mr. Williams' case. (47 RT 3578.)

On November 25, 1992, the court held an in camera hearing to review the personnel records of Detective Moreno. The transcripts of those proceedings – volumes 49 and 50 of the Reporter's Transcript in this case – remain under seal as of the filing of this brief.[3] (CT 452.)

The hearing on Appellant's motions for a new trial and for modification of the verdict began on December 15, 1992. (CT 711; 52 RT.) The proceedings spanned three days and testimony was taken from eight witnesses, including Mr. Williams and Detective Moreno. (CT 711-713; 52 RT - 55 RT.)

On December 17, the court denied Appellant's motion and sentenced him to death on Counts I and II, and to a term of imprisonment of fourteen years for Counts III and IV. (CT 711-729, 731-735; 54 RT 4191-99.)

## STATEMENT OF FACTS

The Court often sees cases with bad lawyers. This case is different. This case involves a lawyer who was not simply bad, he violated virtually every ethical precept of representation in the book. The following statement of facts will describe the process by which defense counsel LeMieux came to represent Mr. Williams, what he did in the months preceding his client's trial, why he absented himself entirely from selecting

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[3] In September 2004, Appellant filed in this Court an Application for Order Unsealing these portions of the trial record. That Application is still pending.

his client's capital jury, how he hired a neophyte attorney (and recently convicted criminal) to conduct voir dire, and how LeMieux gave an opening statement that focused on a defense theory that he never investigated and promised the jury evidence he never obtained or presented, including his own client's testimony. Defendant will then summarize the guilt phase case presented by the State and the defense and discuss the jury's struggle to reach a verdict notwithstanding the lack of a defense.

Defendant will then describe his attempt to fire LeMieux as counsel, the trial court's claim that LeMieux had done an "outstanding" job and its assurance that LeMieux was prepared for the penalty portion of the case. Defendant will then discuss LeMieux's failure to investigate any of the State's aggravating evidence and his failure to conduct any mitigation investigation. Finally, Defendant will summarize the State's case in aggravation, the defense's brief case in mitigation, and the jury's difficult deliberations on the sentencing verdict.

**Pretrial Proceedings and Events**

Mr. Williams Voluntarily Surrenders to Police

Mr. Williams voluntarily surrendered himself to the police on February 8, 1990, after learning that he was wanted for questioning in connection with the shooting deaths of Jack Barron and Willie Thomas on January 2, 1990. (26 RT 2813.) Mr. Williams provided a videotaped

statement in which he stated that he had lent guns to a friend, Patrick Linton, prior to the crime, and that on January 3, 1990, Linton had told Mr. Williams that he had accidentally shot Barron the day before. (18 RT 1720-21.)

Of the four individuals prosecuted for the murders of Barron and Thomas, Mr. Williams alone was charged with two special circumstances on each of the murder counts: multiple murder (Penal Code §190.2(a)(3)) and robbery-murder (Penal Code §190.2(a)(17)(i)). The prosecution announced that it intended to seek the death penalty against Mr. Williams in the event he was found guilty of at least one count of first degree murder and one special circumstance allegation, even though Mr. Williams' prior criminal history consisted of a single misdemeanor conviction.

LeMieux Retained As Trial Counsel

After Mr. Williams surrendered himself to police, he retained Attorney H. Clay Jacke, II to represent him. Mr. Williams' parents paid Mr. Jacke a fee of $10,000 to represent their son in Municipal Court through the preliminary hearing. When Mr. Williams was bound over to Superior Court, Mr. Williams declared that he was indigent and the court appointed Attorney Jacke to represent him at public expense in further proceedings. Attorney Jacke then retained second counsel and an investigator (Mr. Glover) to work on Mr. Williams' case.

By early 1991, however, Mr. Williams concluded that his attorney was overly-burdened with a heavy criminal caseload and believed that Mr. Jacke was not sufficiently prioritizing his case. (CT 582.) Desiring his trial date to move forward sooner than Mr. Jacke seemed able to deliver, Mr. Williams sought substitute counsel. (CT 582-583.) In late January or early February, 1991, Mr. Williams met with attorney Ronald J. LeMieux at the Los Angeles County Jail. (CT 582-583.) At that initial meeting, LeMieux promised Mr. Williams that he would try his capital case quickly and cheaply. LeMieux offered to represent Mr. Williams for a flat fixed fee of $15,000 to try both the guilt and penalty phases of his capital case. (CT 583, 476.)

At the time, LeMieux was "actively involved" in defending himself against a State Bar investigation concerning the mishandling of client funds in about a dozen cases. LeMieux also had never tried a capital case, had never conducted a penalty phase investigation or penalty phase argument, had no background or training in capital defense, and had never attended any conferences, lectures or other educational courses about that type of work. (52 RT 3663, 3680-82; CT 563, 571.)

LeMieux's lack of capital trial experience, however, did not prevent him from claiming otherwise to the trial court and opposing counsel, to whom he remarked, at various points during the trial: "It has been my

experience in death penalty cases – and I've done a number of them in the last 22 years . . . ." (30 RT 3131); "I have done [penalty phase defenses] before" (31 RT 3152); ". . . the previous arguments I have made in death penalty cases . . . ." (35 RT 3443.)

Despite his lack of capital trial experience LeMieux did not take any steps to acquire sufficient learning and skill to try Mr. Williams' case. In LeMieux's words: "I cannot recall whether prior to [the Williams trial] I was ever compelled to do any research or reading on [capital representation]." (52 RT 3663-64).

In fact, in 1990, one year before agreeing to represent Mr. Williams, LeMieux began "to leav[e] the practice of law." (52 RT 3672.) He vacated his law office and moved his practice into his home. He did so because he "no longer wished to be a trial attorney. . . . [He] felt burned out psychologically and emotionally." (52 RT 3671).

As a result, by 1991, when LeMieux agreed to represent Mr. Williams in his capital trial, LeMieux had largely wound down his practice of criminal law. (52 RT 3671-72). He was a solo practitioner. He had no secretary, no paralegal, and no assistance from any other support staff. (52 RT 3667-68.) He lacked a complete set of California Reporters, a subscription to any criminal defense periodicals or even a photocopier. (52 RT 3666.) He did not belong to any professional organizations, and he

received no publications from such organizations. (52 RT 3668-69.) And, by his own admission, he had never handled a case in which the documents and materials had filled even *two* boxes. (See 53 RT 3812.)

At his initial meeting with LeMieux Mr. Williams voiced two concerns. First, LeMieux's requested fee of $15,000 was insufficient compensation to try a capital murder case and that unless LeMieux was paid more money, LeMieux would not focus enough attention on the case to adequately prepare the defense. With respect to this concern, Mr. Williams offered to pay – and LeMieux agreed to be paid – a flat fee of $25,000 to undertake the entire capital trial. (CT 472, 476, 583.) This was $10,000 more than LeMieux's initial asking price. This fee was paid by Mr. Williams' parents. (CT 476-77.)

Mr. Williams' second concern centered on whether LeMieux was willing to investigate members of the Los Angeles Police Department in presenting the defense. To this end, Mr. Williams explained to LeMieux that a Los Angeles Police Department Detective, Anthony ("Tony") Moreno, was deeply involved in the case, including having connections both to the underlying drug deal that was supposed to have taken place on January 2, 1990, and to the guns used in the murders. Mr. Williams made clear to LeMieux that his defense depended upon LeMieux investigating and subpoening Detective Moreno and perhaps other members of the

L.A.P.D. LeMieux promised Mr. Williams that he would undertake these steps. (CT 583-84.)

LeMieux's Pretrial Preparation

LeMieux made his first appearance in Mr. Williams' case on February 22, 1991. At that time, he moved to set the trial for March 22, 1991. During the next seven months, LeMieux's lawyering was characterized more by his omissions than his achievements.

For example, LeMieux

- "Never called [attorney Jacke] to talk about the case," even though Mr. Jacke represented Mr. Williams for one full year before LeMieux became counsel of record (CT 560; See also 52 RT 3703, 3739);

- Spoke only once with investigator Jackie Glover, by happenstance, before Mr. Williams' trial, and even then did not discuss Mr. Williams' case (16 RT 1265; CT 476; See also 17 RT 1404);

After his appointment and before the start of trial, LeMieux conducted two interviews with his client to discuss the case. Each interview lasted approximately 6 hours. (CT 583.) At those meetings, Williams expressed frustration to LeMieux at the progress of the defense trial preparation and, in particular, the lack of progress with respect to the investigation of Detective Tony Moreno. In addition, Mr. Williams specifically requested that LeMieux do the following:

- Locate and interview potential alibi witnesses whom Williams said he was with near the time of the murders (CT 477-79, 583);

- Interview former co-defendants (Patrick Linton, Dino Lee, and Dauras Cyprian), all of whom were in state prison after plea bargains with the District Attorney, to learn the terms of their pleas and any incentives they were offered, whether any of them intended to testify in Mr. Williams' case, and, if so, the nature of their testimony (CT 477-79, 583);

- Interview the State's eyewitnesses (Irma Sazo and Jose Pequeno) to ascertain whether they could identify Williams at trial and to prepare for the cross-examination (CT 477-79, 583);

- Subpoena or otherwise obtain Department of Motor Vehicle records for Williams' black BMW, which would prove that he had sold the vehicle more than two weeks prior to the murders, thereby undercutting the expected testimony of Irma Sazo that she saw that vehicle at the murder scene on the night of the crime (CT 477-79, 583);

- Interview and subpoena Williams' hairstylist, who would testify that shortly before Christmas in 1989 she gave him a short Jheri-curl haircut, thereby undercutting the testimony of Irma Sazo that he wore an Afro haircut on the day of the murders (52 RT 3732; CT 580, 583);

- Obtain and review beeper records from Delcomber Communications to show that the address of the owner of the beeper found at the crime scene was a place where Patrick Linton (not Williams) stayed, and that many calls to that beeper were returned from Linton's home (CT 477-79, 583); and

- Investigate and subpoena Detective Tony Moreno of the L.A.P.D. (CT 477-79, 583.)

LeMieux failed to pursue *any* of these leads. (52 RT 3728, 3732; CT 583-84.)

The "murder book" is the compendium of most, if not all, of the official paperwork created and collected by law enforcement that follows a murder from its initial report to the arrest of the suspect(s), from the crime scene log to witness interviews and suspect statements. (22 RT 2300.) LeMieux failed – repeatedly – to retrieve and review the three volumes of murder books in this case, despite the State's overtures to him to do so. On Wednesday, September 11, 1991, five days before the start of Williams' trial, LeMieux failed to appear at a scheduled pretrial conference. The prosecutor, noting a pattern, put on the record that LeMieux had also twice failed to appear to review the murder books. As the prosecutor explained, he had the murder books brought to court "so [LeMieux] would have an opportunity to go through all the murder books, the three that are present here in court today, to make sure he had all items." (14 RT 1096.) According to the prosecutor, "[t]his is the second time I've made [the murder books] available here at the courthouse for Mr. LeMieux on his own time table . . . and Mr. LeMieux didn't show on that occasion either." Nor did LeMieux follow up by phone with the chief detective to arrange yet another appointment to review the murder books. As the prosecutor remarked on the eve of trial, Lemieux had not "taken th[e] opportunity to look at the[] [murder] books." (14 RT 1096.)

Before trial LeMieux also neglected to obtain the charging documents filed against Mr. Williams' co-defendants. When the trial began, LeMieux was unaware whether these co-defendants had faced special circumstance charges for their roles in the double murders for which Mr. Williams was capitally charged. (18 RT 1708-09.)

The testimony of Mr. Williams' alleged accomplices formed a central part of the State's case. What benefits they received in return for their testimony was relevant to their credibility. LeMieux, however, did not bother to learn before trial precisely what benefits, if any, Mr. Williams' co-defendants received in return for their guilty pleas and testimony. (See 18 RT 1706-17, 19 RT 1888-91.) Indeed, LeMieux appeared overwhelmed by just the documents that he was given by attorney Jacke. "I never had a case where I was presented . . . with so much material to deal with. When I obtained the [trial] file . . . from Clay Jacke it was *two* file boxes full of stuff. (53 RT 3812.) (emphasis added.)

Moreover, although this was a capital case, the only pretrial motion LeMieux filed was a declaration of indigency and a request for preparation at county expense of the reporter's transcripts of Patrick Linton's first trial. (CT 205.) LeMieux did not, however, file any motions requesting discovery, later explaining that he "had not filed a discovery motion in 22

years of practice" (52 RT 3695). Nor did he file any number of other pertinent motions including, but not limited to motions:

> (1) for production of physical evidence;
>
> (2) to obtain the location of Detective Moreno;
>
> (3) that prosecution be barred from presenting evidence of Mr. Williams' alleged gang affiliations with respect to this non-gang-related crime;
>
> (4) continuing the guilt trial so that he could adequately prepare the defense;
>
> (5) for second counsel;
>
> (6) for an investigator[4]; or
>
> (7) for even a single expert, for use at the guilt trial or the penalty trial.

(CT 568, 634-38, 482, 472; 54 RT 4132, 52 RT 3704.)

**Jury Selection**

In July 1991, LeMieux decided that he did not have the time to conduct – or even attend – jury selection in Mr. Williams' case. (CT 567; 53 RT 3812.) Accordingly, LeMieux retained attorney Douglas McCann to undertake this part of the representation. (CT 567.) Like LeMieux, McCann had never tried a capital case, had never conducted Hovey voir dire, (52 RT 3726), and had no prior training or course work in capital litigation. (CT 562-563.) His prior criminal trial experience was limited to

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[4] LeMieux did not request an investigator even though the trial court indicated that it would pay for an investigator. (25 RT 2578-79.)

roughly one year in the Los Angeles County Public Defender's Office, where he was assigned to traffic and misdemeanor cases, a solo practice where he had worked for roughly two years after leaving the public defender's office, and his own criminal arrest for spouse abuse in the same month he began representing Mr. Williams. (CT 562.) LeMieux paid McCann a flat fee of $5,000 to select Mr. Williams' jury. (CT 563.)

From a panel of 400 jurors, 206 were selected to complete questionnaires on August 12 and 13, 1991. (3 RT-4RT.) Voir dire took place from August 19-23, 1991, and from September 3-6, 1991. (5 RT-13 RT.) One hundred and two individuals were found qualified to serve as jurors, of whom 12 were selected as jurors, and five as alternate jurors. (15 RT.)

Although the court explained the jury selection process to attorney McCann (3 RT 78), he seemed unfamiliar with the procedures. (4 RT 136-37; 5 RT 220-221.) He was uncertain as to the number of peremptory challenges he would receive (5 RT 221-222.) When the prosecutor suggested using the "6-pack method" for initial questioning, McCann was not sure how that method worked. (13 RT 1092-94.) He seemed reluctant to return to the court to pick-up copies of the jurors' questionnaires to review over the weekend after special arrangements had been made for

them to be quickly copied and available to counsel for that purpose. (4 RT 142.)

LeMieux's Family Problems and Medical Conditions

LeMieux's failure to take part in the selection of his client's jury, his failure to investigate foundational elements of his client's case, and his failure to file basic pretrial motions that are essential components of defense practice, can perhaps be attributed to Mr. LeMieux's family problems and his debilitating medical conditions. As the record reflects, on September 1, 1991, two weeks before opening arguments, LeMieux united his first two sons with his new family in a recently leased home in Malibu. (52 RT 3691.) While McCann selected Mr. Williams' capital jury, LeMieux spent "two complete weekends" moving his family from Glendale to Malibu and made several additional trips to the new home with "odds and ends." (52 RT 3691.) The consolidation of LeMieux's two families resulted in "constant arguments and constant friction" before and during Mr. Williams' trial. (52 RT 3692). Instead of preparing for trial, LeMieux "was constantly on the phone at night ironing [sic] differences, refereeing" disputes. (52 RT 3692). On an average of two weekday evenings each week, "maybe on occasion three times" each work-week (52 RT 3693), LeMieux made lengthy "trips to Malibu [from Glendale] to settle arguments. It was constant friction and stress." (52 RT 3692.).

LeMieux's problems did not end with bitter family problems. Before and during Mr. Williams' trial, LeMieux experienced mental and physical problems related to diagnosed conditions of anxiety and depression. Symptoms experienced by LeMieux included chronic and severe sleep disturbance (resulting in an average of only four or five hours of sleep a night), pronounced tremors in his upper limbs, acute dry-mouth, and the "inability to concentrate" for "more than five or seven minutes or so" at a time. (52 RT 3688-90.) LeMieux indicated that his limb tremors were so severe that he was unable to take notes. (52 RT 3689.) "I simply couldn't write with my right hand." (53 RT 3804.)

The record reflects that LeMieux's fragile health impacted Mr. Williams' trial from the beginning. On September 16, 1991, the opening first day of the guilt phase proceedings, and LeMieux's first full day in court after absenting himself from jury selection, LeMieux asked the court "that we not be in session on Fridays . . . *for medical reasons*." (16 RT 1260) (emphasis added.) To accommodate LeMieux's medical request, the court reversed its earlier promise to the jurors that "the trial itself will be in session from Monday to Friday," (3 RT 20) and canceled all guilt phase proceedings on Fridays. (See 27 RT 2893; 23 RT 2393.) On September 24, 1991, LeMieux asked to cut short the afternoon proceedings for apparent medical reasons (21 RT 2169) and the court reluctantly agreed to do so. (21

RT 2197.) In July 1992, in the middle of proceedings on Mr. Williams' motion for new trial, LeMieux suffered a physical and/or mental breakdown and "passed out" in court during voir dire in another case. (52 RT 3684.)

**Guilt Phase Trial**

Defense Counsel's Opening Statement

When LeMieux gave his opening statement on September 16, 1991, he had yet to locate Detective Tony Moreno, much less speak with or subpoena him. (41 RT 3531, 3542). LeMieux nonetheless placed Detective Moreno at the heart of the defense theory of the case, and made him the centerpiece of his opening statement to the jury. As the Deputy District Attorney observed, LeMieux "made an opening statement where he alluded to Tony Moreno all over the place. . . ." (28 RT 3044.) According to LeMieux, Mr. Williams' defense hinged on the testimony of Moreno.

> I hope by having Tony Moreno on the witness stand to be able to show a number of things which will be very valuable in persuading the jury that my client was not the shooter in this case.

(16 RT 1269.) In the event he had not made his theory of the case clear, LeMieux hammered the point again:

> I think it is *absolutely essential* that Tony Moreno be available [to testify].

(16 RT 1271) (emphasis added.)[5]

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[5] The many reasons why Detective Moreno was central to the defense case are explained in Argument XV, infra.

Spotlighting Detective Moreno for jurors in his opening, LeMieux told them, "You are going to learn more about . . . Tony Moreno, the L.A.P.D. detective." (16 RT 1330.) "Write that down," LeMieux instructed the jury, "Tony Moreno." (16 RT 1312.)

But when it became apparent that Moreno might not be available to testify or was evading subpoena, LeMieux failed to take to take even the most basic steps to try to procure Moreno's testimony, uncover the reasons for his unavailability, or protect his client's interests in a fair trial. Specifically, LeMieux did not prepare or file a motion seeking to determine Moreno's whereabouts, his actual availability, or, in the alternative, the grounds for his unavailability. LeMieux did not seek a continuance of the trial until Moreno's testimony could be secured. And he did not seek a mistrial when it became evident that Moreno's testimony was not going to materialize.

Detective Moreno was not the only matter which LeMieux emphasized to the jury in his opening statement but which he had failed to investigate before trial and on which he failed to present evidence. LeMieux also drew the jurors' attention to several pieces of physical evidence that were "very important" to help exonerate his client. For example, LeMieux told the jurors that:

- The beeper found at the crime scene belonged to co-defendant Linton, not Mr. Williams. (16 RT 1313.) LeMieux, however,

failed to subpoena documents that could have shown this (52 RT 3705-06);

- "[W]e're . . . going to prove to you that [the] .38 revolver [found at the crime scene] was not the murder weapon . . . [and that it] had not even been fired . . . ." (16 RT 1329.) But LeMieux never conducted an independent analysis of the alleged murder weapon and presented none of the promised evidence;

- He would "prove . . . that the defendant loaned" the three guns found at the crime scene to his co-defendants the day before the crime. (16 RT 1329.) LeMieux, though, never substantiated this claim;

- The "shoestrings . . . [were] an *absolute critical point* for the defense." (16 RT 1314.) LeMieux, however, did not follow-through with this point at trial; and

- The plastic orange bucket at the crime scene was "a *pivotal* piece of physical evidence in this case that will assist you in proving and believing and being persuaded that George Williams was not present at that house." (16 RT 1320.) LeMieux, however, never discussed, much less showed the jury how the bucket exonerated his client.

LeMieux, in short, failed to independently investigate any of the items of physical evidence to which he drew the jurors' attention, and therefore failed to substantiate the claims he made for this evidence in his opening statement. Each of these items was subsequently lost or destroyed by the State shortly after Mr. Williams' trial. (See Supplemental III CT 297-302; Reporter's Transcript of Proceedings, Oct. 31, 2000 at 8-9).

State's Case

Over the course of ten days, the People called 25 witnesses to testify at the guilt phase. Despite his client's express instructions, and notwithstanding his professional obligations to investigate the State's case, LeMieux did not interview any of the State's witnesses prior to their testimony. Nor did LeMieux independently investigate any of the physical evidence introduced at trial by the State through its expert witnesses. Nor did he investigate the underpinnings of the theory of the defense case that he presented to the jury in his opening statement. (CT 568; 52 RT 3727, 3730, 3733-3734, 3751.)

The heart of the State's case was the testimony of two of Mr. Williams' co-defendants, who fingered Mr. Williams as the mastermind and triggerman behind the crime. (17 RT-19RT.) The State supplemented the co-defendants' testimony with the testimony of neighbors who claimed they saw Mr. Williams at the crime scene on the night of the crime, the testimony of witnesses who saw or overheard different aspects of a drug deal being arranged, and witnesses who testified to Mr. Williams' pre-crime and post-crime activities and whereabouts, including two witnesses who testified that Mr. Williams or his wife, Monique, tried to get them to falsely serve as alibi witnesses for Mr. Williams. (17 RT, 20 RT-22 RT.)

Testimony of the co-defendants sentenced to prison

Prior to Mr. Williams' trial, co-defendants Linton and Cyprian had ample opportunity to speak with one another about the events of January 2, 1990. Both men were incarcerated at Folsom State Prison. (CT 199, 201.) While waiting to testify for the State at Mr. Williams' trial, both were moved to and housed in the Los Angeles County Jail, where they spoke with one another daily and shared a holding cell. (CT 503.)

The State, through its witnesses, presented the following story.

On January 2, 1990, Jack Barron and Willie Thomas were killed at 11017 Spring Street, in the apartment of co-defendant Dauras Cyprian's brother, Ernie Pierre. Long before that crime, and well before Mr. Williams first visited Pierre's house, Cyprian frequently hung out at Ernie's apartment with co-defendants Linton and Lee. (18 RT 1665), and stayed there overnight on occasion. (19 RT 1822.)

On the morning of January 2, 1990, Linton went to Mr. Williams' home and then the two of them drove in separate cars to Spring Street to hang-out in front of Ernie Pierre's house, where it appears they smoked marijuana and drank alcohol. (17 RT 1557-59.) That afternoon, Mr. Williams told Linton that he was going to try to set up a drug deal to purchase cocaine. (17 RT 1561, 1482-83.) A prior attempt to transact the

deal, one week previously, was not successful. (17 RT 1559-60; 18 RT 1604-07, 1696.)

Linton, Cyprian and Mr. Williams then drove to Mr. Williams' house in Linton's Blazer. (17 RT 1562; 18 RT 1605, 1607.) While there, Mr. Williams assembled packages of torn-up yellow pages from a phone book, which he wrapped to resemble bundles of cash (17 RT 1563; 18 RT 1766), and retrieved the guns that were later found at the crime scene, including the .38 revolver, .380 semi-automatic pistol, and the .30 carbine rifle. (18 RT 1607-1609; 17 RT 1562; 18 RT 1766.)

Next, Linton drove Mr. Williams and Cyprian in his Blazer to the home of JoJo Dolphin, who had helped Mr. Williams arrange the drug deal with Jack Barron and Willie Thomas. Thomas was at Dolphin's home when Mr. Williams, Cyprian and Linton arrived. (18 RT 1611.) Linton then drove Mr. Williams and Cyprian in his Blazer to the Mi Cabana Bar; Dolphin and Thomas followed them in a blue Chevrolet Sprint. (18 RT 1611-12; 18 RT 1765-1769.) Jack Barron and a group of Hispanic males were awaiting them at the bar. (18 RT 1611-1614.)

After parking in the lot, Mr. Williams exited the Blazer and spoke with Barron for about 30 minutes outside Barron's vehicle. Thomas joined the conversation between Barron and Appellant (18 RT 1614-15; 19 RT 1768). Dolphin went into the bar. (18 RT 1768.). Jose Pequeno, a former

co-worker of Thomas and Barron, and who worked at the bar, testified that he did not see the person who got out of the Blazer and spoke with Barron seated in the courtroom. (22 RT 2236.) Only after being prompted by the prosecutor, who pointed to Mr. Williams at defense counsel's table did Pequeno testify (through a Spanish language interpretor), "I think he's the one" who spoke with Barron (22 RT 2236.) Following the crime, Pequeno was twice interviewed by Detective Herrera in Spanish; at the second interview, in March 1990, Pequeno picked Mr. Williams from a photo line-up. (22 RT 2245, 2237.) Pequeno emphasized that it was the driver of the Blazer who got out and spoke with Barron that night. (22 RT 2246.) Pequeno also testified that he saw a black female exit the blue Spring and get inside Linton's Blazer. (22 RT 2249.)

While waiting in Linton's Blazer, Cyprian saw a Camaro enter the parking lot. An Hispanic male got out of the the Camaro and approached the Blazer. According to Cyprian, after the man walked away, Linton told Cyprian, "That was Tony." (19 RT 1874-1876.) Linton, however, denied seeing someone named Tony that night. (18 RT 1704.)

Linton testified that Dolphin, Thomas, and Barron all left the parking lot in the blue Sprint. (17 RT 1565, 18 RT 1616, 1703, 1704.) Cyprian, however, testified that Dolphin and Willie Thomas left in the blue Sprint, while Jack Barron got in the Camaro and left with "Tony" and two other

Hispanic men. (19 RT 1876-1877.) Pequeno, meanwhile, testified that Barron and Thomas left in the Sprint, and could not recall ever seeing Dolphin. (22 RT 2250.)

Mr. Williams, Linton, and Cyprian then drove to Mr. Williams' house where they dropped off the guns and the fake money. (18 RT 1618, 1769.) Linton then drove Cyprian in the Blazer to Ernie Pierre's house. Mr. Williams followed separately in his Mercedes. (17 RT 1566, 18 RT 1618, 1769.) The three went to the upstairs apartment in the house where they drank alcohol and smoked marijuana. (17 RT 1566-1567.) Dino Lee subsequently joined the group, learned of the planned drug deal, chose to remain at Ernie's house, and smoked marijuana with his friends. (26 RT 2749-2750, 2754, 2784.)

While at Ernie's house, Mr. Williams received a page and made a call. Mr. Williams then told Linton that Barron wanted to come to the house to transact the drug deal. (17 RT 1568-1569.) Fifteen to thirty minutes later, Barron and Thomas arrived in a blue Chevy Sprint and parked in front of the house. (17 RT 1570-1572; 18 RT 1618.) Mr. Williams went outside to speak with them and then returned to the apartment to get Linton. (18 RT 1619.) According to Linton, he and Mr. Williams then left separately in their respective vehicles to retrieve guns and the fake money from Mr. Williams' house and returned in Linton's

Blazer to Ernie's house twenty minutes later. (17 RT 1570; 18 RT 1620.) By contrast, Lee testified that Linton remained behind with him at Ernie's apartment while Mr. Williams returned to his home by himself. (26 RT 2755-2756.)

Barron and Thomas, meanwhile, waited in their car front of Ernie's apartment. (17 RT 1573-1575.) According to Linton, when he and Mr. Williams returned, the two of them and Barron and Thomas entered the upstairs "bachelors" apartment together. (17 RT 1573-1576.)

Linton entered first and then heard someone yell, "Get down." (17 RT 1576.) According to Cyprian, Mr. Williams said, "Don't nobody move," and pulled a revolver. Mr. Williams was holding a gun when he entered the apartment and was also carrying a paper bag with the fake money. (RT 2759.) Linton brandished an automatic pistol, pointed it at Barron and Thomas and ordered them to lie down on the living room floor. (26 RT 2757.) Barron and Thomas got down on the floor on their stomachs. Mr. Williams pulled shoe laces from his coat pocket and told Linton to tie-up Barron and Thomas. (17 RT 1576-1578.) Lee, Linton and Williams tied up the hands and feet of Barron and Thomas. (17 RT 1577-78.) Linton did so while armed with a .380 semi-automatic pistol (18 RT 1771-1773); Mr. Williams held the .38 revolver (17 RT 1577-1578.).

Linton stated that Lee blindfolded Barron and Thomas. (18 RT 1627-1628.) Lee, however, denied blindfolding or gagging Barron or Thomas and he denied touching any of the guns while in the apartment. (26 RT 2762.) Lee, instead, claimed that Mr. Williams gagged Barron and that he did not pay attention to who gagged and blindfolded Thomas. Cyprian, for his part, was not sure who blindfolded Thomas. (18 RT 1775-1776.). Lee stated he helped hold Thomas while Linton bound him. (26 RT 2767.)

According to Cyprian, after Barron and Thomas were bound, Lee went downstairs to retrieve the .30 caliber carbine rifle. (18 RT 1773.) Lee, by contrast, testified that Linton retrieved the rifle from downstairs. (26 RT 2768, 2791.) Cyprian testified that he took Barron and Thomas's wallets from their pockets. (18 RT 1773, 1775.) Lee testified that both Cyprian and Mr. Williams removed the victims' wallets, and that he (Lee) handled the wallets but did not look inside them or remove anything from them. (26 RT 2795-96.) Nor did Lee see anyone else remove money from the wallets. (26 RT 2795, 2797.)

Cyprian then left to move Barron's and Thomas' Willie blue Sprint from in front of the house, per Mr. Williams' instruction. (17 RT 1582; 18 RT 1633.) Cyprian parked the car around the block and returned to the house. (18 RT 1777.)

Inside the apartment, Mr. Williams sat Barron against a wall and he wanted Barron to make a phone call (17 RT 1579-80.) Williams dialed a number for Barron and put the phone to Barron's ear. Barron told Williams that the phone was not ringing. Mr. Williams began to redial the phone, holding the gun and the telephone in the same hand. While Mr. Williams was dialing, the gun in his hand accidentally discharged, shooting Barron in the chest. (17 RT 1581.) Mr. Williams said, "Ah, shit," and then walked over to Thomas and shot him twice in the head. (17 RT 1581.) Mr. Williams then walked back to Barron and shot him once in the head. (17 RT 1581-1582.) Initially on cross-examination Lee testified that Mr. Williams shot Barron twice before before shooting Thomas (26 RT 2781-2782), but later changed his testimony to cohere with Linton's testimony. (26 RT 2792.)

After the shooting, Mr. Williams, Linton, Lee, went outside to Ernie's backyard. Dauras Cyprian returned from re-parking the victims' car around the corner, and re-joined the other three. Mr. Williams told Cyprian that he had shot Thomas and Barron. (19 RT 1786.) According to Cyprian, Mr. Williams had bloody hands. (19 RT 1786.) Mr. Williams told Cyprian that the first shot was an accident, but that he then shot Barron and Thomas.

According to Linton and Cyprian, Mr. Williams decided that Barron and Thomas should be placed in Linton's truck and told Linton to park the Blazer in garage. (17 RT 1583; 19 RT 1786.) Cyprian and Lee then opened the garage door for Linton, who drove parked the Blazer inside. (19 RT 1787; 26 RT 2762-2763, 2772.)

According to Cyprian, Mr. Williams and Linton carried the bodies to the truck and Lee helped put the bodies in the truck. (19 RT 1787.) According to Linton, all four men carried the bodies down the stairs and into the truck. (17 RT 1584-1585; 18 RT 1634-1636.) Lee, however, denied helping remove the bodies from the apartment. (26 RT 2762-2763.)

Cyprian then retrieved an orange plastic bucket from Ernie's yard and went to his mother's house to fill it with water to clean blood from the apartment. (19RT 1788.) While at her house, Cyprian told Marcella Pierre that there was trouble and that he would talk to her later. (19 RT 1788.)

According to Linton, while the four men were cleaning up the apartment, Lee hollered "one time," a code indicating that the police were nearby. All four fled the crime scene. (17 RT 1585; 18 RT 1637.) Lee denied alerting them about the police and claimed Cyprian said "The police are coming." (26 RT 2774.) Approximately twenty to thirty minutes elapsed between the time of the shooting and the arrival of the police. (18 RT 1637.)

Eyewitness Testimony of Pierre and Sazo

The State put on two neighbors who saw and heard portions of what transpired at Ernie Pierre's house on January 2, 1990: Marcella Pierre and Irma Sazo.

Marcella Pierre is the mother of co-defendant Dauras Cyprian and of Ernie Pierre, her eldest son, at whose house the murders occurred. Ms. Pierre lived across the street from the crime scene and behind the house of Irma Sazo. (16 RT 1337.) She also knew Mr. Williams well, as he went to her house almost daily in the months preceding the crime. (16 RT 1335; 17 RT 1501.) Ms. Pierre was handcuffed and taken into custody the night of the crime because for refusing police orders to stay in her house during the investigation. (16 RT 1353.) When interviewed by the police, Ms. Pierre admittedly withheld information from them – including the fact that Cyprian had been across the street – in an attempt to protect her sons. (16 RT 1387-1389, 1359-60, 1392.) She subsequently attended all of Patrick Linton's court proceedings, including both of his trials, where she heard Dino Lee testify. (17 RT 1386-87, 1393.) She also attended all of Mr. Williams' court proceedings from the time Cyprian pled guilty. LeMieux informed the court that he believed that Mrs. Pierre had a recent felony conviction. The prosecutor stated that he would run her rap sheet before

she was recalled as a witness. (17 RT 1465-66.) The record does not indicate whether a rap sheet was run or provided to the defense.

Marcella Pierre testified that visibility was poor near the crime scene on the night of January 2, 1990, as there were no operating lights on the side of the street near Ernie's house. (16 RT 1373, 1354, 1376.)[6] She also testified that it was easy to mistake Linton, Lee, Cyprian and Mr. Williams for one another: The four men dressed alike and wore their hair in jeri-curls. In Ms. Pierre's words, "If you don't know them you might mix them up." (17 RT 1441.) (See also 17 RT 1523.)[7]

Ms. Pierre first came to know Mr. Williams through Cyprian, about five months before the crime. (16 RT 1334.) Mr. Williams, along with Linton, Lee, and others, visited with Cyprian on almost a daily basis. (16 RT 1335; 17 RT 1501.) On the night of the murders, Linton's truck was parked in front of Ernie's apartment. (16 RT 1375.)

During the day of January 2, Mrs. Pierre had seen Mr. Williams, Linton, Lee and Cyprian at Ernie's house. That night, she was at home with a friend, although she left home for a while to go to the liquor store. (16 RT 1393-94.) About ten to fifteen minutes before she heard shots fired from

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[6] Irma Sazo and Detective Herrera testified similarly. (21 RT 2174, 2176-2177, 2184, 25 RT 2602-2603.)

[7] Cynthia Cyprian, Dauras' wife, testified similarly. (17 RT 1440, 1522, 16 RT 1365-66, 18 RT 1773.)

the apartment, she saw Mr. Williams and Linton and two people, whom she did not recognize, at the gate on the side of Ernie's house. (16 RT at 1341, 1397-98.)

Mrs. Pierre then heard four noises that sounded like shots. (16 RT 1343.) She looked out her window but could not see anything. (16 RT 1343.) About five or ten minutes later, she saw Cyprian, Lee, Linton, and Mr. Williams arguing outside. (16 RT 1344-45.) She heard her son ask Mr. Williams, "What did you do that for, man?" (16 RT 1345.) Dauras then walked across the street to get a bucket of water. (16 RT 1346.) Shortly after Dauras returned to the apartment with the bucket of water, the police arrived. (16 RT 1350.)

It was at Mr. Williams' trial that Ms. Pierre stated for the first time that Mr. Williams was present at Ernie's house both before and after she heard the shots. (16 RT 1390-91.)

Irma Sazo lived next door to the crime scene on Spring Street. In 1990 she could not speak English (22 RT 2214-15) and was interviewed in Spanish by the police on January 3, 1990. (24 RT 2447.) Sazo testified at both of Patrick Linton's trials and at Mr. Williams' preliminary hearing. (22 RT 2220-21.) At Mr. Williams' trial she testified through a Spanish language interpreter. (21 RT 2141.) It was Sazo who telephoned the police

on the night of January 2, after hearing what she believed to be four shots at roughly 10 p.m. that night. (22 RT 2205-2206.)

Like Marcella Pierre, Irma Sazo testified that for up to six months before the crime Mr. Williams visited Ernie Pierre's house almost daily and hung out there with Cyprian, often drinking, smoking marijuana, and playing loud music. (21 RT 2142-47, 2163; 22 RT 2200; 24 RT 2448.) She would ask them to stop the music. She also saw many other black men come and go, and many cars park in front of Ernie's house late at night. (22 RT 2214.)

On January 2, 1990, at about 7 p.m., Sazo saw a new black BMW parked next door to her house. (21 RT 2148.) At about 9:00 p.m., Sazo saw Linton's Blazer parked in front of Ernie's house, but the BMW was no longer there. (21 RT 2190.) At about 10 p.m. that evening, Sazo heard a rapid succession of gun shots coming from Ernie's house. (21 RT 2149.) She looked out her kitchen window and noticed that the black BMW was no longer there. (21 RT 2150.) In its place was parked a blue Chevrolet Blazer which she recognized to be Linton's. (21 RT 2151.) She then saw four individuals in Ernie's yard, outside his house, whom she later identified as Mr. Williams, Linton, Lee and Cyprian from mug shots provided her by the police. (21 RT 2152, 2158, 2165.) Sazo testified that Mr. Williams approached Sazo's window and when he saw her inside, he

remarked, "Oh, oh, the lady is in the window." (21 RT 2155.) In her statement to police on January 3, 1990, however, Sazo did not mention Mr. Williams saying anything. (24 RT 2459.) She then went to her dining room window. Sazo saw Cyprian fiddle with the lock on Ernie's garage. (21 RT 2160.)

Sazo testified that after she heard the shots, she saw Linton, Lee, and Mr. Williams leave the crime scene in the Blazer. (21 RT 2160, 2192, 2193-94; 22 RT 2207.) Officer Balderas, who interviewed Ms. Sazo on January 3, 1990, testified, however, that Sazo told him that she did not see Linton, Lee and Cyprian leave the scene, but only noticed that the three men were gone when she returned to her window after calling the police. (24 RT 2449-50.) She then saw Cyprian walk across the street to his mother's house, returning a few minutes later carrying an orange bucket. (21 RT 2160, 2195-96; 22 RT 2207-2208.) After Cyprian went inside Ernie's house, Sazo phoned the police, who arrived about five minutes later. (21 RT 2161, 2196; 22 RT 2209.)

In her statements and testimony, Sazo was adamant that Mr. Williams drove a black BMW at the time of the crime. (21 RT 2143, 2148; 22 RT 2201.) She was also adamant that the person with the black BMW wore a "thick afro." (24 RT 2452, 2454.) In addition, she told the police

that the man who stood in front of her window wore his hair in a "thick afro." (24 RT 2452-54.)

Defense Counsel's Refusal to Comply with Court Order

On September 19, 1991, with the State's case-in-chief well-underway, the court asked about the scheduling of witnesses for both parties. The prosecutor told the court that he had received absolutely no information from LeMieux as to what witnesses LeMieux intended to call for the defense and had received no investigation reports. The court was shocked by LeMieux's failure to comply with its previous order. LeMieux stated that he planned to call Mr. Williams, Tony Moreno, and Monique Williams. The prosecutor, however, insisted that LeMieux provide this information in writing and also provide him with copies of witness statements and investigation reports. LeMieux stated that there was nothing in writing to give the prosecutor. LeMieux also indicated that he would attempt to serve Detective Moreno with a subpoena that day or the following day. (19 RT 1900-1903.)

Aftermath of the Shooting

Linton, Lee, Cyprian and Mr. Williams fled the crime scene as the police arrived. (18 RT 1637, 1679; 26 RT 2777.) Linton reported to the police that his Chevy Blazer had been stolen. (18 RT 1638, 1642-1643, 1689.) Cyprian joined Mr. Williams at Mr. Williams' house where the

disposed of their clothes and ammunition and then drove to a motel in Long Beach. (19 RT 1793-1794, 1797.) The following day, January 3, 1991, Mr. Williams sold his Mercedes. (19 RT 1798, 1861-1862.) He and Cyprian then drove with Monique Williams to a Travelodge in Los Angeles where Mr. Williams made plane reservations to New York. (19 RT 1799, 1804, 1863, 1865.) Cyprian recalled the Travelodge because he had previously stayed there with Mr. Williams on Christmas day, 1989. (18 RT 1761.) Monique then drove Mr. Williams and Cyprian to the airport and the two men flew to New York. (19 RT 1805.)

In New York, they registered at the Stanford Hotel as Michael and Mark Cole. (19 RT 1807.) After about four days in New York, the two men went to Las Vegas, Mr. Williams by plane, Cyprian by Greyhound. (19 RT 1810.) A few days later Cynthia Cyprian and Monique Williams joined their partners in Las Vegas. (19 RT 1811, 17 RT 1507, 1537.) The two couples returned separately to Los Angeles in mid-January. (19 RT 1812-1814.)

The Alibi Witnesses

In mid-January, 1990, Raymond Valdez met Mr. Williams in the poolroom at the apartment complex at which Valdez lived with his girlfriend, Kathleen Matuzak, and George lived with Monique. (20 RT 1942, 1944.) Valdez and Mr. Williams played pool together frequently. (20

RT 1907.) They also smoked marijuana together which Valdez purchased from Mr. Williams in the poolroom. (20 RT 1912.) Mr. Williams told Valdez that he a member of a gang called the Rolling Sixties. (20 RT 1914.)

Valdez and Matuzak testified that they initially knew Mr. Williams as "Patrick" and, later, as "George." (20 RT 1907-09, 1944.) Matuzak testified that George and Monique both told her that Mr. Williams was in trouble for something he did not do and that he needed her help. (20 RT 1953.) Valdez testified that Mr. Williams asked him, Matuzak, and two downstairs neighbors to provide an alibi for him in court for his whereabouts on January 2, 1990. (20 RT 1912-14.) Mr. Williams offered Valdez $1,500.00 and marijuana for his testimony. (20 RT 1912-14.) Valdez initially agreed to do so because he believed Mr. Williams when he said he was being framed for a crime "by a friend." (20 RT 1913, 1917.)

After Mr. Williams was arrested, Monique dropped by Valdez's apartment to talk about Mr. Williams' case, to make sure Valdez would testify for Mr. Williams, and "to make sure we got our stories right." (20 RT 1915.) Mr. Williams called Valdez from jail on several occasions and told him that he was being blamed for a killing committed by a friend, that he was scared, and that he needed help. (20 RT 1915, 1931.)

One night at about 10:30 p.m. three Black males came to Valdez's apartment and asked him if he was going to testify for Mr. Williams. (20 RT 1917.) Valdez told them that he would. According to Matuzak, she had understood from Valdez that the men had asked him *not* to testify. (20 RT 1959, 1961.)

Valdez was evicted from his apartment for failure to pay rent and subsequently moved to another apartment. (20 RT 1922.) Monique visited him at this new apartment, as well, to inquire whether he was still planning to testify for Mr. Williams. (20 RT 1919.)

Monique Williams

Monique Williams was George Williams' girlfriend at the time of the crime and married Mr. Williams after his arrest. (25 RT 2695-96.) She worked as a hairdresser. (25 RT 2703.) From roughly June 1989 through early January 1990, Monique lived with George down the street from Mr. Williams' parents in a converted garage owned and paid for by Mr. Williams' family. (20 RT 1969; 25 RT 2681.)

Monique Williams took the stand on three separate occasions as a witness for the State and testified as one of the four witnesses for the defense. She maintained that she and George were largely inseparable from Christmas Eve, 1989, through the end of January. (21 RT 2067-68, 2088-

90, 2096, 2100, 2105, 25 RT 2691-94, 2696, 20 RT 2012, 2026-2028.)[8] She testified that she was unaware of Mr. Williams owning, possessing, loaning or firing any guns while she lived with him. (20 RT 2006-08, 2011; 21 RT 2064-65, 2094, 2098; 26 RT 2834.) She denied knowing Dauras Cyprian (20 RT 2021; 21 RT 2108; 25 RT 2699) or Patrick Linton (21 RT 2139; 25 RT 2699), but stated that on the evening of January 2, 1990, Linton knocked on their door and spoke with George outside for a few minutes. (20 RT 2028-2029; 21 RT 2104.) It was only after George's arrest that George told Monique that Linton had stopped by the house to borrow guns. (21 RT 2104-05.)

On the afternoon of January 3rd, Cyprian appeared at her house and George asked her to drive Cyprian to the Travelodge and then to LAX airport. (20 RT 1967; 21 RT 2106.) George accompanied Monique and Cyprian to the hotel and airport. Monique testified that George did not leave on a plane with Cyprian, but rather stayed with Monique in Los Angeles. (21 RT 2109, 2113-14; 25 RT 2679-80; 20 RT 1967.)

Monique testified that on January 9 she and George traveled together by Greyhound bus from Los Angeles to Las Vegas and remained there through January 15. (20 RT 1966; 21 RT 2119-20.) They took a bus to Las

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[8] At his motion for new trial proceeding, Mr. Williams testified that during this time he sneaked away from Monique to see other women and that, consistent with the testimony of Dauras Cyprian, he did go to the Travelodge on Christmas Day, 1989. (54 RT 4053.)

Vegas (26 RT 2837), traveled under Monique's maiden name, Perry (21 RT 2120) and while in Las Vegas ran into Cyprian and Cynthia. (21 RT 2122.) Upon returning from Las Vegas, Monique and George moved to a larger apartment in Wilmington, filling out a rental application on January 19, 1990 and moving on January 20. (20 RT 2009-10; 21 RT 2125.) Monique wanted to move because she was pregnant and felt that the single-room converted garage that she and George lived in was too small. (21 RT 2114; 25 RT 2687.)

When Monique first met George he drove a black BMW. (20 RT 2005, 2017.) He sold the BMW in late 1989; a transfer of vehicle document for the BMW was filed with the DMV and dated December 21, 1989. (26 RT 2826.) Monique stated that at the time of the crime, George did not own a car, but used Monique's white Hyundai and often borrowed one of his mother's several cars, a white Mercedes. (20 RT 2018-19; 25 RT 2701, 2705-06; 26 RT 2862.) She claimed that George never had a 190 Mercedes. (20 RT 2042; 26 RT 2828.)

With respect to communications devices, Monique testified that George did not own or carry a portable cellular phone (20 RT 1968, 2024-2025; 28 RT 2831); that his BMW had a car phone but that she never saw him use it (20 RT 2024; 26 RT 2833); and that George had owned a beeper as long as she has known him. (20 RT 1968, 2024; 26 RT 2829.)

Monique testified that Mr. Williams wore his hair in a jeri-curl and did not change his hairstyle from December 1989 through his arrest in February 1990. (25 RT 2686.) He also had several tattoos including Monique's name, his son's name, "Nuttie," and "6 X 10," "60" and "sixties." (20 RT 2004-05; 26 RT 2849.) Monique claimed to not know what 6 X 10 signified and stated she was not aware that George was a member of the Rolling 60's gang. (20 RT 2001, 2006; 26 RT 2841.) She did not associate with George's friends or acquaintances. Rather, her relationship with him was a private affair: They did not attend parties or go on dates with other couples. Most of the activities they engaged in during their courtship were family-oriented. (25 RT 2702.)

After his arrest, George called Monique several times from jail. (21 RT 2132-38; 25 RT 2676-77.) Monique testified that George told her that he was being framed by three persons, including Patrick Linton. (20 RT 2035.) She admitted to speaking with Raymond Valdez and Kathleen Matuzak about testifying falsely on Mr. Williams' behalf, on or around February 8 through 12, 1990. (20 RT 1970, 2029-2031, 2036.) Ms. Williams, however, denied, *asking* them to testify falsely on Mr. Williams' behalf. (20 RT 2039; 21 RT 2129-30; 26 RT 2851.) She also denied going to Delcomber Communications (26 RT 2839), contacting Deitrick Pack ("Peaches") or telling Pack to lose the paperwork on a pager. (20 RT 2036-

37; 26 RT 2852.) She stated, however, that Peaches had reason to be angry with her, as Monique had previously stolen a boyfriend from her. (26 RT 2852-53.)

Physical and Forensic Evidence

The Pager From the Crime Scene

The State argued that the Delcomber pager found at the crime scene belonged to Mr. Williams. To this end, the State called Deitrich Pack, an employee of Delcomber Communications. (20 RT 1978.) Pack attended three years of high school with Mr. Williams' wife, Monique and used to date a cousin of Patrick Linton. (20 RT 1982-83, 1990.) Pack testified that Mr. Williams and Patrick Linton came to the Delcomber store in 1989. (20 RT 1979, 1987.) She identified a Delcomber's contract for the purchase of a Panasonic pager filled out for "Patrick Cole" on October 30, 1989. (20 RT 1981, 1987.) Pack further testified that she was contacted by Monique who asked her whether she could destroy a Delcomber file on "Patrick Cole" in return for $100 if Monique needed her to do so. (20 RT 1983-84, 1994.) Pack believed she could not do so and did not have any further contact with Monique or Mr. Williams. (20 RT 1984.)

Phone Bills

To further link the pager purchased from Delcombers to Mr. Williams, the State traced the origin of phone calls placed to the pager to

the home of Monique's father, Robert Perry, to the pager on December 9, 16, 26, 28, 29, 1989, and January 1, 2, and 3, 1990 (23 RT 2431-33).

The State also relied upon phone bills to connect Mr. Williams to the victims, using phone bills to show that on January 2, 1990, three calls were placed from Mr. Williams' residence to Barron's and Thomas' workplace; two calls were placed in the morning, one in the afternoon (23 RT 2438-39). Phone bills also showed that on the afternoon of January 2, 1990, one call was placed from the victims' workplace to Mr. Williams' residence (23 RT 2439).

The State further used Mr. Williams' home phone bill – which showed that no calls were made from his home between January 2 and January 16 (23 RT 2440) – as evidence in support of the State's argument that Mr. Williams fled the State after the crime.

Hotel Evidence

Jagisah Patel managed the Travelodge Hotel on Imperial Highway in Inglewood, California. (23 RT 2344-45.) Mr. Patel identified hotel registration forms for two dates: December 25, 1989, for a party of two in a room with one bed who stayed one night, and January 3, 1990. (23 RT 2347-2350). Bruce Greenwood, a handwriting examiner for the L.A.P.D., reviewed handwriting exemplars provided by Mr. Williams and compared those exemplars to various documents in the case. Greenwood testified that

Mr. Williams' signature appeared on the Travelodge registration forms for both December 25, 1989, and January 3, 1990. (23 RT 2326-2327, 2335-2336.) Greenwood further testified that he reviewed other signatures on other documents, including a Delcombers Communication documents dated October 30, 1989, signed by a "Patrick Cole", and a Stanford Hotel registration form from New York with the printed and signed name "Mark Cole." Greenwood testified that he could not identify either document as having been signed by Mr. Williams. (23 RT 2330-32.)

Forensic Evidence

The State's final twelve witnesses were law enforcement officers who responded to the crime scene, police detectives who investigated the crime, and crime scene investigators and forensic experts who analyzed physical evidence and interviewed witnesses. Defense counsel LeMieux did not independently investigate any of the physical or forensic evidence in the case and did not retain any experts to assist or advise him with respect to this evidence or the anticipated testimony of the state's experts. (CT 568, 482; 52 RT 3704.)

Homicide Detective Joe Herrera identified photographs of the crime scene, including the victims' bodies whose limbs were bound with shoelaces (22 RT 2309-13), two pairs of shoes found at the crime scene with shoelaces intact (25 RT 2657-2659), a telephone hand receiver, .30

caliber carbine rifle, .38 Smith & Wesson revolver, several pieces of paper with writing on them, and a plastic shopping bag with brown paper sacks wrapped and tapped closed were gathered from the kitchenette area. (24 RT 2537.)

Herrera observed bloodstains on the barrel and frame of the Smith & Wesson revolver. (24 RT 2539.) He did not, however, preserve the bloodstains from the revolver or mention the stains in his official police reports, and there is no indication that the blood on the guns was ever tested. (25 RT 2614-2616.) Wallets belonging to Thomas and Barron were found in a cabinet above the kitchen sink, but the wallets and their contents were not submitted for fingerprint analysis. (24 RT 2556-2557; 25 RT 2617-18.) A Delacomber pager was found in the apartment near the phone base. (24 RT 2543-2544.)

Howard Sanshuck, a forensic apprentice print specialist, obtained 82 cards with fingerprints from the crime scene. (23 RT 2364.) Of the 82 cards, 35 contained prints having sufficient characteristics to be identified as belonging to someone, but that could not be matched with anyone. (23 RT 2378.) The remaining cards contained prints of Patrick Linton, Dauras Cyprian, Dino Lee, Ernie Pierre, and Mr. Williams. (23 RT 2375; 2378-79.) Mr. Williams' prints were *not* found on the receiver of the phone in

the apartment. (23 RT 2384.) His fingerprint was found on the driver's side rear view mirror of Linton's Blazer. (23 RT 2371, 2385, 2391.)

Dr. Irwin L. Golden, Deputy Medical Examiner for the Los Angeles Coroner's Office testified that Thomas died as a result of two gunshot wounds to the right side of his head, above the ear. (23 RT 2400.) Based on the presence of soot or powder burns, Dr. Golden characterized the wounds as contact wounds, meaning that the muzzle of the gun was pressed against the skin when fired. (23 RT 2401-2402.) With respect to Barron, Dr. Golden again found two contact wounds: one wound behind the right ear, and a second wound in the chest. (23 RT 2407-2408, 2414-15.)

David Butlar, a firearms examiner from the LAPD was unable to make an exact match between test bullets fired from the .38 caliber Smith & Wesson revolver found at the crime scene and the bullets retrieved from the victims by the coroner. (24 RT 2491, 2497-98, 2504, 2511.) Butlar testified that the coroner's bullets were fired from a .38 special or .357 magnum revolver, had markings indicative of a Smith & Wesson weapon, and could not have been fired from the other weapons found at the crime scene. (24 RT 2493, 2495-2496, 2505-06, 2521-2522, 2529.)

Forensic specialists from the SID examined the weapons, ammunition and cell phone found at the crime scene and could not find Mr. Williams' fingerprints on any of these items. (24 RT 2468-2470; 2472,

2477-2479.) No witness for either party testified to seeing or handling the cocaine that the victims purportedly planned to sell the night of the crime. No cocaine was recovered at or near the scene of the crime. And the State did not introduce any cocaine into evidence during the trial. (1 RT - 54 RT; 16 RT 1310.)

Conclusion of the People's Case

On October 1, 1991, the State rested its guilt phase case after presenting 25 witnesses over ten days. After resting his case, the prosecutor reported that he still had not received anything from LeMieux in the way of discovery (25 RT 2577.) LeMieux responded "I have no reports . . . whatsoever. (25 RT 2578.) The following day the prosecutor again reported that he had received no discovery, except for the names of some witnesses for the defense. LeMieux responded that he had no statements and had no contact with the "individual I privately hired as an investigator since he appeared in court the day before yesterday." (26 RT 2720.)

The Defense Case

As noted above, LeMieux had told the jury that Tony Moreno was the most important witness in the defense case. Having failed to interview, subpoena or even contact Moreno, counsel made an astonishing decision. Rather than present Moreno, he called as his lead-off witness Dino Lee, one of Mr. Williams' original three co-defendants. As also noted above, Mr.

Lee had received a deal from the state in exchange for his testimony against co-defendant Linton.

Lee's testimony was stark. He told the jury that he was standing about three feet from Barron when the victims were shot and that Mr. Williams shot both victims. (26 RT 2723-25, 2741.) As attorney Doug Otto would later say, "it seems to me that one of the things that you learn if you talk to Dino Lee is that he is going to bury your client." (54 RT 4126.)

Although the other three witnesses which LeMieux called were not equally devastating to the defense case, none were of genuine assistance to the defense. Two of the four witnesses – Monique Williams and Detective Joe Herrera – had already testified for the prosecution. Monique's testimony largely covered ground already covered by her testimony as a prosecution witness, summarized above. Detective Joe Herrera, who took the stand five times to testify for the prosecution, testified that Mr. Williams surrendered himself to the police on February 8, 1990. (26 RT 2813.) A third witness, Ingrid Tubbs, was someone LeMieux never planned to call. In fact, five days into the guilt trial, LeMieux told the prosecutor and court that Mrs. Tubbs was not on his witness list. (20 RT 1974-75.) Tubbs did not testify about the crime or an alibi for Mr. Williams but instead testified only as to her and Monique Williams' whereabouts during the first week of

Mr. Williams' trial. It is not clear how her testimony was relevant to the defense case. (26 RT 2864-68.)

Jury Guilt Phase Deliberations and Verdict

During its guilt-phase deliberations, the jury requested the court to read back three separate pieces of testimony given by two of the State's witnesses, Monique Williams and Dauras Cyprian. (See CT 300, 29 RT 3116 (jury requests read back of testimony of Monique Williams and Dauras Cyprian); CT 301, 29 RT 3118 (jury requests further read back of testimony regarding Defendant's loaning of murder weapons to co-defendant Patrick Linton before the crime).)

The jury's deliberations lasted more than 6 and one-half hours and spanned more than three days of court time (not including the weekend) before it returned a verdict of guilty on all counts.

**Motion to Proceed Pro Per**

After the jury rendered its guilty verdicts LeMieux informed the court that Mr. Williams wanted to relieve him as counsel and proceed pro per. At a hearing to ascertain the cause of Mr. Williams' dissatisfaction and determine whether he was insistent on firing LeMieux, Mr. Williams explained that a major reason that he sought to dismiss his trial counsel was that LeMieux failed to investigate or subpoena Los Angeles Police Department Detective Anthony Moreno, whom Williams believed could

provide a critical alibi, even though LeMieux promised Mr. Williams' jury during his opening statement that Detective Moreno would be an important defense witness. (31 RT 3141.)

The trial court responded to Mr. Williams' concerns by informing him that Mr. LeMieux's representation at guilt phase had been "masterful," "amazing," "great," and "outstanding"and by assuring Mr. Williams that Mr. LeMieux was "prepared" to try the penalty phase (31 RT 3146-47) and that he would "properly represent[]" him (31 RT 3153). Mr. Williams then withdrew his motion to dismiss his counsel and proceed pro per. (31 RT 3153.)

**Penalty Phase Trial**

As the record reflects, LeMieux, who had never before participated in a penalty phase of a capital case, did virtually nothing to prepare for the penalty phase portion of the case. He failed to familiarize himself with how to try a capital penalty phase; to seek resources from the court to investigate penalty phase issues; to retain, through court or private funding, any expert assistance for the collection and presentation of penalty phase evidence (CT 571); to independently investigate the State's aggravating evidence; or to investigate mitigating evidence on behalf of his own client. (CT 455.)

Indeed, on the eve of the penalty trial, LeMieux had failed to conduct mitigation-focused interviews with potential witnesses to elicit information

to be presented at the penalty trial. He had not received – and failed to seek – formal notice of the aggravating factors that the State would present in support of its request for the death penalty. He had not reviewed, much less investigated the aggravating evidence that the State had provided him. And he erroneously believed that there would be a 30-day break between the guilt and penalty phases of trial. (CT 571.) Notwithstanding LeMieux's unpreparedness to go forward with the penalty trial, he failed to seek a continuance of the penalty phase proceedings. (CT 571.)

**State's Case in Aggravation**

The State's case in aggravation centered on four offenses that Mr. Williams was "involved in" (32 RT 3175): three assaults and a possession of a concealable firearm. Two of the alleged assaults and the firearm offense had not been previously adjudicated. The State called eight witnesses as part of its penalty case.

The State began its penalty case with the assault of Kenneth Moore. Latrece Abraham and Kermit Richmond testified that on May 28, 1983, a group of boys from the Five Nine Hoover Crips attacked a group of bicycle riders. The Five Nines separated Kenneth Moore from the group of riders. Ms. Abraham testified that all of the members of the Five Nines hit and kicked Moore and one member of the gang, Eddie Jackson, shot and killed

Moore. (32 RT 3184.) Mr. Richmond was unable to identify Mr. Williams as one of the Five Nines.

Not long after the assault on Moore, Ms. Abraham spoke to the police about the assault. (33 RT 3298-3299.) Abraham told the officers that "I did see [Williams] standing over there when they were hitting the boy, but I don't remember if [Williams] was kicking the boy or not." (32 RT 3274-3275.) Eight years later, at Mr. Williams' trial, however, Abraham stated that she saw Mr. Williams hit and kick the victim. (32 RT 3187-3194.) After Ms. Abraham's testimony the state stipulated to the fact that in her more contemporaneous statement to police, she did not recall whether Mr. Williams was even involved in the assault. (33 RT 3298-99.) The State further stipulated that with respect to the Moore incident, Mr. Williams was charged and convicted of the misdemeanor offense of assault with a deadly weapon, or fists and feet. Neither the charge nor the conviction involved possession or use of a firearm.

In an attempt to connect Kenneth Moore's assault with gang activity and to Mr. Williams, the prosecution presented testimony from a purported gang expert, LAPD Detective Roger Magnuson. (32 RT 3212-3233.) Magnuson had been periodically assigned to the South Bureau CRASH Division, the gang unit in South Central, since 1982. Magnuson stated that the Hoover Crips gang was comprised of several smaller gangs, including

the Five Nines, whose territory encompassed the area where Moore was attacked. (32 RT 3234-3244.) Magnuson claimed that in May 1983 Mr. Williams belonged to the Five Nine Hoover Crips, and was a member of the "Old Guard." (32 RT 3238-3239.) Magnuson also testified that in July 1985, Mr. Williams was a member of a different gang, the Rolling Sixties. (32 RT 3243.)

Following the Kenneth Moore assault, the State presented testimony regarding three unadjudicated incidents.

1. Shots Fired at Officer Sims

On December 3, 1983, Carl Allen Sims was a LAPD Rookie on duty during his probationary year. He was completing the arrest of a burglary suspect and was standing outside his squad car on the passenger side at 102nd Street when gunfire erupted from the west at his head. A nearby tow truck driver warned him to look out. Sims testified that he observed a black male standing behind a palm tree fifty to seventy-five feet away facing in the direction from which shots were fired. When Sims aimed his shotgun at the man, the suspect fled. Sims pursued the suspect to a group of ten to eleven black males who were climbing into a flatbed. When Sims approached the truck, the man whom he had chased appeared to reach for a gun. Sims ordered everyone to raise their hands and they were taken into custody. (33 RT 3278-3285.) At Mr. Williams' trial, Sims identified

Appellant as the man behind the palm tree. (33 RT 3285-3286.) According to Sims, a search of the truck revealed a fully loaded .38 Smith & Wesson revolver (33 RT 3286, 3292) and ammunition in Mr. Williams' pocket. (33 RT 3286.)

Sims's contemporaneous police report told a far different story. In his police report – prepared within days of the actual incident – Sims said he did not know from which direction the shots were fired. (33 RT 3289-90.) In his police report, Sims did not mention bullets flying by his head. (33 RT 3291.) He also did not mention either the palm tree or the warning from the tow truck driver. (33 RT 3290-92.)

The State stipulated that no criminal charges were ever filed against Mr. Williams in connection with the December 3, 1983, incident.

2. The Thomas-Williams Assault

Finally, the prosecutor alleged that in deciding whether Mr. Williams would die, the jury could rely on a July 1985 assault with a deadly weapon and robbery of Mona Thomas and David Williams.

Mona Thomas testified that on the evening of July 7, 1985, a group of young men surrounded the car in which she and her father were riding. Someone threw a brick at the window and the gang pulled her and her father from the car and beat them. (32 RT 3250.) Thomas recalled speaking with an officer at the scene and pointing to an assailant. At Mr.

Williams' trial, however, Ms. Thomas was unable to identify Mr. Williams as the person she indicated to the police on the day of the attack. (32 RT 3250-3262.) When shown an arrest photograph of Mr. Williams, Thomas was unable to state that it was he who attacked her. (32 RT 3250-3262.)

Detective Herrera testified that Thomas, during an interview on October 10, 1991, with the prosecutor in Mr. Williams case, identified Mr. Williams through that photograph. (33 RT 3276-3277.) Officer Michael Daly testified that he detained and arrested Mr. Williams in July 1985 based on Mona Thomas' identification of Mr. Williams. (33 RT 3263-3266.) Daly noted that Mr. Williams was not in possession of a firearm at the time (3 3RT 3267), and that no wallet or purse was ever recovered. (33 RT 3269.)

3. Possession of a Concealed Weapon

Detective Michael Bowers testified that he stopped Appellant in a 1977 Firebird on December 7, 1985. At the time, Bowers was a senior lead officer in the Wilshire Division. Bowers found a Smith & Wesson .38 revolver with five live rounds inside the car, between the console and the driver's seat. (32 RT 3207-3210.) He arrested Appellant for possession of a concealed weapon. (32 RT 3210-3211.)

The State stipulated that no charges were ever filed with respect to Mr. Williams' arrest for possession of a concealed weapon.

**The Defense's Case in Mitigation**

LeMieux's penalty phase defense presentation was limited to the testimony of three of his client's family members: Mr. Williams' two sisters, Betty Williams Hill and Edna Williams Vicker, and Mr. Williams' mother, Jessie Mae Williams. LeMieux put these witnesses on the stand even though he had never interviewed them in the context of preparing a penalty phase defense nor prepared them to take the stand on Mr. Williams' behalf. Their testimony was brief.

Mr. Williams' sisters both testified that Mr. Williams entered the home of Jessie and Charles Williams at the age of one or two as a foster child and was then adopted at age three or four. (RT 3301-3324.) They described Mr. Williams as a respectful young man, who never raised his voice, never talked back to elders or used any profanity (RT 3308-3310, 3335-3355), and who was compassionate to the mentally retarded children for whom his family cared (RT 3314-3315) and to his aunt when she was ill with cancer. (RT 3321-3322.) Both sisters were unaware of Mr. Williams' gang-related activities. (RT 3319-3320; 3329; 3345; 3350.)

Mr. Williams' mother, Jessie Mae Williams, was unable to recall many details of Mr. Williams' past. She stated that Mr. Williams never had any academic or disciplinary problems, he was obedient, courteous and willing to help around the house. (RT 3363-3387.) She could not recall,

however, when Mr. Williams moved out of his parents' home, when he stopped attending high school, or that he had been caught possessing a weapon as a juvenile and turned over to his mother by police (34 RT 3387-88; 35 RT 3409.)

No other evidence was presented regarding Mr. Williams' life, educational background or relations with other people.

Jury Penalty Phase Deliberations and Verdict

The jury commenced its penalty deliberations on Thursday October 17, 1991. After a full day of deliberations, one of the jurors asked the court what would happen if it could not "come to a conclusion." (36 RT 3492.) The jury deliberated all of Friday, October 18, and on Monday, October 21, 1991, returned its verdict of death. (38 RT 3496; CT 734.)

## ARGUMENT

I. APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTOR'S UNCONSTITUTIONAL EXERCISE OF PEREMPTORY CHALLENGES AGAINST FEMALE AFRICAN-AMERICAN PROSPECTIVE JURORS IN VIOLATION OF APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTIONAL AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION.

A. Introduction

Six African American women were summoned to Mr. Williams' jury pool. The prosecutor struck five of them. On the first panel of twenty prospective jurors called, three were African American women, and the prosecutor struck all three. (15 RT 1099-1100.) In the next panel, nine prospective jurors called, one of whom was an African American woman, and she was struck by the prosecutor. (15 RT 1202.) In the next panel, of the nine prospective jurors called two were African American women and the prosecutor struck one of them. (15 RT 1214). The pattern is clear; the prosecutor was striking black women jurors.[9]

For the black women jurors struck, the prosecutor proffered two sets of reasons: the answers they gave when questioned expressed equivocation

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[9] As defense counsel trenchantly noted when asked by the prosecutor to keep his voice down at sidebar while arguing his third Wheeler-Batson motion, "it is clear to the jury and clear to everyone here that we are up here on the blacks getting kicked off . . . ." (15 RT 1235.)

regarding their support of the death penalty, and their demeanors in answering questions also conveyed this equivocation. The prosecutor's first reason , however, does not pass muster, because the responses provided by the black women regarding their views about capital punishment were, in all relevant respects, virtually identical to the answers provided by several of the (non-black female) jurors seated by the prosecutor. Thus, the only justification supporting the prosecutor's strikes were the jurors' purported demeanor. But the court made no sincere and reasoned attempt to assess the demeanor claim; indeed, the court could not recall the demeanor of the jurors in question. All six African American women in the jury pool agreed that it was appropriate for governments to have the death penalty and all agreed that if aggravating evidence outweighed mitigating evidence they could impose the death penalty. Nevertheless, the prosecutor, over the repeated objections of defense counsel, struck five of these women and sat only one.

To be sure, the jury which tried and convicted Mr. Williams and sentenced him to death was comprised, in part, by five African Americans. It also had four women. But, with one exception, Mr. Williams' jury was missing a critical group of persons who were a central part of Mr. Williams' community and his upbringing: <u>African American women</u>.[10] Eighty three

[10] African American women also comprised the entirety of the witnesses who testified on Mr. Williams' behalf at the penalty phase of

percent of the African American women called to serve as jurors in Mr. Williams' case were systematically culled from his jury pool, peremptorily challenged by the prosecutor notwithstanding their avowed ability to impose the death sentence.

Moreover, and equally astonishing, **their removal from the venire was uncritically assented to by Mr. Williams' trial judge** who openly and unabashedly questioned whether African American women *as a class* were fit to serve on a capital jury. Specifically, the trial court declaimed:

> **I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true.**

(15 RT 1240.)

This Court's decision in People v. Wheeler (1978) 22 Cal.3d 258)[11], and the United States Supreme Court's subsequent decision in Batson v. Kentucky (1986) 476 U.S. 79, were meant to eradicate precisely the kind of discrimination that infected the selection of Mr. Williams' jury. "[T]hat African-American women comprise a cognizable class for Wheeler purposes is clear." People v. Boyette (2002) 29 Cal. 4th 381, 422 (citing People v. Clair (1992) 2 Cal.4th 629, 652).

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trial.

[11] In 2000, the California legislature codified the core principles of the Wheeler decision. (Code Civ. Proc. § 231.5.)

The trial court's candid admission about its views of black women impacted the proceedings in several ways. First, it served to confirm defense counsel's suspicion (and fear) that the State was targeting these individuals for exclusion from Mr. Williams' jury by virtue of their race and gender. Second, the court's acknowledged bias prevented it from making a "sincere and reasoned attempt" to determine whether the prosecutor exercised his peremptory challenges in a discriminatory manner. People v. McGee (2002) 104 Cal.App.4th 559, 569. When, in response to the defense's incredulity at how black women were being systematically struck from the jury, the prosecutor gave wholly subjective, unsubstantiated reasons for the exercise of his peremptory challenges, the court altogether abdicated its legal duty to independently assess whether these reasons were pretextual.

Third, the trial court, in tarring an entire class of persons – black women – as unfit for capital jury service, made clear not only that Mr. Williams would not be tried by a representative cross-section of his community, but also that African-American women would be deprived of an equal opportunity to fulfill a fundamental aspect of citizenship; namely, to participate in the administration of the law. And make no mistake: when an African-American woman is struck from a jury because of her race and

gender, history and culture make her keenly aware that the strike may stem from invidious motives.

Fourth, the trial judge's comments – steeped as they were in racial prejudice and gender stereotype – taint the integrity of the judiciary and undermine the confidence of the public in the workings of the courts. As the Supreme Court has noted, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." Batson, supra, 476 U.S. at pp. 79, 87. When the exclusion comes not just in a governmental forum, but at the instance of the government's representatives themselves, the injury is further compounded. Such discrimination "raises serious questions as to the fairness of the proceedings . . . [,] mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." Rose v. Mitchell (1979) 443 U.S. 545, 556. See also Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614, 628, ("[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.").

For reasons explained more fully below, the jury selection process in this case violated several fundamental provisions of both the state and

federal constitutions and, as a matter of law, this Court must vacate Mr. Williams' convictions and sentence.[12]

B. The Crucial Role of Juries in a Democratic Society

Juries are both a real and symbolic bulwark against the State's misuse of its powers to confine or execute its citizens. "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." (Batson, supra, 476 U.S. at p. 86.) It is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," Duncan v. Louisiana (1968) 391 U.S. 145, 156, "a prized shield against oppression," Glasser v.

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[12] Sadly, the two events which plainly appear in the record of Mr. Willams' voir dire proceedings and which are at the heart of his Wheeler-Batson claim – (1) the prosecutor's discriminatory striking of African American women from a capital jury, and (2) the trial court's complicity in the discriminatory selection of a capital jury to make the jury more death prone – do not appear to be isolated incidents in the state. There is some evidence that prosecutors harbored bias against black women serving on capital juries in counties other than Los Angeles, including a sworn affidavit filed with this Court by a former Alameda County Deputy District Attorney declaring that the Alameda County District Attorney's Office had a policy and practice to systematically exclude black women from serving on capital case juries. (See, e.g., Mike McKee, "Judge Accused of Helping to Rig Death Sentence," New York Lawyer, July 29, 2004). Equally disheartening is the possibility that other members of bench are not immune to such biases. See Order to Show Cause issued on July 28, 2004, in In re Fred Freeman (ordering California Attorney General to investigate sworn claim that a former Alameda County Superior Court judge colluded with county prosecutors to maximize the chances of a death verdict by removing Jews from the final venire in capital cases. (See id.)

United States (1942) 315 U.S. 60, 84, that "fence[s] round and interpose[s] barriers on every side against the approaches of arbitrary power," id. at pp. 84-85.

The jury also serves as the defendant's primary protection against the invidious influence of race in the decision whether he lives or dies. "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' Strauder v. West Virginia (1880) 100 U.S. 303, 309. Specifically, a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality,"' Taylor v. Louisiana (1975) 419 U.S. 522, 530 (quoting Thiel v. Southern Pacific Co. (1946) 328 U.S. 217, 227 (Frankfurter, J., dissenting)), in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death,' Witherspoon v. Illinois (1968) 391 U.S. 510, 519)." McCleskey v. Kemp (1987) 481 U.S. 279, 310 (footnotes omitted); see also Turner v. Murray (1986) 476 U.S. 28, 35 ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for . . . prejudice to operate but remain undetected. . . .The risk of [such] prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.").

'The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it

gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.'" Powers v. Ohio (1991) 499 U.S. 400, 406 (quoting Balzac v. Porto Rico (1922) 258 U.S. 298, 310)). For people who are wrongly excluded from jury participation, there is no such security, but doubt and mistrust that the system is functioning in a fair and impartial manner.

C. Racial Discrimination in Jury Selection Discredits the Entire Judicial System

The Sixth and Fourteenth Amendments' guarantees to a jury trial are first and foremost intended to protect individuals against arbitrary governmental action. See Duncan v. Louisiana (1968) 391 U.S. 145, 155-56. The U.S. Supreme Court in Batson also recognized that race-based exclusion of jurors violates the equal protection rights of the excluded jurors as well as the community at large. (See Batson, supra, 476 U.S. at p. 87.) Further, jury service is a fundamental aspect of citizenship, allowing the individual to "participate in the administration of the law." Strauder v. West Virginia (1880) 100 U.S. 303, 308. To be told that you are unfit because of your race and/or gender to judge your fellow citizens is to be told unequivocally that you are a second-class citizen. Your voice is not considered to be a voice of common sense to be interposed between the government and the accused. Your intelligence, your ability to be fair, your life experiences, your understanding of your society, and your integrity are

all denigrated. People excluded from juries because of [invidious discrimination] are as much aggrieved as those indicted and tried by juries chosen under a system of [invidious discrimination]." Carter v. Jury Commission (1970) 396 U.S. 320, 329.

Race-based and/or gender-based exclusion from jury service does violence to the constitutional principle of equal access to government. See Powers, supra, 499 U.S. at p. 400, 407 (race); J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127 (gender); People v. Boyette, supra, 29 Cal. 4th at p. 422 (race and gender). Such exclusion denigrates fundamental democratic institutions, much as the exclusion of voters due to their race and/or their gender undermines constitutional ideals, whether or not this exclusion affects the outcome of a particular election. Jury service and voting have both been regarded as fundamental incidents of citizenship. See Carter v. Jury Commission of Greene County, 396 U.S. 320, 330 (1970).

A democratic society depends on the shared belief of its members that the system is fair and impartial, that verdicts are objective and reliable, and that punishments meted out are punishments deserved. "Wise observers have long understood that the appearance of justice is as important as its reality." J.E.B. v. Alabama ex rel. T.B., supra, 511 U.S. at p. 155 (Scalia, J., dissenting).

It is not only the members of the group being discriminated against who equate such discrimination in the courtroom with a denial of justice. The United States Supreme Court has repeatedly observed that "discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. [Impermissible] bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." Rose v. Mitchell (1979) 443 U.S. 545, 556.

For these reasons, courts across this nation police the private sector and other branches of government for compliance with constitutional prohibitions against discrimination and with civil rights legislation. But when courts fail to abide by these same norms in the selection of jurors, the enforcement authority of the bench is undermined and the integrity of the judiciary sullied. See Georgia v. McCullom, (1992) 505 U.S. 41, 52 (quoting Edmonson, supra, 500 U.S. at p. 624 (internal citations omitted)).

D. Standard of Review

The use of peremptory challenges to remove members of a racial, religious, or ethnic group from a jury, on the basis of a presumed group bias, violates the defendant's right under article I, section 16 of the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (People v. Turner (1986) 42 Cal.3d 711,

715-716; Wheeler, supra. Such racial discrimination in the selection of jurors is also a violation of the Sixth Amendment right to an impartial jury and the right to equal protection under the Fourteenth Amendment to the U.S. Constitution. (Batson, supra, 476 U.S. at p. 89.) "Although a presumption exists that peremptory challenges are exercised in a constitutional manner, those used to remove prospective jurors solely on the basis of membership in a cognizable racial group violate both the federal and state Constitutions. [Citations omitted.] (People v. Farnam (2002) 28 Cal.4th 107, 134.

"The rules governing a Wheeler challenge are settled. If a defendant believes the prosecution is improperly using peremptory challenges for a discriminatory purpose, he or she must raise a timely objection and make a prima facie showing that jurors are being excluded on the basis of racial or group identity. [Citations omitted.]" (Id. at pp. 134-135.) A prima facie case is made under Wheeler-Batson if the defendant, inter alia, "can show a reasonable inference that such persons are being challenged because of their group association. [Citations.]" (Id. at p. 135). See also Batson, supra, 476 U.S. at p. 96; Wade v. Terhune (2000) 202 F.3d 1190, 1192-1197.)[13]

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[13] In its Wheeler opinion the California Supreme Court articulated two seemingly disparate standards to describe the prima facie showing that a defendant must make to trigger a court's inquiry into the State's reasons for peremptorily striking particular jurors: the defense must either show that there is a "strong likelihood" that the State's peremptory challenges were exercised in a discriminatory manner, Wheeler, supra, 22 Cal. 3d at p.

Once the trial court finds that the [defendant] has made a prima facie case, the burden shifts to the [prosecutor] to provide an explanation for the peremptory challenges that is race or group neutral and related to the particular case being tried." (People v. McDermott (2002) 28 Cal.4th 946, 970 .) "The prosecutor need only identify facially valid race- neutral reasons why the prospective jurors were excused." (People v. Gutierrez (2002) 28 Cal.4th 1083, 1122.) " ' "If a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." ' [Citation omitted.]

The trial court must make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of 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

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280, or it must meet the lesser hurdle of simply raising a "reasonable inference" that they were so exercised. Id. at p. 281. Although in recent years California courts appear to have settled upon the lower "reasonable inference" standard mandated by the federal constitution, see e.g., Cooperwood v. Cambra (9th Cir. 2001) 245 F.3d 1042, 1047, at the time of Mr. Williams' trial, California trial and appellate courts routinely endorsed the improper "strong likelihood" standard, see id. at p. 1046-47; People v. Sanders, (1990) 51 Cal. 3d 471 at 501-02. While the record is silent as to which standard the Williams court applied in analyzing the defense's Wheeler motion, the record is plain that the trial court believed that the defense had met its prima facie burden by asking the prosecutor to justify his strikes. In the event that this Court finds that the trial court did not deem a prima facie case to have been made, it must reverse defendant's conviction on the ground that the trial court applied the constitutionally impermissible "strong likelihood" standard.

and has exercised challenges for cause or peremptorily." (People v. McGee (2002) 104 Cal.App.4th 559, 569) (quoting People v. Hall (1983) 35 Cal.3d 161, 167-168 ). "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded." (McGee, supra, 104 Cal.App. 4th at p. 569 (quoting People v. Fuentes (1991) 54 Cal.3d 707, 720)). In ruling on a Wheeler motion, "the trial court should state expressly its determination as to the adequacy of the justification proffered with respect to each peremptory challenge." (McGee, supra, 104 Cal.App. 4th at p. 569 (quoting People v. Sims (1993) 5 Cal.4th 405, 431)).

As a general matter, the trial court's ruling on a Wheeler-Batson motion "is reviewed for substantial evidence." (McGee, supra, 104 Cal.App. 4th at p. 569). But this "deferential standard of review" is applied "**only when** "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (Id. (quoting People v. McDermott, supra, 28 Cal.4th at p. 970) (emphasis added.)

The court asked the prosecutor to respond to each of appellant's three Wheeler motions, and the prosecutor in turn provided explanations as to each of the five challenged jurors. (15 RT 1211, 1226, 1234.) A review

of the record shows that each of these invitations and subsequent explanations constituted an implied finding of a prima facie showing. (See People v. Arias (1996) 13 Cal.4th 92, 135; People v. Turner (1994) 8 Cal.4th 137, 167; People v. Turner (1986) 42 Cal.3d 711.) After listening to the prosecution's explanations, the trial court denied each of the three Wheeler motions.

The trial court failed to make a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. A review of the prosecution's explanations further reveals that substantial evidence does not support the trial court's rulings. In short, the prosecutor failed to state adequate neutral grounds for the challenges in question and the trial court side-stepped its duty to assess the validity of the prosecutor's explanations. (See People v. Alvarez (1996) 14 Cal.4th 155, 198, fn. 9.)

E. The Wheeler-Batson Motions

During jury selection, which commenced August 12, 1991 and continued through September 12, 1991 (3-15 RT 17-1251), the trial court heard and denied three motions, brought by appellant pursuant to Batson v. Kentucky, supra, 476 U.S. 79, and People v. Wheeler, supra, 22 Cal.3d 258,

to declare a mistrial and dismiss the existing jury panel.[14] (15 RT 1210-1213, 1225-1240.)

1. First Wheeler Motion

After the prosecutor used peremptory challenges to dismiss three out of three African American female jurors in the first three juror panels, the defense brought the first Batson-Wheeler motion. (15 RT 1210-1213.) Specifically, the defense objected to the dismissal of Ms. Harriett Reed, Ms. Theresa Cooksie and Ms. Paula Cooper-Lewis, stating at sidebar: "I think we have the beginnings of a Wheeler situation. Of the five blacks that have been in the 12, as part of the 12, the prosecution has perempted [sic] Miss Reed, Miss Cooksie and Miss Cooper-Lewis . . . And I would also like the record to reflect . . . my client is black and . . . I would have liked to have a better cross-section of the community. That is my concern." (15 RT 1210-1211.)

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[14] Although Appellant cited only Wheeler in his motions for a mistrial and did not mention the federal Constitution or the Batson case, Appellant did not waive his federal rights. This Court held in People v. Yeoman (2003) 31 Cal.4th 93, that to consider defendant's claim under Batson is more consistent with fairness than to deny the claim as waived. (See also Ford v. Georgia (1991) 498 U.S. 411, 418-419 [a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under Batson, even if he did not cite Batson or describe with particularity the exact federal provision violated]. Accord Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of Wheeler construed to allege Batson]; overruled on other grounds by Tolbert v. Page (9th Cir. 1999) 182 F.3d 677.)

The prosecutor responded "I will go ahead and justify," to which the court replied "I would ask you to do so." (Id.) Deputy District Attorney McCormick then explained that he rates prospective jurors by what he perceives to be "their reluctance towards answering questions which I've asked them." With respect to his exercise of peremptories against Mesdames Reed, Cooksie and Cooper-Lewis, McCormick states:

> Each of them demonstrated a reluctance in terms of answering direct questions which called for the requirement of the imposition of the death penalty with an affirmative answer that they would impose it. They would either say, well, I think I might be able to, or I could, but their reluctance to impose it was evident not only from the answers that they gave from the time that it took them to respond to the question, their general demeanor in answering the questions and my impression from each of them.

(Id.) As explained below, the written and verbal answers provided by these three African-American women were materially the same as the answers provided by persons seated to be jurors. So in actuality it was their "general demeanor" that bothered Mr. McCormick. He summarized his subjective selective process thus: "It was just my general impression from their answers that in spite of what they said they wouldn't have the ability to impose it when it actually came down to it. That is my reason for excusing them." (15 RT 1212.)

Dismayed that the prosecutor's "general impressions" of jurors resulted in the eradication of black females, defense attorney McCann re-

iterated that "So far only 10 percent of [the persons called up from the jury pool] have been black; only four were black. And 75 percent of those were perempted [sic] by the prosecutor. . . . . I would also [sic] the record to reflect that all the blacks that were kicked were female . . . ." (Id.)

Mr. McCormick then tried another angle. To downplay the significance of his actions the prosecutor suggested that his striking black females from the jury was (somehow) not improper because the State was planning on calling non-white witnesses. "Okay. Just so the record at this point – since he is making his Wheeler objection – is clear," McCormick says, "my victims in this case are a male black and a male Hispanic. All of my witnesses, including the three codefendants in this case, are going to be young black males. I have male Hispanics who are going to require interpreters testifying, so I have a great cross-section of people who I am going to be calling to the stand. Not one of them are white."[15] (15 RT 1213.)

The prosecutor's reasoning, such as it is, is hard to fathom. At first blush it appears that he is suggesting that a racially diverse array of State's witnesses can assuage the State's exclusion of persons of color from the

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[15] In point of fact, the **majority** of the witnesses called by the prosecutor were **not** African American, to wit: Raymond Valdez, Kathleen Matuzak, Donald Mauk, Mark Arneson, Joe Herrera, Bruce Greenwood, Howard Sanshuck, Dr. Irwin Golden, Diana Rattan, Jagusah Patel, Irma Sazo, Jose Pequeno, John Balderas, Peggy Fidero, David Butlar, Diana Castro, and "Peaches." (See Motion for New Trial, CT 701-702.)

jury. But such a claim is legally indefensible (and offensive). But another reading indicates that McCormick may be suggesting that he has little incentive to strike black women from the jury because black women are more likely to credit the testimony of black men (or men of color), and the State's key witnesses are Mr. Williams' three black co-defendants (and some of its other witnesses are non-white men). But even assuming the veracity of this questionable assumption, the prosecutor's rationale backfires. Because the defendant, George Brett Williams, is also African American, if the prosecutor actually believes black women jurors are sympathetic to black men – or at least more likely to credit their testimony – then these jurors would be just as willing, if not more so, to be biased in favor the defendant. Accordingly, if Mr. McCormick believes in his own rationale he would harbor a tactical incentive to strike black women – qua black women – in order to bolster the State's case.

But flimsy rationales aside, the prosecutor's actions find no basis in the law, which clearly regards black women as cognizable class for purposes of a Wheeler-Batson motion and forbids their exclusion from the jury in light of their race and gender. The trial court, however, did not conduct any further inquiry, and summarily denied the defense's first Wheeler-Batson motion. (15 RT 1213.)

2. Second Wheeler Motion

The second Wheeler-Batson motion occurred during the fourth panel and concerned the prosecutor's peremptory challenge of Ms. Retha Payton, another African American woman. Defense counsel objected to the prosecutor's strike, pointing out that "four out of the six blacks have been perempted [sic] and [all] four of them have been women" and that "12 perempts [sic] have been blacks, and that is 33 percent right there. We have only had a mix of 10 percent blacks who have come on this jury as potential jurors, and he has kicked 75 percent of them, so those numbers speak for themselves." (15 RT 1226-1227.)

The court invited the prosecutor to respond to the objection. Mr. McCormick again provided an explanation rich in subjective "general impressions" but wholly ungrounded in the record. In his words:

> Under Miss Payton, even though she was rated initially as a three on my scale, she was downgraded to one. Next to most names I don't write anything but I've written next to her, "ambivalent, no opinions." . . . . I asked her about the death penalty serving a deterrent value to her. She said, "I hadn't really pinned it down." Question: You don't have opinions one way or the other whether it serves a deterrent value or not?" She said, "With some people it would and with some people it probably would not." I asked her, "In terms of your own feelings on the death penalty, you can't give me anymore guidance on how you feel about it other than you haven't really thought about it?" Her answer is "No, I really haven't. It is just something that I would – could say yes, it would, or no it wouldn't." My impression from my conversation with her at that time was apparently that while she was saying that she didn't know whether it had a deterrent value, she didn't

> know if she could impose it. . . . It was my general impressions from my discussion with her that she didn't have the ability to do it, or I wouldn't have downgraded her so far.

(15 RT 1228-1229.)

In rebuttal, the defense pointed out to the court that Ms. Payton had plainly stated she would be fair and impartial on death penalty issues. The prosecutor, by way of reply, again retreats deep into the realm of the subjective, stating "It was just my impression she didn't have the ability **in spite of what her answers were** . . . ." (15 RT 1230.) (emphasis added).

In short, based on a "general impression" that he felt, but could not articulate, the prosecutor thoroughly discounted the veracity of the written and verbal answers given by Ms. Payton – and three other African-American women, and dismisses these women from the jury. As defense counsel noted, Mr. McCormick's "impressions" have resulted in the "systematic[] perempt[ion] [sic] [of] black women by an incredible percentage margin" (15 RT 1230-1231.) All that Mr. McCormick could do is to repeat his mantra. "It has to do with their demeanor . . . and my perception that they could actually impose the death penalty on George Brett Williams in this case." (15 RT 1231.)

In ruling on the Wheeler motion, the trial court made clear it was not able to credit the prosecution's characterization of Ms. Payton's, but nonetheless, without further explanation, permitted the prosecution to strike

Ms. Payton, cryptically stating: "I'm going to say that there is sufficient explanation on Miss Payton. As I indicated earlier, I had made notes on some of them and that was by their demeanor and their manner of responding. I don't have anything on this one at this time, but I would accept Mr. McCormick's explanation as to his exercise of the peremptory, so I would not make a finding that there is a Wheeler violation. (15 RT 1231-1232.)

3. Third Wheeler Motion

Two peremptory challenges after the one exercised against Ms. Payton, the prosecution challenged Miss Ruth Jordan, a African American female, and the defense again objected. Anticipating the argument, the court asked "Is this another Wheeler motion?" (15 RT 1232.) The defense responded by observing that from a statistical standpoint the prosecutor's actions are "bizarre" – "five of six black women have been perempted [sic]." (Id.) What is more, the defense pointed out, Ms. Jordan was on the panel at a time when he had accepted them, and then he is invading into the jury after I have accepted them to further make the entire jury that we have less black . . . If she was a problem before why wasn't she preempted? He has accepted her while she was on the jury." (Id.)

The court offered the prosecutor an opportunity to respond. Mr. McCormick stated that although he did not particularly like Ms. Jordan as a

juror he kept her on the jury because he feared that if he struck her earlier he would prompt another Wheeler motion and/or lead other African Americans in the jury pool to believe that he was racist. But in the end, McCormick explained, "I've reviewed all my notes. . . . I went down to my office and thought about it, and it doesn't make any sense to me to go through this entire process with a juror that I honestly don't believe because of her responses and the many she answered me during the individual voir dire, . . . to me to try this case in front of that person when I think going in they don't have the ability to render a death verdict if that's what the case calls for." (15 RT 1233-34.)

Faced with the State's peremptory striking of five of six black women from the jury, and the prosecutor's wholly subjective, factually unsupported reasons for doing so, the trial court made the following, astonishing admission:

> THE COURT: And I have to say **in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true.**

(15 RT 1239) (emphasis added.) The court then acknowledged that it was unable to assess the credibility of the prosecutor's proffered explanation regarding his striking of Ms. Payton and Ms. Jordan, stating:

> But as I said **I cannot say anything about these.** [sic] **I can only go by what Mr. McCormick is saying because I stopped making notes on my Hovey.**

(Id.). The court then added:

"The [defense's third Wheeler] motion is denied."

(15 RT 1240.)

4. Final Jury Composition

By the conclusion of voir dire, the prosecution had exercised 15 peremptory challenges, 13 of which were to females, 5 of whom were African Americans. The prosecutor had successfully challenged 5 of 6 female African American jurors from the four panels. The final jury had seven Caucasians and five African-Americans. Of the five African American jurors, four were male. (CT 696.)

5. Background of the Five Prospective Jurors Who Were the Subjects of the Batson-Wheeler Motions

a. Harriett Reed

Harriett Reed was a 24-year-old single African American female. (14-15 Supp.1 CT 3530-3564.) She was employed by the IRS as a tax examiner. She was a high school graduate with some community college and had no arrest record. On her questionnaire, Ms. Reed answered that she thought the death penalty should be enforced under certain hardcore murders and that she believed that California should have the death penalty under certain circumstances.

When questioned during voir dire, the prosecutor asked Ms. Reed what she meant when she wrote "hardcore murders" and in what situations could she see herself imposing the death penalty. (7 RT 390-391.) She responded that she considered hardcore murders to be things like burning of bodies and mutilation, but that she could impose the death penalty in other cases if necessary. (7 RT 391.) The prosecution pressed her on whether she could impose the death penalty on Appellant. She responded that she could, and stated that if after weighing the aggravating factors against the mitigating factors the appropriate verdict was death, she could impose the death penalty. (7 RT 391-392.) The prosecutor passed Reed for cause. (7 RT 392.)

The prosecutor did not ask any further questions before exercising his peremptory challenge on her later in voir dire.

b. Theresa Cooksie

Theresa Cooksie was a 27 year old married African American female with a five-year old daughter. Ms. Cooksie had some community college, no arrests and was employed as a typist/clerk.

In her questionnaire Ms. Cooksie wrote that California should have the death penalty

> **"Because when cold-hearted [killers] take People['s] lives then their live[s] should be taken also."**

(21 Supp. 1 CT 5138-5172.). Ms. Cooksie believed that the death penalty had a purpose, and that purpose was "to stop these cold-hearted killers from hurting innocent people." And Ms. Cooksie "**strongly agreed**" that persons who killed intentionally without legal justification should be sentenced to death. Ms. Cooksie wrote that she wanted to be on the jury "to give my opinion as fair as I can." (Id.)

When questioned during voir dire, Ms. Cooksie stated that she would vote for death or LWOP depending on the evidence. (5 RT 214-315.) Ms. Cooksie also stated that she thought the death penalty would be a more severe punishment than LWOP. (5 RT 215.) The prosecutor asked Ms. Cooksie to explain what she meant by "cold-hearted" killer, a phrase she used in filling out her questionnaire, to which she responded that she meant a senseless killing or a killing with no feelings or just a killing out of a cold heart. (5 RT 218-219.)[16] Ms. Cooksie reaffirmed that she could and would impose the death penalty if the evidence warranted it. (5 RT 219-220.)

The prosecutor did not ask any further questions before exercising his peremptory challenge on her later in voir dire.

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[16] In his closing argument to the jury at the penalty phase of trial, the prosecutor characterized Mr. Williams' crime as a "cold-blooded execution" (35 RT 3423-24), presumably a description that would have resonated with Ms. Cooksie had he not struck her.

c. Paula Cooper-Lewis

Paula Cooper-Lewis was a 28 year-old separated African American female employed as a supply technician at the Naval Weapons Station. (10 Supp. 1 CT 2447-2480.) She had some community college and had never been arrested. In the questionnaire, when asked about her general feelings regarding the death penalty, Ms. Cooper-Lewis wrote that "it's fair in some cases" and that she hadn't decided whether California should have the death penalty or not. However, she saw the purpose of the death penalty as "to rid society of people that would be a constant threat to society as a whole, i.e., people who commit heinous crimes and if ever released into society would jeopardize society's safety." Ms. Cooper-Lewis also wrote that she "somewhat agreed" that people who intentionally kill another person without legal justification should get the death penalty, but that every case had different circumstances. She wrote that she wanted to be on the jury because she was open-minded, willing to listen to both sides and judge for herself without any outside influences. (Id.)

When questioned during voir dire, Ms. Cooper-Lewis acknowledged that if the case warranted she could impose the death penalty, and in response to a hypothetical from the prosecutor she stated that if she were a dictator on an island she would probably have the death penalty as part of her legal system. (10 RT 758-759.)

The prosecutor did not ask any further questions of Ms. Cooper-Lewis before exercising his peremptory challenge on her later in voir dire.

After appellant's first Wheeler motion, the prosecutor explained he challenged jurors Reed, Cooksie and Cooper-Lewis because "during the individual questioning of them I rated very reluctantly in terms of their ability to impose the death penalty." (15 RT 1211.) The court denied the motion. (15 RT 1213.)

d. Retha Payton

Retha Payton was a 63 year-old African American female employed as a nurse and married to a disabled fork lift mechanic. (10 Supp. 1 CT 2412-2446.) She had an Associate's Degree in Childhood Education and had five adult children; she had never been arrested.

As to the death penalty, Ms. Payton wrote on the questionnaire that "it is sometimes necessary" and that maybe California having the death penalty would make more people think before committing serious crimes and act as a deterrent. She also wrote that it would depend on the circumstances whether someone who killed another without legal justification should get the death penalty. She wrote she would want to be a juror because "I feel I can contribute." (Id.)

When questioned during voir dire, the prosecutor asked what her feelings on the death penalty were. Ms. Payton responded that under some

circumstances it is necessary and that she would have to follow the evidence, and that she could vote for the death penalty if the circumstances and evidence warranted it. (10 RT 739.)

The prosecutor accepted the jury three times with Payton on it, but then used a peremptory to excuse her without asking her any additional questions.

After appellant's second Wheeler motion, the prosecutor explained that he challenged Ms. Payton because in spite of her answers she would be reluctant to impose the death penalty. (15 RT 1228-1230.) The court denied the motion. (15 RT 1231-1232.)

e. Ruth Jordan

Ruth Jordan was a 65-year-old married African American with no children. (5 Supp.1 CT 1049-1082.) She was employed as a supervisor in the California Employment Development Department and had a Bachelor's degree in business administration. She had never been arrested.

Ms. Jordan wrote in her questionnaire that she considered being called for jury service a privilege and that her past grand jury experience was "the most enlightening experience of [her] civil service career." On the death penalty, Ms. Jordan stated that she felt that California should have the death penalty and wrote that while she did not believe that the death penalty had been shown to be a crime deterrent,

> **Capital punishment . . . is necessary in our society** because so many people think it is.

She also wrote that the purpose of the death penalty was:

> **"To let the punishment fit the crime"**

and to provide "perpetrators and victims families and friends . . . with finality." In declaring that California should have capital punishment, Ms. Jordan explained that executing convicted murderers would be of "solace to the friends [and] family of the victim." (Id.)

Ms. Jordan stated she would like to be on the jury because she was "old enough, experienced in life enough and mentally capable of being objective." (Id.)

When questioned during voir dire, the prosecutor asked if she had the ability to render a death verdict against another person and she responded that she did and that if the death penalty was warranted after evaluating all the evidence, she would. (12 RT 914-915.)

The prosecutor accepted the jury three times with Ms. Jordan on it, but then used a peremptory to excuse her without asking her any additional questions. (15 RT 1235-1238.)

After appellant's third Wheeler motion, the prosecutor explained that he kept her on the jury initially because he did not want to give the rest of the jury the impression he was racist by kicking off so many blacks, but that

after thinking about it, he decided that it was worth kicking her off since he did not believe Ms. Jordan had the ability to impose the death penalty. The court denied the motion. (15 RT 1240.)

F. The Trial Court Erred in Denying Appellant's Wheeler Motions Because it Failed to Make a Sincere and Reasoned Attempt to Evaluate the Prosecution's Explanations.

The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (Powers v. Ohio (1991) 499 U.S. 400; Batson v. Kentucky, supra, 476 U.S. at 89) and by the California Constitution. (People v. Wheeler, supra, 22 Cal.3d 258, 276-277; People v. Mayfield (1997) 14 Cal.4th 668, 722-723.) Appellant timely moved for relief from the prosecutor's unconstitutional exercise of peremptory challenges by systematically excluding African American women. This Court has repeatedly recognized African American women as a cognizable group. (People v. Cleveland (2004) 32 Cal.4th 704, 734; People v. Motton (1985) 39 Cal.3d 596, 605-606; see also People v Gray (2001) 87 Cal.App.4th 781 (noting African American men constitute a cognizable group)). Here, the trial court erred in accepting the prosecutor's categorical assertion as to each of the African American women that they would be unable to impose the death penalty, since those assertions were unsupported by the record.

1. Prima Facie Case

By the end of voir dire, the prosecutor had exercised 17 of his twenty peremptory challenges and used 13 of those to exclude female prospective jurors. Of those 13, five were to female African American prospective jurors (38.5%). The prosecution successfully challenged five of the six prospective female African American jurors (83%). Only one African American woman was on the final jury.[17] This alone is sufficient to raise an inference of discriminatory motive. Federal decisions have found prima facie cases established by similar or less disproportionate excusal of minority jurors than this. See United States v. Bishop (9th Cir. 1992) 959 F.2d 820, 822 (finding exclusion of two of four members of cognizable group established prima facie case); United States v. Lorenzo (9th Cir. 1993) 995 F.2d 1448, 1453 (finding three out of nine members excluded established prima facie case); United States v. Power (9th Cir. 1989) 881 F.2d 733, 740 (finding one of two excluded established prima facie case); United States v. Battle (8th Cir. 1987) 836 F.2d 1084, 1085 (holding trial court erred in not finding prima facie case where prosecutor used five of six peremptories to strike five of the seven African American members of the

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[17] After the third Wheeler motion and after the prosecution had excused five female African Americans, the prosecution professed concern that the jury would perceive him as racist and asked the panel whether anyone had been offended by the way he had exercised his challenges. (15 RT 1247-1251.)

original panel.) There is no "magic number" (United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695, 698), but the exclusion of this many of a prevalent cognizable group cannot be dismissed as coincidental.[18] There is nothing in this record which rebuts the glaring inference that arises from the systematic removal of five of six female African American jurors (83%) from appellant's jury. In the absence of circumstances rebutting the inference, exclusion of five female African American jurors out of seventeen peremptory challenges (29%) when there were only a total of six female African American prospective jurors in the five panels reviewed establishes a compelling inference.

In applying the reasonable inference test, it is important to note that both federal and California courts have held that the exclusion of even a single juror of the group against whom the challenges were exercised may establish the violation. (Wade v. Terhune, supra, 202 F.3d 1190, 1198 ("the Constitution forbids striking even a single prospective juror for a discriminatory purpose"); United States v. Vasquez-Lopez (9th Cir. 1994) 22 F.3d 900, 902 (same); People v. Fuentes (1991) 54 Cal.3d 707, 715 ("the

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[18] As defense counsel noted during his Wheeler motions at side-bar: "The chances of [this number of black women being struck at random] would probably be pretty low if you mathematically figured it out." (15 RT 1231.) See also 15 RT 1236 ("If all of these people were the same color and we did a random on that and you said those five are going to be kicked out of those six ladies, the chances would be astronomical. The fact that they happen to all be blacks is more than coincidence.")

striking of a single black juror for racial reasons violates the equal protection clause"). It is important to note that a Batson violation may occur notwithstanding the fact that other members of the group are still on the jury. (Matthews v. Evatt (4th Cir. 1997) 105 F.3d 907, 917, n. 8.)

The record before the court at the time of the motions compelled the judge to find a prima facie case had been established. Moreover, the prosecutor provided explanations as to each of the challenged jurors as if a prima facie case had been made. A review of the record makes it clear that the prosecutor exercised peremptory challenges on the basis of an impermissible presumption that black female jurors would refuse to impose a death sentence. The record further reflects that the trial court expressly shared the prosecutor's bias against African American women sitting on a capital jury, and approved the prosecutor's peremptory strikes without a sincere and reasoned evaluation of the prosecutor's grounds for exercising his challenges.

2. The Prosecutor's Reasons for Striking the Vast Majority of Black Women

A critical question in determining whether a prisoner has proved purposeful discrimination is the persuasiveness of the prosecutor's justification for his peremptory strikes. (Miller-El v. Cockrell (2003) 537 U.S. 322; Purkett v. Elem (1995) 514 U.S. 765, 768) "Implausible or fantastic justifications may (and probably will) be found to be pretexts for

purposeful discrimination." (Miller-El, supra, at p. 339 (quoting Elem, supra, 514 U.S. at p. 768.)) In other words, the race-neutral explanations must be credible.

At the first Wheeler motion the prosecutor justified his challenges of Ms. Reed, Ms. Cooksie and Ms. Cooper-Lewis by arguing that *as a group* he "rated them very reluctantly in terms of their ability to impose the death penalty." The prosecutor argued that "Each of them demonstrated a reluctance in terms of answering direct questions which called for the requirement of the imposition of the death penalty with an affirmative answer that they would impose it. They would either say, well, I think I might be able to, or I could, but their reluctance to impose it was evident. . . . It was just my general impression from their answers that **in spite of** what they said they wouldn't have the ability to impose it when it actually came down to it." (15 RT 1210-1213.) In reviewing the answers these three jurors gave on their questionnaires as well as in individual voir dire, no reluctance to impose the death penalty can be found.

Harriett Reed wrote on her questionnaire, in response to Question # 97 about whether California should have the death penalty, that it should and it should be imposed in certain circumstances. (14-15 Supp.1 CT 3530-3564.) When the prosecutor asked her if she could impose the death penalty against another person, she answered "Yes, if necessary." (7 RT

391.) When he asked her whether she could impose the death penalty against appellant she answered "Not just by looking at him I can't say." (Id.) When asked if she could impose the death penalty against him if the aggravating circumstances in this case substantially outweighed the mitigating and she thought the appropriate verdict was the death penalty she said "If I thought it was, yes." (Id.) Nothing in her answers showed a reluctance or inability to impose the death penalty.

Theresa Cooksie wrote on her questionnaire, in response to Question # 97, about whether California should have the death penalty, that she believed it should "because when [the] cold-hearted take people['s] lives, then their life should be taken also." (21 Supp.1 CT 5138-5172.) When the prosecutor asked her if she could impose the death penalty she answered "yes." (5 RT 219.) When asked if she could impose it against appellant, she answered "If it is the appropriate thing." (Id.) When asked if she could impose the death penalty after listening to all the evidence, she again responded "Yes." (15 RT 320.) Nothing in her answers showed a reluctance or inability to impose the death penalty.

Paula Cooper-Lewis wrote on her questionnaire, in response to Question # 98, about the purpose of the death penalty, that she believed its purpose was "to rid society of people that would be a constant threat to society as a whole, i.e., people who commit heinous crimes and if ever

released into society would jeopardize society safety." (10 Supp.1 CT 2447-2480.) When asked by the prosecutor if at the end of the trial, the circumstances warranted it, she could impose the death penalty she answered "I think I could." (10 RT 760.) When asked if she thought she had the ability if it came to that she responded "I think I do." (Id.) Although her answers could arguably be characterized as equivocal, as argued infra, many other non-female African American seated jurors had just as or more equivocal answers written in their questionnaires. Further, a review of Ms. Cooper-Lewis' questionnaire shows that her answers stemmed more from her need to keep an open mind rather than a reluctance or inability to impose the death penalty. In response to Question # 95 about her general feelings on the death penalty, she wrote that "its fair in some cases." In response to Question #99 about whether she agreed or disagree that anyone who intentionally kills without legal justification should receive the death penalty she replied "Every case has different circumstances." Finally when asked if she wanted to be on the jury she wrote " I am an open minded person willing to listen to both sides [] and judge for myself without any outside influences."

At the second Wheeler motion the prosecutor similarly justified his challenge on Ms. Retha Payton by explaining that "It was my general impressions from my discussion with her that she didn't have the ability to

do it [impose the death penalty]." (15 RT 1228-1229.) However, when the prosecutor asked her if she felt she had the ability to impose the death penalty if the circumstances warranted it, she replied in the affirmative "If the circumstances warrant it." (10 RT 739.) When asked if she could vote for the death penalty against appellant, she responded " I feel I could. I feel I could follow my mind as the case progressed if that is the way the evidence pointed." (Id.) Further in her questionnaire she wrote that the death penalty was "sometimes necessary" and California should have the death penalty since it would "make more people think before committing a serious crime" and that its purpose was to serve as a deterrent to crime. (10 Supp.1 CT 2412-2446.) Nothing in her answers showed a reluctance or inability to impose the death penalty.

At appellant's third Wheeler motion the prosecutor explained that he challenged Ruth Jordan because based on her responses he didn't believe she had the ability to render a death verdict. (15 Rt 1235-1238.) However, Ms. Jordan wrote in her questionnaire that although she didn't think capital punishment was necessarily a deterrent to crime, it was necessary to society and that execution would serve to give perpetrators and victims families needed finality. She also wrote that one of the purposes of the death penalty was "to let the punishment fit the crime." When asked during individual voir dire if she had the ability to return a death verdict if the case warranted

it, she stated "Yes, I would." (12 RT 915.) Although she didn't believe the death penalty necessarily was a deterrent to crime, nothing in her answers showed a reluctance or inability to impose it.

### 3. The Trial Court's Uncritical Acceptance of the Prosecutor's Reasons

Determining whether the opponent of the strike has proved purposeful racial discrimination.' " (People v. Silva (2001) 25 Cal.4th 345, 384.) "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of 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.) "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (People v. Fuentes (1991) 54 Cal.3d 707, 720.) "Preferably, in ruling on a Wheeler motion, the trial court should state expressly its determination as to the adequacy of the justification proffered

with respect to each peremptory challenge." (People v. Sims (1993) 5 Cal.4th 405, 431.)

The trial court's ruling on this issue is reviewed for substantial evidence. (People v. Howard, supra, 1 Cal.4th at p. 1155.) However, "we apply this deferential standard of review *only when* 'the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror.' [Citations.]" (People v. McDermott, supra, 28 Cal.4th at p. 970) (emphasis added.)

Here, because the trial court failed to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, . . ." (People v. Hall (1983) 35 Cal.3d 161, 167-168.), the trial court's findings are not entitled to deference. (People v. Fuentes, supra, 54 Cal.3d at p. 718.). Far from "address[ing] the challenged jurors individually to determine whether any one of them [was] improperly excluded," (McGee, supra, 104 Cal.App.4th at p. 569), the trial judge (1) acknowledged having no independent recollection of the behavior or demeanor of any of the challenged jurors, (2) accepted the prosecutor's stock explanation that notwithstanding their answers to the contrary in voir dire, the jurors' were unable to impose a death sentence, and (3) reaffirmed that in its experience, female black jurors as a class routinely were unable to render death verdicts.

To be sure, a prospective juror's strong views about the death penalty may be a permissible basis for exercising a peremptory challenge in a capital case. But the court permitted the prosecutor to strike the women at issue not because the court found that these women had expressed views that merited their excusal, or even because their demeanor somehow belied an expressed willingness to render a death sentence, but rather because these women were African-American, and, in the court's experience, African American women, as a class, did not vote for death.

Discrimination, at its core, concerns the differential treatment of individuals not on the basis of what they have done but rather on the basis of the group with which they are identified by others to belong. Perhaps because of its overt bias against African American females sitting as capital jurors, the court neglected to undertake a "sincere" and "reasoned" evaluation of the prosecution's explanations for striking the vast majority of black women from the jury. Whatever the excuse, though, the court did not provide lawfully adequate reasons for accepting the prosecutor's explanations. Accordingly, the court's denial of the defense's Wheeler motion is not entitled to deference on appellate review.

The trial court was obligated to "determine not only that race-neutral grounds to challenge an African American prospective juror exist in the abstract, but also that the prosecutor's statement that he *relied* on those

grounds is credible." (People v. McGee, supra, at p. 571 (emphasis in original); People v. Tapia (1994) 25 Cal.App.4th 984, 1013-1014.) "An explanation that seems credible in isolation may appear pretextual when viewed against a pattern of race-based exclusion of jurors." (People v. McGee, supra, 104 Cal.App.4th at pp. 571-572.) "If reasonable grounds exist to justify a challenge, but the trial court does not believe those grounds *in fact* motivated the prosecutor, the Wheeler motion must be granted and a new jury impaneled. (Id.) (emphasis in original.)

Here, the trial court failed to address the challenged jurors individually to determine whether any one of them had been improperly excluded. Specifically, the court failed to determine not only that a valid reason existed [for the prosecutor's exercise of his peremptory challenge], but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (People v. Fuentes (1991) 54 Cal.3d 707, 720.)

At the first Wheeler motion regarding the exclusion of the first three African American women, the trial court first berated the defense for exercising a peremptory against a juror who, in the court's words "looked like he might be black".[19] (15 RT 1211.) Then the court asked the

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[19] Reversal is also required because the trial court impermissibly used the defense's strike of this juror, Henoch S. Carrillo, Jr., who *appeared* to the court to be African American, to justify the prosecution's strike of three African American women. See People v. Reynoso (2003) 31 Cal. 4th

prosecutor to justify his challenges. The trial court listened to the prosecutor, but instead of assessing the credibility of the prosecutor's proffered explanation, cf. Miller-El v. Cockrell, (2003) 537 U.S. 322, 339; People v. Johnson (2003) 30 Cal.4th 1302, 1320, the court simply responded: "The motion is denied." (15 RT 1213.)

At the second Wheeler motion, the trial court told defense counsel that they couldn't go by the numbers alone and asked the prosecutor to bring up his sheet so he could put his reasons on the record. (15 RT 1227.) The trial court noted that it hadn't made a mark next to Ms. Payton, but that at some point the court had stopped making marks on its Hovey sheet. (15 RT 1228.) After the prosecutor explained why he excused Ms. Payton, the trial court failed to make a credibility determination of the prosecutor's explanation, stating simply that it didn't "have anything on this one at this time," but that it "would accept Mr. McCormick's explanation as to his

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903, 944 (Moreno, J., dissenting). Although the court never asked defense counsel to explain why he struck Mr. Carrillo (who was not African American), the record makes clear that defense counsel had several compelling, race-neutral explanations for this strike, including Mr. Carillo's having witnessed six separate robberies, his strong belief that violent crime was a "very serious" problem and is largely rooted in "drugs", "unemployment" and "lack of education" (See CT - Supp. I, Vol. II, 349-383). Defense counsel was understandably wary of a juror with such background and views sitting in judgment of a case concerning a drug-related double robbery and drug-related double-murder by an unemployed defendant who was a high school drop-out.

exercise of the peremptory, so I would not make a finding that there is a Wheeler violation." (15 RT 1230-1231.)

At the third Wheeler motion regarding the exclusion of Ms. Jordan who had previously been accepted by the prosecutor, the court was unable to make the necessary credibility determination regarding the prosecutor's proffered explanation; instead the court admitted that it did not "recall her responses at all." (15 RT 1234.) The prosecutor then observed that "sometimes you get a feel for a person that you just know that they can't impose it based on the nature of the way they say something." (15 RT 1237). Such a "gut-level" response, however, is not a race-neutral reason for striking Ms. Jordan; **it is no reason at all**. See e.g., Weddell v. Weber, (D.S.D. 2003) 290 F.Supp.2d 1011, 1027.

Notably, the prosecutor's observation prompted the trial court to make a stunning observation of its own – one that calls into question not only the propriety of the prosecutor's challenged peremptory strikes but the impartiality of the court's review of those strikes. As the court confessed:

> **. . . I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is.**

(15 RT 1237, 1239.)

In light of the pattern of the prosecution excluding five of the six female African American prospective jurors, the prosecution's stock

explanation that despite their answers, each would be unable to impose the death penalty, was clearly pretextual. A review of the voir dire and questionnaires, as well as the trial court's empathetic comment about black women jurors being reluctant to impose the death penalty no matter what, shows that the grounds relied upon by the prosecution were not the grounds that *in fact* motivated the prosecutor. The prosecution in this case was systematically excluding African American women from the jury because of a belief that, as a group, black women are unable to impose the death penalty, this was unconstitutional and the Wheeler motion should have been granted.

4. This Court Should Use Comparative Analysis

The prosecutor's discriminatory motive in this case is also made clear by a comparison of the challenged jurors' qualifications with those of seated jurors.

In Miller-El v. Cockrell, supra, the U.S. Supreme Court held that comparative juror analysis was among the evidence reviewing courts could consider. This Court agreed that when the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling." (People v. Johnson, (2003) 30 Cal.4th 1302, 1325 (cert. dism. sub nom. Johnson v. California (2004)

__ U.S. __, 124 S.Ct. 1833, 41 USLW 4348.) This Court also held that although comparative juror analysis for the first time on appeal is not constitutionally compelled, it is not prohibited either. (Id.)

In the case at bar, trial counsel argued comparative analysis in the Motion for New Trial, where he asserted "[t]he prosecutor had not challenged any of the 5 [] black female jurors for cause. He claimed that he excused them by peremptory challenge because of his "reading" of their ability to impose the death penalty – yet, there [sic] answers during "Hovey" voir dire had not differed from the answers of those Caucasian female jurors who were accepted by the prosecutor." (CT 708.) "Both groups," the defense noted, "had undergone the same standard and routine questions and given the same expected answers." (Id.) "In other words, a review of the voir dire examination indicates that the 5 [] black female jurors were excused after giving the same routine, acceptable responses to the prosecutor's questions as those female jurors who were accepted by the DA." (Id.) In sum, Williams' trial counsel argued the struck jurors' "standard responses to the voir dire examination disclosed no particular reason for their exclusion – *except their race and gender*." (Id.) (emphasis added).

The record of jury selection in appellant's case reveals some striking similarities to the facts in Miller-El, *supra*, in which the U.S. Supreme

Court used comparative analysis to reverse a death penalty case on habeas corpus. In Miller-El, the prosecutor used 10 of his 14 peremptory strikes to exclude black venire members. The Court noted that "happenstance is unlikely to produce this disparity." (Id. at p. 1043.)

In the case of Miller-El, the Court noted that three of the proffered race-neutral rationales for striking African-American jurors pertained just as well to some of the white jurors who were not challenged and who did sit on the jury. The prosecutors explained that their peremptory challenges against six African-American potential jurors were based on the jurors' ambivalence about the death penalty; their hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal to the prosecutor's explanation, the Miller-El petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were subject to the prosecutorial peremptory challenges. And, as in the case at bar, four white jurors had family members with criminal histories.

The court held that even though the prosecutor's reasons for striking African American members from the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. (Id. at p. 1043.) The court went on to say

that its "concerns were heightened" by the fact that, when presented with this evidence, the state court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. The court held that this was clear error, and that "[i]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" Batson, supra, at p. 98 (quoting Norris v. Alabama (1935) 294 U.S. 587, 598.)

In the case at bar, there were seated jurors who expressed as much or greater "reluctance" to impose the death penalty than the black women struck by the prosecutor. For example, when asked if she thought she could impose the death penalty against Appellant if the prosecution asked her to, seated juror Lela Bohn replied: "Well, if he's going to do it that doesn't meant I have to vote for death." (8 RT 520.) When asked if she had the ability to impose the death penalty, Ms. Bohn stated: "Yes, I think so." (8 RT 521.) The following interaction occurred between the prosecutor and seated juror Deborah Hubbard during individual voir dire:

> [DA] McCORMICK: What do you think about being asked to sit on a jury where ultimately if we get to the end I'm going to stand up and look at you as a juror and ask you to put this man here to death; what do you think about that?
>
> HUBBARD: Well, it's a big decision to make, but if the evidence is there and it's true, if that's the decision that has to be made I think I can make it.
>
> [DA] McCORMICK: Okay. It would be a tough decision?

HUBBARD: It would be. It's something you don't like to do.

[DA] McCORMICK: Of course not. Do you think that the death penalty serves a deterrent value?

HUBBARD: I think, I think so as far as I am concerned, and that is about all I can answer, I think so.

(6 RT 364.)

Seated juror Willie Jackson opined that life in prison without possibility of parole was a more severe sentence than death because "it would be with them all the time, instead of giving them death and it would just be over with." (6 RT 266.) When asked about his feelings towards the death penalty, Mr. Jackson stated that he thought it would apply to real horrible crimes like murder with no feeling or remorse. (6 RT 269-279.) When asked if he came to the conclusion that the death penalty was the appropriate verdict would he be able to impose it, he answered "Yes, I think so." (6 RT 271.)

Seated juror Lyle Stoltenberg did not think the death penalty should be imposed for crimes of passion. (8 RT 551-552.)

Seated juror Billy Haley told the court that he would prefer not to be a juror because it caused him a little discomfort. (5 RT 153-154.) When asked about his views on the death penalty he stated that he believed some people could be rehabilitated and others couldn't but he would need to decide on a case by case basis. (5 RT 160.) When asked if he would have

the ability to impose the death penalty, he answered: "Never having done it before I believe I could. Without having that experience, you now, it's kind of a hard thing to say, 'yeah, I definitely will,' but I believe that I could do that if that's what I felt was necessary." (5 RT 162.)

None of the five excluded jurors challenged in the Wheeler-Batson motions gave any more equivocal answers than the seated jurors discussed above. The prosecutor, in other words, did not exercise his peremptory strikes against persons who expressed some equivocation about voting for the death penalty; he struck **black women** who did so. If the prosecutor was indeed so concerned about equivocal answers and purported reluctance to impose the death penalty, with three peremptory challenges left, he would have struck some of the above-mentioned seated jurors. None of these jurors, though, were African American women.

G. Conclusion

The record here makes clear that California's long-held determination to end invidious racial discrimination in the selection of juries went unfulfilled in this case. The removal of even one member of a cognizable group for improper reasons violates the equal protection rights of the defendant. (United States v. Vasquez-Lopez, supra, 22 F.3d 900, 902; People v. Fuentes, supra, 54 Cal.3d 707, 715)

Here, the prosecutor had no lawful justification for exercising nearly one-third of his peremptory challenges to excuse most of the female African American jurors from the jury. The trial court, for its part, acknowledged the State's systematic exclusion of black women. But instead of making a sincere and reasoned attempt to uncover the grounds for the exclusion, the trial court, in apparent approval of the prosecution's actions, gave voice to its own heartfelt view that "black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is." (15 RT 1240.)

"The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (People v. Wheeler, supra, 22 Cal.3d at p. 283.) (Batson v. Kentucky, supra, 476 U.S. at p. 100.). To remedy the unconstitutional nature of Mr. Williams' jury selection process and to assure that there is an adequate and certain check on the biased use of peremptory challenges to exclude African-American women from future juries, Mr. Williams' convictions must be reversed.

## II. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S MOTIONS FOR CAUSE AS TO PROSPECTIVE JUROR REHEIS WHO EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY BUT DID NOT INDICATE HE WOULD BE UNABLE TO RETURN A VERDICT OF DEATH OR THAT HIS VIEWS WOULD SUBSTANTIALLY IMPAIR HIS DUTIES AS A JUROR.

### A. Introduction

As noted in a preceding section, the trial court was predisposed to excusing African American women jurors who, in the court's view, were, as a class, 'very reluctant to impose the death penalty; they find it very difficult no matter what it is.' (15 RT 1240.) As this section illustrates, the court was also quick to prune prospective jurors who merely disfavored the death penalty. Specifically, the court erred by permitting the prosecution to strike for cause a juror who unambiguously and repeatedly stated that if seated as a juror he could set aside his personal reservations about capital punishment and impose the death penalty. As discussed below, the trial court's ruling violated the standards set forth by the U.S. Supreme Court in Wainwright v. Witt (1985) 469 U.S. 412, and this Court in People .v Stewart (2004) 33 Cal. 4th 425.

### B. Standard of Review

The erroneous exclusion of a prospective juror because of his or her views on the death penalty is reversible error per se. (See People v. Cooper (1991) 53 Cal.3d 771, 809, citing Gray v. Mississippi (1987) 481 U.S. 648

[107 S.Ct. 2045, 95 L.Ed.2d 622].) A prospective juror may be excused for cause only when that 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." (Witt, supra, 469 U.S. at p. 420.) Prospective jurors may not be excluded for merely expressing a personal opposition to capital punishment.

> A prospective juror personally opposed to the death penalty may nonetheless be capable of following an oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded unless a predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.

(Stewart, supra, 33 Cal. 4th at p. 446) (quoting People v. Kaurish (1990) 52 Cal.3d 648, 699.).

As shown below, the trial court's erroneous granting of challenges for cause as to prospective juror Reheis violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution and under the California Constitution (Cal. Const., art. I, § 16), his right to due process of law under the Fourteenth Amendment and the California Constitution (Cal. Const., art. I, §§ 7 & 15), and his right to a reliable penalty phase determination under the Eighth and Fourteenth Amendments and the California Constitution (Cal. Const., art. I, §§ 7, 15, & 17.)

C. Prospective Juror Reheis Did Not Express Views That Disqualified Him For Service On The Jury, And His Dismissal Deprived Appellant Of His Right To An Impartial Jury Pursuant To the Sixth, Eighth and Fourteenth Amendments.

1. Prospective Juror Reheis' Voir Dire

When asked on his questionnaire whether anyone who intentionally kills another person without legal justification should receive the death penalty, prospective juror Gregory Reheis circled "strongly disagree" and wrote "Don't believe in the death penalty." (5-6 Supp.1 CT 1258-1292.) Reheis also answered on his questionnaire in response to a question on his general views of the death penalty, "I do not believe the death penalty is morally just." (Id.) When asked if he thought the death penalty was used too much, he answered "Once is too much." (Id.)

During individual voir dire, defense counsel questioned Reheis about his feelings on the death penalty and whether he could impose it if it were an appropriate sentence under the law. Reheis responded:

> **"I could see myself voting for the death penalty if that's what the law dictated."**

(12 RT 986.)

Defense counsel pointed out to Reheis that the law never dictated the death penalty but instead would require him to impose the appropriate

sentence and asked whether he could never do it even if appropriate or whether he would do what was appropriate. Reheis responded:

**"I believe I could go with the appropriate sentence."**

(12 RT 987-988.) The following exchange then took place:

| | |
|---|---|
| Mr. McCann: | And that could be the death penalty. |
| Juror Reheis: | **Yes** . . . |
| Mr. McCann: | I'm doing a lot of talking here. I don't want to put words in your mouth. |
| Juror Reheis: | I follow what you're saying though. |
| Mr. McCann: | Maybe we can clear this up a little bit. What is your feeling about being in that situation? Is your feeling that you could under certain circumstances impose the appropriate sentence which might be the death penalty? |
| Juror Reheis: | That's correct. |
| Mr. McCann: | I'm not leading you into saying that? |
| Juror Reheis: | No, you're not. |
| Mr. McCann: | Pass for cause. |

(12 RT 988.) The prosecutor asked Reheis how he could ever impose the death penalty against appellant if he did not believe in it and thought it was morally unjust. (12 RT 988-989.) Reheis responded:

**"The way I would interpret my role here as a juror is not to impose my personal opinions but to view the evidence and then go with what the dictates were from that point."**

(12 RT 989.) The prosecutor then asked Reheis if the appropriate sentence to him would always be life without possibility of parole because Reheis did not believe in the death penalty, to which Reheis responded:

> I don't think it would always be that. I don't think it would always be that I would say just because my opinion is not that the death penalty should be there that the person always should be given the life imprisonment sentence.

(Id.)

When the prosecutor asked Reheis whether he could, in spite of his objections to the death penalty, personally impose the death penalty on another person, Reheis responded:

> **"In my role as a juror, yeah."**

(12 RT 989-990.) The prosecutor then asked him under what circumstances, and Reheis responded, "I couldn't tell you at this point under what circumstances. I would have to be involved in the whole thing. I wouldn't know." (12 RT 990.)

The prosecution and the trial court then repeatedly questioned Reheis on how they could not understand how he could possibly impose the death penalty if he were personally opposed to it. (12 RT 991-996, 999-1003.) Reheis stood his ground and responded that he would respect his role as a juror, that he could in fact impose the death penalty in his role as a juror, and that although his personal views would have some impact on his decision, that impact would not be "substantial" nor would "it render

something that is not appropriate as far as a sentence." (12 RT 993-995, 997-999, 1001-1002, 1004.) Neither the prosecutor nor the trial court could understand how Reheis could personally oppose the death penalty and nonetheless be able to impose it sitting in his official capacity at trial. (12 RT 999, 1004-1007.) The trial court granted the prosecution's motion for cause over defense objection and excused prospective juror Reheis. (RT 1007.)

2. Prospective Juror Reheis Was Erroneously Excused for Cause.

The trial court erroneously excluded prospective juror Reheis. Even one erroneous exclusion requires reversal. (See People v. Heard, supra, 31 Cal.4th at p. 966.) The record establishes that Reheis was open to both penalties and was willing to put aside any personal beliefs about opposition to the death penalty and return a verdict of death if he felt it was appropriate. Thus, the exclusion of prospective juror Reheis requires reversal.

A prospective juror should be excused for cause only as a result of views on the death penalty that "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Wainwright v. Witt, supra, 469 U.S. at p. 424, fn. omitted; People v. Heard, supra, 31 Cal.4th at p. 958; People v. Jones (2003) 29 Cal.4th 1229, 1246.) This standard applies whether the juror is predisposed

to vote for or against the death penalty. (Morgan v. Illinois (1992) 504 U.S. 719; People v. Cunningham (2001) 25 Cal.4th 926, 975.) Specifically, this standard is not to be applied to disqualify jurors with conscientious objections to the death penalty:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; **those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing temporarily to set aside their own beliefs in deference to the rule of law.**

(Lockhart v. McCree, supra, 476 U.S. at p. 176.) (emphasis added). Accord, Stewart, supra, 33 Cal. 4th at p. 446. Indeed, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (Witherspoon v. Illinois, supra, 391 U.S. at p.522.) Thus, a prospective juror cannot be excluded because of an unwillingness to impose the death penalty, but a prospective juror can, and must be, excluded because of an inability to follow the law and abide by his or her oath. In other words, an acknowledgment that one may be affected by the possibility of imposing the death penalty should not constitute grounds for removal. Further, jurors cannot be excluded for cause because they indicate that there are some cases where they would not impose the

death penalty or they refuse to say in advance whether they would vote for the death penalty in the circumstances before them. (Id. at p. 523, n.21.)

Prospective juror Reheis was precisely the kind of juror whom the High Court in Lockhart indicated must be allowed to sit: a prospective juror who opposes the death penalty, but is willing to set aside his beliefs and make an appropriate judgment based on the evidence in the case. The prosecutor and the court persisted in questioning Reheis about his ability to impose death, despite his repeated statements that he could fairly consider the evidence and consider both penalties. Although the trial judge found Reheis's answers to be confusing (12 RT 1004-1007), the record makes clear that Reheis was remarkably consistent in his answers: as a juror he could set aside his personal beliefs about the death penalty and follow the law, and, if appropriate, impose the death penalty in this case. (12 RT 984-989, 993-995, 997-1002, 1004.) Reheis gave honest, thoughtful and articulate answers, and there is no record support that Reheis views would impair his ability to serve as a juror.

Although Reheis expressed some personal qualms about the death penalty, he simultaneously made clear that he could set such qualms aside sitting in his official capacity as a juror sworn to follow the law. In this regard, Reheis's stance was no different than many past and present members of the state and federal judiciary who personally oppose capital

punishment (including many who openly state that they would not vote to enact death penalty laws if the were legislators), but who nonetheless faithfully apply the law, and sit in impartial judgment of capital cases, as trial and appellate judges.

This Court recently had occasion to address a situation similar to that posed by the excusal of Reheis. In People v. Stewart, supra, the written answers provided by several prospective jurors in their questionnaires expressed sentiments such as:

"*I do not believe a person should take a person's life*";

"*I am opposed to the death penalty*";

"*I do not believe in capital punishment*"; and

"*I don't believe in irreversible penalties.*"

53 Cal. 4th at pp. 448-49. But, as this Court noted, "the same general opposition" to the death penalty that is embodied in each of these responses "might be stated by many jurors who are properly qualified to sit on a death penalty jury, and is not disqualifying in and of itself." (53 Cal. 4th at p. 448.) What is critical is whether clarifying, follow-up examination reveals that the prospective juror's beliefs are such that they will "'substantially impair the performance of his [or her] duties as a juror'". (Id. at p. 447.) (Quoting Witt, supra, 469 U.S. 412.)

In Stewart, this Court granted penalty relief because no follow-up examination was done of the prospective jurors who expressed the quoted sentiments. In this case, the Court should grant relief because the follow-up questioning of prospective juror Reheis made clear that he was properly qualified to sit on a death penalty jury in that his personal views would not have substantially impaired his service as a juror.

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it **very** difficult for the juror ever to impose the death penalty is **not** equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under Witt . . . .

(Stewart, supra, 33 Cal. 4th at p. 447.) (emphases added). Had he been sat as a juror, Mr. Reheis's conscientious opinions regarding capital punishment may well have informed the manner in which he viewed and weighed aggravating and mitigating factors in this case. But the record is plain that notwithstanding his personal values Mr. Reheis was ready, willing and able to follow the letter of the law as a juror, and was capable of imposing a death verdict in appropriate circumstances.

The policy rationales underlying the legal precedent in this area underscore the fact and magnitude of the court's error. The purpose of the death-qualifying process is simply to eliminate the extreme jurors – those

who would automatically vote to convict or impose death, or automatically vote to acquit or impose a life sentence. (Morgan v. Illinois (1992) 504 U.S. 719, 734, fn. 7 [112 S.Ct. 2222, 119 L.Ed.2d 492].) Principles of Due Process further demand that defendants in capital cases be afforded an impartial jury. (Id.) An impartial jury is not one in which its members are predisposed to sentencing a defendant to his death. As stated in Gray v. Mississippi:

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' Wainwright v. Witt, 496 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross-section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon v. Illinois*, 391 U.S. at 523.

(Gray v. Mississippi, supra, 481 U.S. at pp. 658-659.)

The challenge for cause to prospective juror Reheis should have been denied, and the prosecutor could have then decided whether to exercise peremptory challenges against him. Instead, by excusing Mr. Reheis, who articulated entirely acceptable, conscientious views, the trial court ignored the requirement that the prospective juror have a "predilection [that] would actually preclude him from engaging in the weighing process and returning a capital verdict." (People v. Kaurish, supra, 52 Cal.3d at p.

699.) The trial court created an entirely new standard that allows for the excusal for cause of any juror who is willing to listen to the evidence and follow the court's instructions, but who cannot look into the future and promise how he or she will respond to the evidence.

This Court has repeatedly upheld the denial of challenges to jurors who expressed a strong preference for death, but who gave responses indicating a willingness to listen to the evidence and follow the law. (People v. Jackson (1996) 13 Cal.4th 1164, 1199; People v. Beardslee (1991) 53 Cal.3d 68, 103.) cf. People v. Stewart, supra, 33 Cal.4th at p. 427 ("a juror's conscientious opinions or beliefs concerning the death penalty . . . is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror'"). Certainly the opposite must hold true. Challenges for cause "permit rejection of jurors on narrowly specified, provable and legally cognizable bases of partiality." (Swain v. Alabama (1965) 380 U.S. 202, 220 [85 S.Ct. 824, 13 L.Ed.2d 759].) Apprehension about taking a life and an appreciation for the value of one's own life does not "substantially impair" an individual from serving honorably as a capital juror, from following the letter and spirit of the law, and of impartially judging the evidence presented. For the reasons stated above, the trial court erred in excusing Reheis for cause.

D. The Erroneous Exclusion of Prospective Juror Reheis Requires Reversal of Both the Guilt and Penalty Phases of Appellant's Capital Trial.

The erroneous exclusion of a single prospective juror because of his or her views on the death penalty is reversible error per se. (See People v. Cooper, supra, 53 Cal.3d at p. 809.) Although the penalty phase judgment must be reversed on this basis, the error does not require reversal of the guilt phase or special circumstance finding, unless the trial court's error resulted in a "structural defect" that impugned the integrity of the proceedings below. (People v. Stewart, supra, 33 Cal. 4th at p. 456, citing, People v. Heard (2003) 31 Cal.4th 946, 972-982.) However, in this case, this Court should reverse the guilt determination as well since the jury was a product of a discriminatory jury selection process. As stated by Justice Marshall in Lockhart v. McCree. supra, 476 U.S. at pp. 184-206, there is a powerful body of social science research finding that a jury death-qualified under Witherspoon is more prone to convict at the guilt phase. The majority in Lockhart, though expressing some skepticism about the research, assumed *arguendo* that it was correct and nonetheless denied the claim that a properly conducted Witherspoon voir dire denied a defendant a representative cross-section or an impartial jury.

Here, however, the voir dire was not properly conducted under Witherspoon since pro-life jurors were judged by different, less

accommodating standards than pro-death jurors (e.g., Richard Coon, see discussion below.) This violated not only appellant's rights under Witherspoon, but also the juror's Fourteenth Amendment rights to equal protection, a right which appellant has standing to assert. (Powers v. Ohio (1991) 499 U.S. 400.) Thus, the guilt phase jury resulting from the voir dire in the instant case was the result not of a neutral and proper application of Witherspoon-Witt, but rather from a discriminatory jury selection process. For this reason, this Court should reverse the guilt phase determination as an appropriate remedy for the constitutional violation.

## III. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED A PROSPECTIVE JUROR WHO WAS EQUIVOCAL ABOUT WHETHER HER ATTITUDE ABOUT THE DEATH PENALTY WOULD AFFECT HER PENALTY PHASE DELIBERATIONS, REVERSAL OF THE DEATH SENTENCE IS REQUIRED.

### A. Introduction.

Prospective juror Elizabeth Champlin was also called to jury service in this case. Champlin told the court she was unsure if her views on capital punishment would impact her deliberations.

The prosecutor moved to discharge Ms. Champlin for cause. The trial court sustained the challenge. As more fully discussed below, the trial court erred. Prospective juror Champlin did not state with anything approaching the requisite degree of certitude that she would not consider death as an option under proper instructions from the trial court. Reversal is required.

### B. A Prospective Juror In A Capital Case May Not Be Excused For Cause Based On Opposition To The Death Penalty Unless The Voir Dire Affirmatively Establishes The Juror Will Not Follow The Law Or Consider Death As An Option.

This Court has held that it is the Adams/Witt standard which reviewing courts must apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (See, e.g., People v. Holt (1997) 15 Cal.4th 619, 650.) Under Adams a prospective juror who opposes capital punishment may be discharged for cause only where the record shows the juror is unable to follow the law as set forth by

the court. (Adams v. Texas (1980) 448 U.S. 38, 48.) Witt establishes that if the state seeks to exclude a juror under the Adams standard, it is the state's burden to prove the juror meets the criteria for dismissal. (Wainwright v. Witt, supra, 469 U.S. at p. 423.)

In applying these cases, however, and with all due respect, this Court has taken a wrong turn. In a series of cases, the Court has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death, (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (See, e.g., People v. Mincey (1992) 2 Cal.4th 408, 456; People v. Breaux (1991) 1 Cal.4th 281, 309-310; People v. Frierson (1991) 53 Cal.3d 730, 742; People v. Cox (1991) 53 Cal.3d 618, 646.) Ultimately, these cases all rely for this proposition on People v. Ghent (1987) 43 Cal.3d 739 at 768. In turn, Ghent relied on People v. Fields (1984) 35 Cal.3d 329 at 355-356 for this proposition, which itself relied on this Court's 1970 decision in People v. Floyd (1970) 1 Cal.3d 694 at 724.

What this history shows is that the current rule which the Court is applying – holding that a trial court may rely on a prospective juror's equivocal responses to discharge that juror in a capital case – is based on a 1970 precedent which pre-dates the Adams case by nearly a decade. In fact, an analysis of the actual voir dire in Adams, as well as in cases the Supreme

Court has decided since Adams, shows that the United States Supreme Court embraces precisely the opposite rule.

In this regard, in addition to modifying the Witherspoon standard, Adams went on to apply the modified standard in the case before it to several prospective jurors. Ultimately, Adams held that a number of these jurors had been improperly excused for cause in that case, precisely because the state had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (Adams v. Texas, supra, 448 U.S. at p. 45.) An analysis of several of these jurors shows that this Court's rule deferring to a trial court's treatment of jurors who give equivocal responses is fundamentally contrary to Adams.

In fact, the voir dire in Adams involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. For example, prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no." (Adams v. Texas, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at p. 3, 8.)[20] Prospective juror Nelda Coyle

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[20] The Appendix to Brief of Petitioner in Adams is a transcript of the voir dire examination of prospective jurors.

expressed the same concern. She too was equivocal when asked if her feelings about imposing the death penalty would affect her deliberations. (Adams App. at p. 23-24.) She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.)

Similarly, prospective juror Mrs. Lloyd White was not entirely sure, but believed her aversion to imposing death would "probably" affect her deliberations. (Adams App. at pp. 27, 28.) She "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted that opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would "probably" affect his deliberations. (Adams App. at p. 12, 17.)

In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Significantly, the Supreme Court did **not** defer to any of these five conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. (448 U.S. at pp. 49-50.) Although all five jurors had given equivocal responses, which the state trial judge had resolved in favor of discharging the jurors, the Supreme Court reversed, holding that jurors

could **not** be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, when a juror gives conflicting or equivocal responses – as did jurors Mahon, Coyle, White, Ferguson and Jenson in Adams – the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (Adams v. Texas, supra, 448 U.S. at p. 45.)

Seven years after Adams the Supreme Court addressed this same issue, again holding unconstitutional a trial court's exclusion of a juror who had been equivocal about her ability to serve. (See Gray v. Mississippi (1987) 481 U.S. 648.) There, defendant was charged with capital murder. During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (Gray v. State (Miss. 1985) 472 So.2d 409, 422.) As the actual voir dire shows, the state supreme court's characterization was entirely correct.

When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (Gray v. Mississippi,

No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (Id. at p. 17, 18.) When pressed by the trial court to commit to a position, she agreed that she did not have scruples against the death penalty where it was "authorized by law." (Id. at p. 18.) But when directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (Id. at p. 19.)

The prosecutor moved to strike Ms. Bounds for cause. The trial court noted that "I don't know whether she could or couldn't [vote for death]. She told me she could, a while ago." (Id. at p. 20.) Seeking to resolve this, the court asked Ms. Bounds whether she could vote for the death penalty and she responded "I think I could." (Id. at p. 22.) When the prosecutor again challenged Ms. Bounds, the trial court found that "she can't make up her mind." (Id. at p. 26.) The trial court then resolved the ambiguity by discharging Ms. Bounds for cause.

Before the United States Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (Gray v. Mississippi, supra, 481 U.S. at p. 661, n.10.) In fact, the state explicitly made the very argument this Court has repeatedly embraced, arguing that a conclusion Ms.

Bounds was improperly excused for cause "refuse[s] to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." (Gray v. Mississippi, No. 85-5454, Respondent's Brief at 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the state urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (Id. at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (Gray v. Mississippi, No. 85-5454, Petitioner's Reply Brief at 22.)

Of course, the state's position in Gray represents the precise view this Court adopted in 1970. (People v. Floyd, supra, 1 Cal.3d at p. 724.) As noted above, it is a view this Court has continued to follow since Floyd. (People v. Mincey, supra, 2 Cal.4th at p. 456; People v. Breaux, supra, 1 Cal.4th at pp. 309-310; People v. Frierson, supra, 53 Cal.3d at p. 742; People v. Cox, supra, 53 Cal.3d at p. 646; People v. Ghent, supra, 43 Cal.3d at p. 768; People v. Fields, supra, 35 Cal.3d at pp. 355-356.)

Significantly, however, it is also the same position the Supreme Court rejected, not only in Adams, but in Gray as well. To the contrary, and

just as it did in Adams, Gray rejected the state's arguments that (1) the trial court was free to discharge equivocal jurors for cause and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford **any** deference to the trial court's finding in Gray, but it concluded that the discharge of juror Bounds violated the constitution. (Gray v. Mississippi, supra, 481 U.S. at p. 661, n.10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (Ibid.)

The treatment of equivocal jurors in both Adams and Gray was compelled by developments in the High Court's capital case/Eighth Amendment jurisprudence. In the years between the Court's landmark decision in Furman v. Georgia (1972) 408 U.S. 238 and its later decisions in Adams and Gray, the Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (See, e.g., Gregg v. Georgia (1976) 428 U.S. 153, 181-188; Woodson v. North Carolina (1976) 428 U.S. 280, 305; Gardner v. Florida (1977) 430 U.S. 349, 357; Lockett v. Ohio (1978) 438 U.S. 586, 604; Beck v. Alabama (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (See, e.g., Beck

v. Alabama, supra, 447 U.S. 625; Gardner v. Florida, supra, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in Adams "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (Lockhart v. McCree (1986) 476 U.S. 162, 182.) The rule in Adams – designed to minimize the risk of an "imbalanced jury" – was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (Id. at p. 183.) In fact, the Court specifically noted that the Adams rule would not apply "outside the special context of capital sentencing." (Ibid.)

In other words, however the standard of proof is properly applied in non-capital cases (where the jury is simply making a binary determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" – where the jury is making a largely discretionary decision as to whether a defendant should live or die – there is a greater concern over the impact of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the state not seat juries predisposed to a death verdict. Accordingly, in both Adams and Gray, the Supreme Court made clear that when a prospective capital-case juror gives equivocal responses, the state has not carried its burden of proving that the

juror's views would "prevent or substantially impair the performance of his duties as a juror." (Adams v. Texas, supra, 448 U.S. at p. 45.)[21]

In light of the actual voir dire in both Gray and Adams, this Court must reconsider the 1970 precedent which forms the basis for the rule currently applied in all California capital cases. The current California rule – which permits the state to satisfy its burden of proof by eliciting equivocal answers from prospective jurors – cannot be squared with the rule applied in either Adams or Gray, or the Eighth Amendment developments on which they were based.

The difference between the two rules is important in this case. Applying the actual Adams standard (in light of its application) to the voir dire of juror Champlin compels a finding that the trial court in this case erred. Because this juror merely gave equivocal responses about her ability to serve, she should not have been discharged for cause. Reversal is required.

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[21] In fact, in Gray v. Mississippi, supra, petitioner specifically relied on the "special context" of capital sentencing – and the largely discretionary role of jurors deciding if a defendant should live or die – in urging the Court to find improper the trial court's discharge of an equivocal juror in that case. (Gray v. Mississippi, No. 85-5454, Petitioner's Reply Brief at 22.)

C. Application Of The Adams/Witt Standard Requires Reversal Because Although Prospective Juror Champlin Gave Equivocal Responses, She Did Not Make Clear She Would Not Consider Death As An Option.

1. The Voir Dire of Prospective Juror Champlin.

Prospective juror Elizabeth Champlin was a 30 year-old former employee of the U.S. Census Bureau, single, with no children. On her questionnaire prospective juror Champlin wrote that she "agreed somewhat" that someone who intentionally kills another person without legal justification should get the death penalty because she believed that "people should be aware that taking a life may result in losing theirs." (24 Supp.1 CT 6013-6047.) During individual voir dire prospective juror Champlin described her feelings about the death penalty as "very mixed," and explicitly stated that she would not automatically vote for life imprisonment. (9 RT 645-646.) Champlin stated that she would prefer not to live in a state with the death penalty and would not vote for the death penalty on the ballot. (9 RT 650-651.) In response to the prosecutor's questions, Champlin acknowledged that although it would be difficult to impose the death penalty, "If it came right down to it, I *probably* could." (9 RT 652) (emphasis added.) However, after being pressed by the prosecutor, Champlin equivocated in the other direction, stating she "probably [could] not" vote for a verdict of death. (9 RT 653.) When pressed by the court about what she meant by "probably" Champlin responded that "there is still

a part of me that thinks that I could [impose the death penalty] *but I'm just not certain*. I'm really not." (9 RT 653) (emphasis added.)

The prosecution challenged Champlin for cause based on her answers and because "she got emotional" during her voir dire (9 RT 655.) Defense counsel objected, but the trial court found her to be "substantially impaired" based on her views and reaction. (9 RT 655-656.)

2. Because Prospective Juror Champlin Did Not Make Clear Her Views Would Improperly Impact Deliberations or Preclude Her from Considering Death as an Option, She Should Not have been Discharged for Cause.

Prospective juror Champlin expressed some level of concern that her views on the death penalty would affect her deliberations. See, e.g., 9 RT 652 ("it would be difficult" to deliberate about a death verdict); 9 RT 653 ("not certain" how personal views would impact deliberations). As discussed above, however, the teaching of Adams and Gray is that a prospective juror's equivocal responses do **not** satisfy the state's burden of proving impairment. Absent an affirmative showing that a juror's views would either preclude death as an option, or otherwise prevent him from following the law, the juror may not be excluded for cause. Indeed, a comparison of the responses of prospective jurors – with the jurors held to have been improperly excluded in Adams removes any doubt that the exclusions in this case were improper.

Prospective juror Champlin's responses during voir dire mirrored those of prospective juror White in the Adams case. Just like White, Ms. Champlin worried that she could be personally involved in imposing the death penalty. (Compare 9 RT 652 9 RT 653 (preferring not to be involved in a death penalty case) with Adams App. at p. 26.) Just like White, she was concerned that her feelings would affect her ability to deliberate. (Compare 9 RT 652 (acknowledging her personal beliefs would make it "difficult" to serve as a juror in a death case) with Adams App. at p. 28 ["It would probably affect me in my deliberations."].) Just like White, Ms. Champlin opined at one point that she might not be able to consider a death verdict as an option. (Compare 9 RT 653 with Adams App. at pp. 27-28.) Like White, Ms. Champlin should not have been excluded. Once again, the Sixth Amendment does not permit for-cause exclusion of jurors because they are "unable positively to state whether or not their deliberations would in any way be affected." (Adams v. Texas, supra, 448 U.S. at p. 50.)

In short, the voir dire responses of prospective juror Champlin were virtually identical to those of a juror held improperly excluded in Adams. Although Ms. Champlin was unable to state that her views on the death penalty would not impact deliberations, Adams establishes this will not support a challenge for cause. (448 U.S. at p. 50.) The for-cause exclusions in this case violated both the Sixth and Eighth Amendments.

As noted above, the erroneous granting of even a single challenge for cause requires reversal. (Gray v. Mississippi, supra, 481 U.S. at p. 660.) The conviction must be reversed.

## IV. THE TRIAL COURT ERRED IN REFUSING TO DISMISS JUROR COON FOR CAUSE AFTER HE DEMONSTRATED THAT HIS PRO-DEATH PENALTY VIEWS WOULD PREVENT OR SUBSTANTIALLY IMPAIR HIS ABILITY TO FOLLOW THE LAW VIOLATING APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

### A. Background Law

While the trial court readily pruned Mr. Williams' jury of black women and prospective jurors who merely disfavored the death penalty, the court was extremely reluctant to dismiss for cause those who revealed actual bias in favor of the death penalty. In Morgan v. Illinois, supra, the High Court ruled that a trial court must excuse for cause any juror who would automatically vote for the death penalty, or "a[ny] juror to whom mitigating factors are . . . irrelevant." (Id. at pp. 738-739.) Jurors, in other words, whose personal views about crime and/or capital punishment substantially impair their ability to consider a sentence of life should be excluded for cause.

The constitutional right to an impartial jury is not satisfied when a juror is not able to follow the law. (Id. at p. 727.) Further, it is illogical to allow prospective jurors whose ability to consider a death sentence is substantially impaired to be challenged for cause, but to allow prospective jurors whose ability to consider a life sentence is substantially impaired to remain empaneled. (US v. Webster, (5th Cir. 1998) 162 F.3d 308.) If a juror who would automatically impose the death penalty sits on a jury that

imposes a death sentence, and the right to challenge the trial court's failure to remove the juror has been properly preserved for appellate review, the death sentence must be overturned. (Ross v. Oklahoma (1988) 487 U.S. 81, 85.)

When a state provides for jury sentencing the due process clause of the Fourteenth Amendment requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase. (People v. Williams (1997) 16 Cal.4th 635, 666-667.) The trial court may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that "would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath." (People v. Crittenden (1994) 9 Cal.4th 83, 121, quoting Wainwright v. Witt, supra.)

In arguing that the court wrongly denied a challenge for cause, the defendant must show that his right to an impartial jury was affected. First, "a criminal defendant may, and indeed must, exercise the peremptory challenges granted him by law 'to remove prospective jurors who should have been excluded for cause' – that is to say, to cure the very kind of error claimed here." (People v. Gordon (1991) 50 Cal.3d 1223, 1248, fn. 4, quoting People v. Coleman (1988) 46 Cal.3d 749, 770.) The defendant must also exercise all peremptory challenges and express dissatisfaction to

the court regarding the jury's composition. (People v. Morris (1991) 53 Cal.3d 152, 184; People v. Bittaker (1989) 48 Cal.3d 1046, 1087.) This court has also held that in order to preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so. (People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005.) Here, defense counsel exercised all of his peremptory challenges, and, while defense counsel failed to exercise one of his peremptory challenges against juror Richard Coon, who sat as one of the twelve jurors in judgment of Mr. Williams, this issue can still be appealed if the defense can provide a satisfactory reason for not doing so.

B. Seated Juror Richard Coon

Throughout the questioning by counsel, seated juror Coon equivocated on whether he would *automatically* vote for the death penalty irrespective of the guilt and penalty phase evidence. When Coon was first asked whether he would automatically vote for a verdict of death, he responded in the negative. (12 RT 945.) However, in his questionnaire Coon had written, "If a person willingly takes a life for any reason other than self-defense, mental instability, in defense of another, et cetera, I'm in favor of the death penalty." (12 RT 946.) Yet Coon again denied that he

would automatically vote for the death penalty if those circumstances were not met and claimed that mitigating factors could influence his decision. (12 RT 946-947.) Additionally, when asked what he would do if aggravating factors substantially outweighed mitigating factors, Coon initially stated that he would lean towards imposing the death penalty but would not do so automatically. (12 RT 947-948.) However, when asked the same question by defense counsel, Coon stated that he *would* automatically impose the death penalty. (12 RT 948.) The next *four* times defense counsel asked if Coon would automatically impose the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances, Coon responded affirmatively. (12 RT 948-950.)

The prosecution attempted to rehabilitate Coon, guiding him to state that he could return a verdict of life if the evidence revealed it to be appropriate. (12 RT 951-953.) However, questioning by defense counsel resulted in Coon indicating that it was his impression based on the jury questionnaire and the *voir dire* that Williams committed the crimes of which he was accused. (12 RT 953-955.) Further questioning by the prosecutor prompted Coon, when questioned again by the defense, to "retract" his earlier statements that he would automatically impose the death penalty because the prosecutor had made his understanding of his duties "a little more clear" (12 RT 956.) Defense counsel moved for exclusion based

on Coon's many assertions that he would always vote for death, Coon's unconvincing retraction of that position, and Coon's persistent confusion about the law and what was required of jurors throughout his questioning by both sides. The Court denied the motion.

In capital trials, the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors. (Lockett v. Ohio (1978) 438 U.S. 586, 606.) Thus, a sentencer must listen to the mitigating evidence presented, weigh it, and then decide on an appropriate sentence. (Eddings v. Oklahoma (1982) 455 U.S. 104, 113-114.) Here, Coon was "substantially impaired" because his views about capital punishment and mitigation prevented him from returning an impartial verdict in the case before him. (People v. Bradford (1997) 15 Cal.4th 1229, 1319.) A prospective juror can be excluded for cause if he or she would automatically vote for or against the death penalty because of one or more of the circumstances likely to be present in the case being tried, without regard to the relative strengths or weaknesses of the aggravating and mitigating circumstances. (People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005.)

In individual voir dire, Coon explicitly stated, "Under the circumstances where – yes, where the mitigating circumstances are so minor, yes, brought up in a happy little Christian home and all this and raised right and then – yeah, I would go for the death penalty." (12 RT

950.) Coon further added that he would impose the death penalty automatically under those circumstances. (12 RT 950.) Because the record reflects that seated juror Coon provided answers during voir dire indicating that his views about the death penalty would substantially impair his ability to sit as a juror in impartial judgment at sentencing, the court erred in denying the defense's motion to strike Coon for cause, and reversal is required.

### C. The Trial Court Applied a Different Standard to the "Cause" Challenges to Jurors who Strongly Supported the Death Penalty than to Jurors who had Personal Reservations about the Penalty Jurors, Violating Mr. Williams' Rights to an Impartial Jury, Due Process, and Equal Protection of the Law.

In denying the challenge for cause, the trial court imposed a different, higher standard on the defense's strike for "cause" of seated juror Coon, who openly favored the death penalty and who repeatedly claimed he would automatically impose it in certain circumstances, than the court had imposed on the prosecution's strike for "cause" of prospective juror Reheis, who steadfastly and articulately stated that he could set aside his personal predilections in his role as a juror and vote for death if the law and facts warranted it. The trial court's more accommodating treatment of the prospective juror, Coon, who was avidly pro-death penalty (and who was permitted to serve as a juror) than the prospective jurors, Reheis and Champlin, who expressed personal qualms about capital punishment (and

who were struck for cause) violated Mr. Williams' right to the fair and impartial jury to which he was entitled under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment as well as state law. Because of this disparate standard for the exercise of strikes for cause, and because the court permitted Coon to be seated as a juror notwithstanding views which, by Coon's own admission, substantially impaired his ability to sit in impartial judgment of Mr. Williams, reversal is required.

D. The Trial Court's Denial of the Defense's Strike for Cause of Seated Juror Coon is not Entitled to Deference.

This is not a case in which the reviewing court can accord the customary deference to the trial court's ruling on prospective jurors who gave conflicting testimony. See People v. Jones (2003) 29 Cal. 4th 1229; People v. Carpenter (1997) 15 Cal. 4th 312. The gravamen of Mr. Williams' complaint is that the trial court let bias infect its decision-making process by treating prospective jurors with reservations about the death penalty differently, and with greater hostility, than a prospective juror who indicated he would automatically vote for the death penalty.

As observed in a preceding argument, the trial court openly expressed its hostility toward African American women *as a class* because the court perceived that this group of people – irrespective of answers given during individual voir dire – was "very reluctant" to impose the death penalty. The court's perception resulted in the excusal of 83% of the black

women in the jury pool despite their stated willingness to return a death verdict. This same bias and hostility carried over into the court's inability to credit the claims of prospective jurors who voiced personal reservations about the death penalty but who stated they could set aside those opinions and vote for death when the circumstances warranted. The trial court simply could not fathom what case law clearly recognizes to be a logical and legally acceptable scenario: an individual has personal qualms about capital punishment, those qualms may color how the individual deliberates upon the evidence presented, but the individual is nonetheless able to carry out his or her duty as a juror without their personal views substantially impairing their jury service.

When it came, however, to the question of the impartiality of seated juror Coon, who repeatedly indicated on voir dire that he would *automatically* vote for death under certain circumstances, the trial court displayed no scepticism, no deep-seated concern over whether Coon's strong personal views might substantially impair his ability to serve as a juror. Against this backdrop of bias, express and implicit, by the trial court, the trial court's ruling seating Coon as a juror over the objection of the defense – and its ruling dismissing for cause prospective jurors Reheis and Champlin over the objections of defense – are not entitled to deference by this Court.

V. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE INTRODUCED THE GUILTY PLEAS OF THREE CO-DEFENDANTS AS SUBSTANTIVE EVIDENCE OF APPELLANT'S OWN GUILT WITHOUT ANY LIMITING INSTRUCTIONS.

As discussed in detail above, the State's theory in this case was simple: defendant, Linton, Cyprian, and Lee were all jointly involved in the robbery and murder, and defendant was the shooter. (16 RT 20-22.) The State's theory was that petitioner was the most culpable of the three defendants; it was he, the State argued, that had actually shot Barron and Thomas. (16 RT 21.)

Prior to defendant's trial, Linton, Cyprian and Lee all pled guilty to various homicide and robbery charges in connection with their role in this offense. (16 RT 45; 26 RT 2869) During defendant's trial, each of the former co-defendant's testified. (17 RT 1540 (Linton), 18 RT 1754; 19 RT 1779 (Cyprian), 26 RT 2722 (Lee). The guilty plea of each defendant was admitted to explain possible motives the former co-defendants would have had to testify against defendant. (18 RT 1718 (Linton), 26 RT 2871 (Cyprian and Lee).)

The trial court did not, however, instruct the jury that the co-defendant's guilty pleas could not also be used to infer defendant's guilt. Under this circumstance, as more fully discussed below, the trial court's admission of testimony that Linton, Cyprian and Lee had admitted their

guilt violated defendant's Fifth and Fourteenth Amendment due process rights. Under the circumstances of this case, the state will be unable to show that this error was harmless and reversal is therefore required.

A. The Trial Court's Introduction Of Linton, Cyprian and Lee's Admissions Of Guilt Without A Limiting Instruction Violated Defendant's Due Process Rights.

The Fourteenth Amendment to the United States Constitution provides that the states may not deprive any citizen of liberty "without due process of law." This clause not only generally guarantees that defendants receive a fair trial, but specifically ensures application of the Sixth Amendment right to confrontation. (See, e.g., Taylor v. Kentucky (1978) 436 U.S. 478, 490 (fair trial); Pointer v. Texas (1965) 380 U.S. 400, 406 (confrontation).)

The confrontation clause requires that evidence against an accused must come from the witness stand in a manner that permits a defendant to confront his accusers. (Turner v. Louisiana (1965) 379 U.S. 466, 472-473.) Thus, the government may not seek to convict a defendant by introducing evidence that a co-defendant in the case has admitted guilt and implicated the defendant. (See, e.g., Lee v. Illinois (1986) 476 U.S. 530, 546; Douglas v. Alabama (1965) 380 U.S. 415, 419.) Admissions of guilt by a co-defendant that implicate a defendant are so inherently prejudicial that introduction of such evidence is improper even when the jury has been

specifically instructed not to consider the admissions against the defendant. (Bruton v. United States (1968) 391 U.S.123.) Indeed, even where a co-defendant's admissions have been carefully redacted to remove any explicit reference to a defendant on trial, where the context of the case makes clear that the defendant's culpability is entwined with that of the co-defendant the jury must still be specifically warned it may not consider the co-defendant's admissions as substantive evidence of the defendant's guilt. (See Richardson v. Marsh (1987) 481 U.S. 200, 203, 205, 211.)

It follows from these authorities that when the state tries a defendant in a multi-defendant case, and one or more of the co-defendants admits guilt by pleading guilty, the jury may not consider the co-defendant's guilty plea as substantive evidence of the defendant's guilt. The Supreme Court has recognized this precise principle; when a case involves multiple defendants, the fact that one of the defendants has pled guilty may not properly be considered as substantive evidence of guilt as to the remaining defendants. (See Hudson v. North Carolina (1960) 363 U.S. 697, 702-703.) As the Supreme Court has noted, "the potential prejudice in such an occurrence is obvious . . . ." (Id. at p. 702.)

In light of the Supreme Court's decisions in Hudson, Lee, Douglas, Bruton and Marsh, it is not surprising that lower courts routinely hold "the guilty plea or conviction of a co-defendant may not be offered by the

government and received over objection as substantive evidence of the guilt of those on trial." (United States v. Halbert (9th Cir. 1981) 640 F.2d 1000, 1004.) "[T]he general rule is that guilty pleas of co-defendants cannot be considered as evidence against those on trial." (Baker v. United States (9th Cir. 1968) 393 F.2d 604, 614.

Of course, where a co-defendant's guilty plea is **not** admitted as substantive evidence against defendant, but is instead admitted for some other reason of which the jury is properly advised, then the concerns articulated in these cases are not implicated. However, because of the highly prejudicial nature of a co-defendant's guilty plea, trial courts are required to give rigorous limiting instructions which will ensure the jury does not use the co-defendant's guilty plea as substantive evidence of a defendant's guilt. (See, e.g., United States v. Halbert, supra, 640 F.2d 1000; United States v. Washabaugh (9th Cir. 1971) 442 F.2d 1127.)

Halbert provides a useful example of limiting instructions held insufficient to prevent the jury from using a co-defendant's guilty plea as substantive evidence of guilt. There, Halbert and two co-defendants were charged with mail fraud. Halbert's two co-defendants pled guilty and testified at trial. Their guilty pleas were introduced to aid the jury in assessing their credibility. The trial court instructed the jury that "disposition of [the testifying codefendants] . . . should not control or

influence you in your verdict with reference to the remaining defendant, Mr. Halbert. You must base your verdict as to him solely on the evidence presented to you in this courtroom." (640 F.2d at p. 1006.) Although the guilty pleas had been introduced for an acceptable reason – to aid the jury in assessing the credibility of the testifying co-defendants – the court nevertheless reversed Halbert's conviction "for want of appropriate instructions to the jury on the limited purpose for which the pleas could be used." (Id. at p. 1005.)

In this case, the jury learned that Linton, Cyrpian and Lee had all pled guilty to the precise offense for which defendant was charged. Defendant recognizes that just as in Halbert, there was a plausible reason to introduce these guilty pleas. Since these witnesses were testifying, it was important for the jury to hear the terms of their guilty plea so it could assess their credibility. In contrast to Halbert, however, where the trial court at least attempted to ensure the jury did not also consider the guilty plea as substantive evidence of guilt, the trial court here gave the jury no limiting instruction whatever on the use of these guilty pleas.[22]

B. The Error Requires Reversal Because the Harm is Manifest by the Jury's Lengthy Deliberations and Was Exacerbated by the

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[22] Because the jury potentially relied on the guilty pleas of his co-defendants as substantive evidence of Mr. Williams' guilt, the verdict in this case violates the special reliability requirements of the Eighth Amendment.

Accomplice Instructions and the Prosecutor's Closing Argument.

The existence of federal constitutional error in a state trial requires relief unless the state proves it harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The state will be unable to carry this burden here.

The harm occasioned by the trial court's failure to give the jury a limiting instruction to properly guide and confine the jury's consideration of the co-defendants' guilty pleas is manifest by the following facts: (1) the narrow scope of the jury's deliberative task; (2) the exacerbating nature of the accomplice liability instructions; (3) the prosecutor's closing argument; and (4) the extended deliberations undertaken by the jury.

Mr. Williams was charged with felony-murder. With respect to this issue, his jury had one thing, and only one thing to decide: whether Mr. Williams was present during the crime. The jury did not have to decide whether the killing was premeditated, whether Defendant was intoxicated, or whether the circumstances gave rise to a claim of imperfect self-defense. The jury needed only to find that Mr. Williams committed or facilitated the commission of the robbery which resulted in the two murders.

Because Mr. Williams' three co-defendants pled guilty to the precise offense for which Mr. Williams was charged, their pleas took on added evidentiary weight. Absent any limiting instruction from the court

preventing the jurors from considering those three pleas as substantive evidence of Mr. Williams' guilt, the skids were greased for the jury to treat those pleas as evidence regarding the one issue that it was tasked to decide: whether Mr. Williams participated in the crime

The jury's impetus to improperly employ the guilty pleas in its deliberations was in turn exacerbated by an instruction that the jury did receive: that concerning accomplice liability. Pursuant to CALJIC 3.10, the jury was instructed that "an accomplice is someone who was subject to prosecution for the identical offense charged in Counts 1, 2, 3, and 4 against" Mr. Williams. (CT 332.) The jury was further told that they could find Mr. Williams' three co-defendants to be accomplices. (CT 338.) In short, the jury was presented with co-defendant- accomplices who were each prosecuted for the identical offenses as Mr. Williams, and who each pled guilty. In the absence of the required limiting instruction, logic would impel the jury to reason as follows: the co-defendants were accomplices of Mr. Williams; they committed the same offenses as Mr. Williams; they pled guilty to those offenses; therefore, their pleas must be evidence of Mr. Williams' guilt. But it is precisely this logic which is prohibited by Bruton, supra.

The prosecutor was keenly aware of the power of the co-defendants' guilty pleas on the reasoning process of the jurors. As a result, he peppered

his guilt phase closing with references that would evoke the illicit link between the co-defendants' guilt and Mr. Williams. See, e.g., 28 RT 2974 ("What does Patrick [Linton] tell you? I was there. I did this. I took part in it. I'm doing life because of it."); 28 RT 3086 ("I think I could not make a real, real strong case without any of the co-defendants.")

These three factors – the limited scope of the jury's task, the exacerbating nature of the accomplice instruction, and the prosecutor's reference in closing argument to the co-defendants' admissions of guilt – individually and in combination, underscore the harm of the trial court's failure to give the jury a limiting instruction regarding their use of the co-defendants' guilty pleas. But it is also important to observe how mightily the jury struggled with its guilt deliberations.

As noted above, the felony-murder charge left Mr. Williams' jury with one task: to determine whether Mr. Williams committed or facilitated the commission of the predicate felony. In furtherance of its case, the State called 25 witnesses. Those witnesses offered testimony over a period of ten days. The State further introduced over 150 exhibits for the jury to review. The singular theme throughout the State's case was that Mr. Williams was at the crime scene during the crime.

If the jury had simply accepted the State's case, it would not have requested the court to read back three separate pieces of testimony given by

two of the State's witnesses, see CT 300, 29 RT 3116 (jury requests read back of testimony of Monique Williams and Dauras Cyprian); CT 301, 29 RT 3118 (jury requests further read back of testimony regarding Defendant's loaning of murder weapons to co-defendant Patrick Linton before the crime). Nor would it have deliberated for over 6 and one-half hours, spread out over three days' time (not including the weekend). Something about the State's case gave the jurors pause. Against this backdrop, it cannot be credibly claimed that the constitutional error at issue here was harmless beyond a reasonable doubt.

VI. THE TRIAL COURT VIOLATED MR. WILLIAMS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, A FAIR TRIAL AND A RELIABLE VERDICT WHEN IT REFUSED TO ALLOW HIM TO QUESTION PATRICK LINTON ABOUT THE JURY VERDICT FINDING HIM GUILTY OF FIRST DEGREE MURDER FOR HIS ROLE IN THIS OFFENSE.

A. The Relevant Facts.

In its case-in-chief, the state called Patrick Linton. (RT 1540.) Linton's testimony was critical to the state's theory that Mr. Williams was the killer.

Significantly, however, prior to Mr. Williams's trial, Linton had been tried for the January 2 killing. He had been convicted of two counts of first degree murder. (RT 1711-1712.) After a mistrial was declared (based on jury misconduct), the state retried Linton in January of 1991. (RT 1712, 1716.) At the conclusion of trial, and immediately before the jury began deliberations, the state permitted Linton to plead guilty to a single count of second degree murder (along with a second degree robbery) and receive a term of 15 years to life. (RT 1540-1542.) All remaining charges were dismissed.

Linton's testimony – if believed – was devastating to the defense case. The "lion['s] share" of the evidence at trial was presented by Mr. Williams' three co-defendants (54 RT 4126), and of the three co-defendants, Patrick Linton provided the lion's share of the testimony for the

State. He was the first of the co-defendants to testify and set the stage for the remaining witnesses to corroborate. In the prosecutor's words, *"the one critical point* in terms of how devastating the evidence was in this case . . . came from Patrick Linton." (54 RT 4144.) (Emphasis added.)

The prosecutor focused on this "devastating" evidence in his closing argument to the jury.

> And I don't want to forget this, so I'm going to mention it now. I think when Patrick Linton took the stand and he began answering questions, everybody could not only see, but feel the reluctance in terms of testifying. . . . And if you recall, if you think back, because it stands out very clearly in my mind what happened, is he was on the stand . . . and then I asked him if George Brett Williams killed anybody. And do you remember what he did? He stopped. He looked back and he wouldn't answer. I said the truth, Patrick. And reluctantly, but very honestly, he said, that he did. . . . This is somebody facing life in prison.

(28 RT 2974-75.)

The prosecutor returned to this, what he considered the pivotal moment of the guilt trial, at the Motion for New Trial. To rebut the defense argument that the State's guilt phase evidence was weak and that the reliability of the guilt verdict was questionable, the prosecutor again recreated the courtroom drama of Linton's testimony.

> [T]he court will recall[] [Linton's] mother was present in the back of the courtroom, defendant and defense counsel were seated here and . . . [Linton] was hesitant in terms of giving any responses to anything. And he was asked "Did you kill anybody?" And he looked at his mom and he said "No." . . . .

> "Did Dauras Cyprian kill anybody?" He says, "No." "Did Dino Lee kill anybody . . . ." "No."
>
> But the telling part was what happened next. I said "Did George Brett Williams kill anybody . . . ." And he didn't answer. He sat there and he waited and he looked at his mom and he looked down. And I yelled at him, "The truth, Patrick." And he said, "Yes."

(54 RT 4144-45.) As the prosecutor told the court, "*if any one piece of evidence* all by itself . . . sunk this defendant, that was it . . . ." (54 RT 4145.) (Emphasis added.)

The obvious importance of Linton's testimony was not lost on defense counsel, who spent considerable time cross-examining him on his testimony. (18 RT 1650-1704.) The defense thesis was simple: Linton was lying. In order to support this thesis, defense counsel asked a series of questions to show the jury exactly how beholden Linton was to the prosecution.

Thus, Linton admitted that he had originally been charged with two counts of first degree murder and that he was theoretically facing a consecutive life term on each count. (18 RT 1706.) He also admitted that, after his guilty plea, he received a single sentence of 15 years-to-life. (17 RT 1541.)

The defense theory, of course, was that Linton obtained this extremely favorable deal by offering to testify for the state and inculpate Mr. Williams. For all the jury knew, however, the state offered this

favorable deal not to obtain testimony, but because of a weakness in its case. In order to address this fundamental point, defense counsel offered to introduce the fact – undisputed by the state – that at Linton's first trial, he had actually been convicted of both counts of first degree murder. (18 RT 1712.) In other words, based on his experience at the first trial, there was nothing theoretical about the two consecutive life terms Linton was facing. The state's case against him was rock solid; the state offered him this extremely favorable deal **not** because of a weakness in its case, but in order to get him to testify favorably against Mr. Williams. (18 RT 1712-1713.)

The prosecutor argued that what happened at the first trial was irrelevant, and that the jury was not entitled to hear "what happened in the verdict in the [first] case." (18 RT 1713-14.) In making this argument the prosecutor solemnly assured the court that he had "made [Linton] no promise" and Linton "had no expectations of anything." (18 RT 1713-1714.) Trial counsel responded to the prosecutor's objection, correctly pointing out that although the prosecutor could argue his theory of the case, the jury should at least have all of the evidence it needed to assess Linton's motive for testifying:

> "Now, [prosecutor]. McCormick can counter that in his cross-examination; he can shoot it down; he can do what he wants to it. But I want to be able to argue that this man had a reason . . . ." (18 RT 1713.)

Defense counsel noted the importance of showing that the state had already tried Linton and obtained first degree murder verdicts. (18 RT 1714.) He argued that in light of these verdicts, the state's subsequent willingness to settle for a guilty plea to a single count of second degree murder suggests someone "made the offer" to have Linton testify in exchange for lenient treatment. (18 RT 1714-1715.) He was quite clear as to why this evidence was relevant:

> And I'm trying to develop a motive for Mr. Linton to take the stand to lie about [defendant's] involvement, and I have several lines of inquiry and this is one of them, that a man who knows what he's charged with, knows what he is faced with, has already experienced a guilty verdict, even though it was set aside, has already sat through a trial with the same evidence, the district attorney certainly would have no reason to back down and say, okay, I'm offering you second degree . . . . (18 RT 1717.)

The trial court excluded any evidence that Linton's first trial had resulted in two first degree murder verdicts. (18 RT 1716-1718.) The court explained that if it allowed that evidence in, it would "have to get to everything else, about jury misconduct and why." (18 RT 1716.) Instead, the court limited defense counsel to asking Linton whether he understood he was receiving lenient treatment for his testimony. (18 RT 1717-1718.) Defense counsel complied with the court's order, and Linton was permitted to tell the jury that (1) he did **not** get the guilty plea in exchange for an agreement to testify, (2) it was entirely up to him (Linton) as to whether he

would testify against Mr. Williams, and (3) he did not expect to receive lenient treatment at his parole hearing because of his testimony. (18 RT 1719-1720.)

In evaluating these answers, and Linton's motive to testify, the jury never learned that not only could the state prove Linton's complicity for two first degree murders beyond a reasonable doubt, **but that it had already done so once**. Nor did the jury know that because of the jury's verdicts, when Linton entered his guilty plea he knew that one jury had found the state's evidence so persuasive that it had unanimously convicted him of two counts of first degree murder. The trial court's ruling kept this information from the jury.

As more fully discussed below, this was prejudicial error. Given how important Linton was to the state's case, it was vitally important that Mr. Williams be able to fully expose his motive for testifying. Evidence that he had been convicted for two counts of first degree murder would have been useful in two separate ways. First, this evidence shows the state had a powerful and persuasive case against Linton; in this situation, it would be unlikely for the state to have offered a second degree murder plea absent Linton's agreement to testify favorably. Second, this evidence shows that Linton knew the state's case was powerful, and that he was not facing simply theoretical consecutive life sentences. In this situation, his

motive to make a deal was extremely strong. As discussed below, Mr. Williams's Fifth and Sixth Amendment rights to a fair trial and to present a defense, and his Eighth Amendment right to a reliable determination of guilt in a capital case, entitled him to present this information to the jury. The trial court's contrary ruling requires reversal.

### B. The Trial Court's Refusal To Allow Defense Counsel To Ask About The Result Of The First Trial Violated The Fifth, Sixth And Eighth Amendments.

Both the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 1, section 15 of the California Constitution provide criminal defendants with the right to confrontation. The right to confrontation, in turn, guarantees the right to cross-examine adverse witnesses. (See Pointer v. Texas (1965) 380 U.S. 400, 404-405.) This right is a critical component of the criminal justice system. "[C]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (Davis v. Alaska (1974) 415 U.S. 308, 316.) The right to cross-examination is considered even more important when the witness to be examined is the key witness in a criminal prosecution. (People v. Murphy (1963) 59 Cal.2d 818, 831; United States v. Brown (5th Cir. 1977) 546 F.2d 166, 170.)

Although the **extent** of cross-examination is within the trial court's discretion, the **right** to cross-examine in a relevant area is not. Thus,

although a trial court may properly limit cross-examination in an area, the court has no power to completely preclude inquiry into an area relevant to the witness's credibility. (United States v. Atwell (10th Cir. 1985) 766 F.2d 416, 419-420; United States v. Valentine (10th Cir. 1983) 706 F.2d 282, 287-288; United States v. Haimowitz (11th Cir. 1983) 706 F.2d 1549, 1559; United States v. Brown, supra, 546 F.2d at p. 169.) The court's power to limit the extent of cross-examination in an area arises only "after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." (United States v. Haimowitz, supra, 706 F.2d at p. 1559.) Cross-examination in any particular area is sufficient to satisfy the Sixth Amendment when the defendant has been allowed the opportunity to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Davis v. Alaska, supra, 415 U.S. at p. 318. Accord People v. Boehm (1969) 270 Cal.App.2d 13, 21; United States v. Elliot (5th Cir. 1978) 571 F.2d 880, 908.) When a court precludes cross-examination in a particular area, the defendant's constitutional rights have been violated. (See, e.g., United States v. Valentine, supra, 706 F.2d at p. 287-288; United States v. Brown, supra, 546 F.2d at p. 169.)

The trial court's ruling violated Mr. Williams's state and federal constitutional rights to confrontation and a fair trial. In this case, defense

counsel was limited to cross-examining Linton about the charges which had been filed against him. (RT 1706.) But the trial court completely precluded him from asking Linton about the verdict from the first trial. Because of the trial court's ruling, defense counsel was completely precluded from exploring the connection between (1) the jury's verdict finding Linton guilty of two counts of first degree murder, (2) the state's subsequent willingness to nevertheless accept a guilty plea to a single count of second degree murder, and (3) Linton's subsequent willingness to testify favorably for the state against Mr. Williams. As a consequence Linton was free to testify without contradiction that he was receiving no leniency for his testimony, whereas had the jury been informed of the previous verdicts against Linton they would have had a basis for drawing the highly plausible inference that leniency had indeed been offered Linton and eagerly accepted by him.

Under these circumstances, the trial court's ruling violated Mr. Williams's rights to confrontation and a fair trial. Although the trial court might have been within its discretion to limit the extent of defense counsel's cross-examination in this area, the trial court had no authority to completely preclude cross-examination as to the verdict in the first trial.

In short, the trial court's ruling precluded defense counsel from "expos[ing] to the jury the facts from which jurors, as the sole triers of fact

and credibility, could appropriately draw inferences relating to the reliability of the witness." (Davis v. Alaska, supra, 415 U.S. at p. 318.) The fact that defense counsel was allowed the opportunity to cross-examine on other areas of Linton's testimony does not justify the trial court's complete preclusion of cross-examination regarding the critical point of the jury's verdict in the first trial. The court's ruling denied Mr. Williams his federal and state constitutional rights to confrontation and a fair trial. It also violated his Eighth Amendment right to a reliable determination of guilt in a capital case. (Beck v. Alabama, supra, 447 U.S. 625.)

C. Because Linton's Testimony Was Critical To The State's Claim That Mr. Williams Was The Killer, The Trial Court's Limitation Of Defense Counsel's Cross-Examination Requires Reversal.

Because the court's error of precluding cross-examination of a critical prosecution witness violated Mr. Williams's constitutional rights, reversal is required unless respondent can prove the error was harmless beyond a reasonable doubt. (Delaware v. Van Arsdall (1986) 475 U.S. 673; Chapman v. California (1967) 386 U.S. 18, 24.) On the record of this case, the state cannot carry this burden.

As noted above, Linton was a key witness for the state. The testimony of Williams' co-defendants was at the core of the State's case, and Linton played the lead role within this part of the case. Of the co-

defendants, he testified first and at greatest length. And, according to the prosecution, Linton's testimony clinched the State's case: *"the one critical point* in terms of how devastating the evidence was in this case . . . came from Patrick Linton." (54 RT 4144.) (Emphasis added.). As the prosecutor exclaimed, "i*f any one piece of evidence* all by itself . . . sunk this defendant," it was, Linton's testimony. (54 RT 4145.) (Emphasis added.)

On this record, the trial court's decision to preclude defense counsel from cross-examining Linton about the verdict in the first trial cannot be found harmless. Reversal is required.

## VII. THE PROSECUTOR COMMITTED MISCONDUCT IN CALLING DEFENSE COUNSEL A LIAR AND ACCUSING HIM OF MISLEADING AND DECEIVING THE JURY AND PERVERTING THE SYSTEM.

### A. The Relevant Facts.

Closing arguments began on October 4, 1991. (28 RT 2964-2965.) It did not take long for the prosecutor to accuse the defense lawyers of lying. In fact, it happened almost immediately:

> By Mr. McCormick: Good morning.
>
> The Jury: Good morning.
>
> Mr. McCormick: I gave a lot of thought on how to proceed in my closing argument. I had a hard time sleeping last night because part of me really wants to come in here and attack the defense for the methods which they used to try and mislead you, deceive you, give you false insinuations.

After characterizing the position of the defense as being that Mr. Williams was not there, the prosecutor did not mince words about defense counsel: "I say he's lying." (28 RT 2966.) During his rebuttal, the prosecutor became more direct, telling the jury that the "deception continues." (28 RT 3084.) The prosecutor explained that this deception was "not something that stops and starts." (28 RT 3084.) To the contrary, according to the prosecutor, the deception:

> "continued as a perversion through this entire system, and it continued through closing argument." (28 RT 3084.)

The prosecutor accused defense counsel of "misstat[ing] the evidence" and explained that "the problem for defense counsel and for his client is that . . . . he can't deceive the phone records. He can't manipulate them. He can't confuse them." (28 RT 3084.)

B. 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 (2001) 25 Cal.4th 34, 43-44.)

### C. The Prosecutor's Attacks On Defense Counsel's Integrity Constituted Misconduct.

It is misconduct for a prosecutor to (1) attack the integrity of defense counsel, (2) cast aspersions on defense counsel, or (3) suggest that defense counsel has fabricated a defense. (People v. Bemore (2000) 22 Cal.4th 809, 846; People v. Hill, supra, 17 Cal.4th at pp. 832-834; People v. Walsh (1993) 6 Cal.4th 215, 265. Cf. United States v. Matthews (9th Cir. 2001) 240 F.3d 806, 813 [prosecutor's characterization of defense counsel's argument as obscuring the facts like "an octopus squirting ink" was "unworthy of a representative of our government."].) Here, the prosecutor did all three.

The prosecutor told the jury that defense counsel were liars, pure and simple. The prosecutor was blunt; defense counsel had tried to "mislead you, deceive you, give you false insinuations." (28 RT 2965.) Defense counsel was "lying." (28 RT 2966.) According to the prosecutor, counsel's deception was a "perversion" and "continued through closing argument." Defense counsel had problems with evidence he could not "deceive," "manipulate" or "confuse." (RT 3084.)

D. Given The Nature Of The Misconduct, Reversal Is Required.

The general test of prejudice in evaluating prosecutorial misconduct is the traditional harmless error rule requiring a defendant to show that the misconduct resulted in a miscarriage of justice. (People v. Green (1980) 27 Cal.3d 1, 34-35.) When the misconduct impacts upon a defendant's federal constitutional rights, however, "the burden shifts to the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (People v. Bolton (1979) 23 Cal.3d 208, 214.) Federal due process may be violated where a prosecutor's pervasive misconduct results in an unfair trial. (People v. Hill, supra, 17 Cal.4th at p. 818.) In such a situation, application of the federal standard of prejudice would be required.

In this case there is no need to decide which of the state or federal standards should apply. Under either standard, reversal is required.

As part of its guilt phase prosecution, the State called 25 witnesses, who testified over a period of ten days. The State also introduced over 150 guilt phase exhibits for the jury to review. (CT 296.) The defense, on the other hand, presented the testimony of only four witnesses whose cumulative testimony, on direct and cross examination, lasted less than five hours not even one full court proceeding. The defense also introduced only 14 exhibits. (Id.)

In light of the dearth of defense witnesses, the limited length of their testimony, and the paucity of defense exhibits, the success of the defense depended substantially upon defense counsel's credibility. Indeed, defense counsel's credibility became even more important when it was decided, during the trial, that Mr. Williams would not take the stand in his own defense. Accordingly, much rested on how the jury viewed defense counsel's ability to faithfully summarize the evidence, accurately sift material facts from immaterial ones, illuminate critical holes in the State's case, and offer reasons why there was reasonable doubt about Mr. Williams' culpability. The prosecutor's improper impugning of defense counsel's integrity, thus, cut to the core of the defense's strength. Had the prosecutor not engaged in such misconduct, it is likely that the outcome of the guilt phase would have been different. All indications were that the jury regarded Mr. Williams' guilt to be a very close case. Even with the prosecutor's attacks on defense counsel, the jury struggled mightily with its guilt deliberations, requesting the court to read back three separate pieces of testimony given by two of the State's witnesses. See CT 300, 29 RT 3116 (jury requests read back of testimony of Monique Williams and Dauras Cyprian); CT 301, 29 RT 3118 (jury requests further read back of testimony regarding Defendant's loaning of murder weapons to co-defendant Patrick Linton before the crime). What is more, the jury

deliberated for over 6 and one-half hours, over three days' time (not including the weekend).

Something, in other words, gave Mr. Williams' jurors pause. Against this backdrop, it must be recognized that the prosecutor's attacks on defense counsel, far from being harmless, likely tipped the balance against Mr. Williams in this close case.

## VIII. THE PROSECUTOR COMMITTED MISCONDUCT BY REPEATEDLY QUESTIONING WITNESSES ABOUT FACTS NOT IN EVIDENCE.

During the guilt phase of Mr. Williams' trial, the prosecutor repeatedly referred to inadmissible hearsay and facts not in evidence to insinuate to the jury that Mr. Williams had fled to New York after committing the crime. At trial, defense counsel repeatedly objected to the prosecutor's display of an inadmissible blowup of a New York hotel registration card and questions to witnesses that insinuated to the jury that the registration card contained Mr. Williams' handwriting. Because the prosecutor's repeated acts of misconduct attempted to bootstrap the contents of this inadmissible hearsay into evidence before the jury, violating Appellant's federal and state constitutional rights to confront witnesses and evidence, an impartial jury, a reliable determination of guilt and due process of law, reversal is required.

### A. The Relevant Facts

A critical component of the prosecution's guilt phase case turned on the contention that Mr. Williams fled to New York after committing the crime. While Mr. Williams' alleged accomplice testified that Williams fled to New York after the crime, no physical or documentary evidence linked Appellant either to the crime itself or to the alleged flight to New York. Throughout the trial, the prosecutor repeatedly referred to

inadmissible hearsay regarding Mr. Williams' presence in New York. After the guilt phase trial, the prosecutor conceded that his failure to admit the documentary evidence of Appellant's trip to New York was a mistake that could have misled the jury.

Opening Statement

In the prosecutor's opening statement, he asserted that evidence would be admitted proving that Mr. Williams and a co-defendant fled to New York after the crime. Documentary evidence of this New York trip consisted of a registration card from the Hotel Stanford. (16 RT 1291.) The prosecutor told the jury that the contents of the Hotel Stanford registration card contained Appellant's personal information, such as Appellant's wife's birthday, the number "319" from his residential address, and the name and signature of "Mark Cole," Appellant's alleged alias that was contained in other documentary evidence admitted at trial. (16 RT 1291-1292; 23 RT 2330-2332; 23 RT 2394.) Defense counsel objected to the display of the blowup of the Hotel Stanford registration card, and it was never marked as an exhibit. (25 RT 2715-2716, 27 RT 2904.) Registration cards from two hotels in New York were never admitted into evidence. (19 RT 1800, 25 RT 2714-2716.) After the close of the prosecution's guilt phase case-in-chief, the prosecutor informed the court, out of the jury's presence, that a failure to admit the New York hotel

registration cards into evidence could mislead the jury regarding the evidence that Mr. Williams fled to New York after the crime. (27 RT 2915.)

Sheila Jones – Direct Examination Re: New York Telephone Records

The prosecutor's pattern of misconduct continued throughout the direct examination of witnesses in the prosecution's case-in-chief. During the direct examination of Sheila Jones, the aunt of Appellant's wife, the prosecutor inquired about Appellant's telephone calls to her residence that allegedly originated from the Hotel Stanford in New York. (18 RT 1741.) Although defense counsel did not object to questions about receiving telephone calls from Appellant, the prosecutor displayed in his hand while questioning the witness the alleged telephone records from the Hotel Stanford. The prosecutor did not seek to admit the New York telephone records into evidence, as defense counsel objected to the use of the records on hearsay grounds that there was no foundation for admitting the hotel's telephone records, 18 RT 1741, an objection which the court sustained as discussed below.

At sidebar, the prosecutor repeatedly represented to the court that he would be presenting testimony from the Custodian of Records from the Hotel Stanford, Robert Song, 18 RT 1741, 1742, to authenticate the records at issue and admit them into evidence under the business records

exception to the hearsay rule. However, Robert Song never testified at trial. Despite questioning a witness regarding information contained in the Hotel Stanford telephone records and displaying those records before the jury, the prosecutor admitted at sidebar that he never sought to admit them into evidence. (18 RT 1743.)

While the court permitted the prosecutor to ask Ms. Jones whether she received telephone calls from the Mr. Williams, during his questioning the prosecutor improperly displayed the telephone records within view of the jury, pulling them out of an envelope and permitting the jury to infer that the prosecutor would be admitting documentary evidence to underscore his assertions. After repeated objections and requests from defense counsel not to display the records, 18 RT 1743-1744, the court sustained defense counsel's objection, 18 RT 1744, and attempted to cure the prosecutor's mistakes by sending the jury to the jury room so that the prosecutor could write down information from these records without using the records themselves during his examination of the witness. (18 RT 1744-1745.) The telephone records were never admitted into evidence. (25 RT 2714.)

Testimony of Dauras Cyprian

The prosecutor's pattern of presenting the contents of inadmissible evidence before the jury continued during the his direct examination of

Appellant's alleged accomplice, Dauras Cyprian. Mr. Cyprian admitted that he never saw Appellant filling out the registration card at the Hotel Stanford. (19 RT 1808-1809.) However, Cyprian testified that he and Appellant checked in to the hotel under the aliases Mark and Michael Cole. (19 RT 1807.) This testimony occurred while the prosecutor displayed the blowup of the Hotel Stanford registration card that had the name and signature of "Mark Cole" displayed in open court before the jury, for which the trial court sustained defense counsel's objection. (27 RT 2904.)

Handwriting Expert's Testimony

The prosecutor demonstrated that he knew there was no documentary or physical evidence before the jury linking the handwriting on the Hotel Stanford registration card and Appellant's handwriting during the direct examination of Bruce Greenwood, a police handwriting expert. On cross-examination by defense counsel, Mr. Greenwood testified that he could not "connect" Mr. Williams' handwriting and the name "Mark Cole" that appeared on the Hotel Stanford registration card. (23 RT 2330-2331.) During the prosecutor's re-direct examination, the prosecutor noted that Mr. Greenwood "never even attempted" to compare Appellant's signature to that on the registration card. (23 RT 2394.)

Out of the jury's presence, defense counsel objected to the admission of the New York hotel registration cards. (25 RT 2714-2716.)

Although the prosecutor referred to them throughout the trial, they were never marked or admitted as exhibits. (25 RT 2715-2716, 27 RT 2904.)

B. Prosecutor Admits Error Regarding Admissibility of New York Hotel Records

Recognizing his mistake in not admitting the Hotel Stanford registration card during his case-in-chief, the prosecutor asked the court's permission to re-open his case. The prosecutor told the court that while defense counsel had objected to admitting a display of the blowup of the Hotel Stanford registration card into evidence, the prosecutor had displayed the inadmissible blowup in open court "on the board" in front of the jury for weeks, since the beginning of the trial in mid-September until that day, October 3, 1991. (27 RT 2904.) Defense counsel objected to re-opening the prosecution's case-in-chief, 27 RT 2905, which the court sustained. (27 RT 2928.)

During the sentencing hearing, the prosecutor conceded that it was a mistake not to present the New York hotel registration cards during the People's case-in-chief. (54 RT 4171.)

In his closing argument, the prosecutor repeatedly assailed defense counsel for over-promising in opening statement what he expected the evidence to show and then under-delivering that evidence to the jury. (26 RT 2872-75, 27 RT 2911-12, 2965-66.) The prosecutor's failure to admit the New York hotel receipts into evidence after promising the jury it would

have such evidence similarly misled the jury. As argued elsewhere in the brief, the prosecutor also committed several other instances of misconduct, including, but not limited to jury selection and in impugning the integrity of defense counsel. When taken by itself, or in conjunction with these other instances, the prosecutor's failure to introduce the Stanford Hotel receipts into evidence notwithstanding the great weight he put on those receipts deprived Appellant's rights to confront witnesses and evidence, an impartial jury, a reliable determination of guilt, and due process of law under the federal and state constitutions. Reversal is therefore required.

### C. The Prosecutor's Misconduct Violated Mr. Williams' Sixth and Fourteenth Amendment Rights under the Federal Constitution

The prosecutor's pattern of insinuating Mr. Williams' guilt based on facts not in evidence and inadmissible hearsay violated Appellant's rights to confront witnesses and evidence (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16), his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17), and the fair trial guaranteed by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15). Gomez v. Ahitow (9th Cir. 1994) 29 F.3d 1128, 1136, cert. denied, 513 U.S. 1160 (1995) ("The prosecutor may

not, consistent with a defendant's Due Process rights and Sixth Amendment right to confrontation, 'seek to obtain a conviction by going beyond the evidence before the jury.'" (citation omitted)); People v. Carr (1958) 163 Cal.App.2d 568, 575-576 (prosecutor's overstatement [in opening statement] of items of incriminating evidence allegedly discovered in defendant's possession required reversal under Due Process Clause of the 14th Amendment of the U.S. Constitution).

Stating, implying, or arguing facts damaging to Appellant on which no evidence had been introduced violated Appellant's Sixth Amendment right to confront and cross-examine the witnesses against him (Douglas v. Alabama (1965) 380 U.S. 415, 418 (holding that the Confrontation Clause of the Sixth Amendment of the U.S. Constitution was applicable to the states); see, e.g., Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643, fn. 15; Cal. Const., art. I, § 16). A prosecutor's actions may violate the Confrontation Clause in at least two profound ways. First, the prosecutor may seek to introduce an out-of court statement against a defendant. Hutchins v. Wainwright (11th Cir. 1983) 715 F.2d 512, 515-516) (prosecutor may not seek to obtain a conviction by presenting statement of witness who did not testify). Second, a prosecutor violates a defendant's federal and state constitutional rights when he or she refers to evidence not admitted at trial on which a defendant has no opportunity to cross-exam.

See, e.g., Gomez v. Ahitow, 29 F.3d 1128, 1136 (9th Cir. 1994) ("The prosecutor may not, consistent with a defendant's Due Process rights and Sixth Amendment right to confrontation, 'seek to obtain a conviction by going beyond the evidence before the jury.'").

Applicable law proscribes a prosecutor's attempts to introduce the contents of an out-of court statement against a defendant. Hutchins v. Wainwright (11th Cir. 1983) 715 F.2d 512, 515-516 (prosecutor may not seek to obtain a conviction by presenting statement of witness who did not testify). The admission of an out-of-court statement runs afoul of the Confrontation Clause unless the State can establish the statement's reliability either by showing that the statement falls under a firmly rooted hearsay exception or by making an affirmative showing that of the statement's trustworthiness. Idaho v. Wright (1990) 497 U.S. 805, 818-821; Goldsmith v. Witkowski (4th Cir. 1992) 981 F.2d 697, 704 (prosecutor prohibited from presenting evidence through the "back door" and thus permitting jury to infer facts not in evidence), cert. denied, 509 U.S. 913 (1992); United States v. Simtob (9th Cir. 1990) 901 F.2d 799, 805 (government may not refer to extrinsic information not presented in court as supporting its case).

Here, over defense counsel's sustained objections, the prosecutor repeatedly displayed the Hotel Stanford registration card blowup in open

court before the jury. The prosecutor's failure to admit this unmarked exhibit demonstrates that the State could not establish the reliability of the blowup under a hearsay exception or make an affirmative showing of its trustworthiness. Rather, while the prosecutor at sidebar repeatedly represented to the court his intent to call as a witness Robert Song, the Custodian of Records for the Hotel Stanford, 18 RT 1741-1743, the prosecutor failed to do so, and thus the blowup was not admitted into evidence.

Second, the prosecutor violated Mr. Williams' constitutional rights when he referred to evidence not admitted at trial on which the Appellant had no opportunity to cross-exam. See, e.g., Gomez v. Ahitow (9th Cir. 1994) 29 F.3d 1128, 1136 ("The prosecutor may not, consistent with a defendant's Due Process rights and Sixth Amendment right to confrontation, 'seek to obtain a conviction by going beyond the evidence before the jury.'"); United States v. Vera (11th Cir. 1983) 701 F.2d 1349, 1361 (prosecutor may not go beyond evidence presented in pursuing a conviction); Hicks v. Straub (E.D. Mich. 2003) 239 F.Supp.2d 697, 707-712 (prejudicial Confrontational Clause violation for prosecutor to refer during opening statements to a purported confession made by petitioner to a jailhouse informant and then fail to produce the witness.) "While prosecutors are not required to describe sinners as saints, they are required

to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch or spite." United States v. Schindler (9th Cir. 1980) 614 F.2d 227, 228. In contrast to the prohibition against admitting hearsay evidence, which focuses on the nature of the evidence, this prohibition focuses on the prosecutor's actions.

Thus, a prosecutor runs afoul of the Confrontation Clause when suggesting during closing argument that evidence not admitted bolsters the case against the defendant. See, e.g., United States v. Carroll (5th Cir. 1982) 678 F.2d 1208, 1210 (District attorney violated defendant's Confrontation Clause rights by suggesting in closing argument that the defendant had to have been at the scene of the crime because he knew more about certain pictures than his lawyer) (citing United States v. Vera (11th Cir. 1983) 701 F.2d 1349, 1361, cert. denied, 513 U.S. 1160 (1995); United States v. Molina (9th Cir. 1991) 934 F.2d 1440, 1446 ("The prosecutor's assertions that there were as many as nine other law enforcement officials who would support their testimony is an improper reference to inculpatory evidence not produced at trial." ).

The improper references to inadmissible hearsay allowed the prosecutor to act as an unsworn witness, thereby violating Mr. Williams' constitutional right to confrontation (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16). In addition, under California law a prosecutor who

uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct even if such action does not render the trial fundamentally unfair. (People v. Earp (1999) 20 Cal.4th 826, 858; People v. Hill (1998) 17 Cal. 4th 800, 819; People v. Berryman (1993) 6 Cal. 4th 1048, 1072; People v. Espinoza (1992) 3 Cal.4th 806, 820; People v. Price (1991) 1 Cal. 4th 324, 447.)

D. The Prosecutor's Misconduct Was Prejudicial and Requires Reversal

It is misconduct to ask questions which call for inadmissible evidence (People v. Smithey, supra, 20 Cal.4th at p. 960; People v. Bell, supra, 49 Cal.3d at p. 532), and the misconduct here was prejudicial even though the court sustained defense counsel's repeated objections. A prosecutor may commit misconduct without a showing of bad faith. The issue turns on whether the Appellant's rights were violated, intentionally or inadvertently. People v. Hill, supra, 17 Cal.4th at p. 822.

It is misconduct for the prosecutor to imply to the jury that there is evidence which has not been introduced which would support the prosecution's case. (People v. Hill, supra, 17 Cal.4th at pp. 828-829; People v. Bolton (1979) 23 Cal.3d 208, 213.) "[T]he prosecutor should not allude to additional evidence he cannot or will not present, thus leaving jurors to speculate that the People have . . . a stronger case" than the one the jurors have heard. (People v. Montiel (1993) 5 Cal.4th 877, 912.)

Here, the prosecution's case rested almost wholly on the testimony of alleged accomplices. No physical evidence linked Mr. Williams directly to the crime, so the tangible documentary evidence of the New York hotel registration cards is some of the most prejudicial documentary evidence suggesting that Mr. Williams committed a crime and was conscious of his guilt thereafter. Accordingly, the prosecutor's repeated insinuations and display of inadmissible evidence, as well as the prosecutor's pattern of soliciting answers from witnesses based on this inadmissible evidence, violated Appellant's right to confront and cross-examine the witnesses against him under the federal and state constitutions, and reversal is required.

The prosecutor was determined that the jury be told about the contents of the New York hotel records, in defiance of repeated, sustained defense objections and the prosecutor's own concession that failure to admit the hotel registration cards into evidence would have misled the jury. Accordingly, the constitutional rights of Appellant to a fair and reliable determination of guilt under the federal and state constitutions were violated. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17.)

Cumulative instances of prosecutorial misconduct can render a trial fundamentally unfair. (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-643.) This Court has recognized that misconduct violates federal due

process standards if it infects a trial with fundamental unfairness. (People v. Hill, supra, 17 Cal.4th at p. 819.) Moreover, the Eighth Amendment guarantees of reliability in capital cases requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (Beck v. Alabama (1980) 447 U.S. 625, 638 (constitutional demands for reliability in capital case extends to guilt determination.)) Here, Appellant was subjected to numerous instances of bootstrapping inadmissible evidence that individually and cumulatively rendered the trial fundamentally unfair.

The sheer breadth and consistency of the improper questions posed to lay witnesses, accomplices, and experts amount to a pattern of "constant and egregious" misconduct requiring reversal. People v. Hill, supra, 17 Cal.4th at p. 818.

In addition, in California "the rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" People v. Wagner (1975) 13 Cal.3d 612, 619. Thus, it is misconduct to deliberately ask questions calling for inadmissible and prejudicial answers. People v. Bell (1989) 49 Cal.3d 502, 532; People v. Pitts (1991) 223 Cal.App.3d 606, 734.

When a prosecutor intentionally asks questions in bad faith for the purpose of insinuating prejudicial matter not properly admissible in evidence (although bad faith is no longer required under People v. Hill, supra, 17 Cal.4th at p. 822), the fact that the witness gives negative responses, or that the court admonishes the jury to disregard the questions, will not cure the harm. People v. Wagner (1975)13 Cal.3d 612, 619. In Wagner, the defendant took the stand, denied being involved in a drug transaction in California, and testified that he owned a lucrative business in Alaska and therefore had no need to sell drugs for money. During his cross-examination, the prosecutor contended that this testimony opened the door for character evidence and, over defense objections, asked the defendant a number of questions implying that he had sold drugs previously in Alaska. Id., at pp. 616-617. The defendant gave negative responses to all these questions, and after the prosecutor failed to produce any evidence or make an offer of proof to substantiate the charges implied by the questions, the trial court admonished the jury not to draw any inference or speculate about any question to which an objection was sustained, and also later instructed the jury not to "speculate to be true any insinuation suggested by a question asked a witness." Id., at p. 621.)

This court reversed for prosecutorial misconduct. Although the court agreed that the defendant had opened the door to character evidence,

it found that the prosecutor had acted in bad faith in asking questions for which he had no factual basis. Id., at p. 619. Regardless of the witness's responses to the questions, this was misconduct.

> The impropriety of the prosecutor's conduct in this case was not cured by the fact that his questions elicited negative answers. By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. The rule is well established that the prosecuting attorney may not interrogate witnesses solely "for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." [Citations omitted.] It is reasonable to assume that, in spite of defendant's negative responses in the instant case, the jurors were led to believe that, in fact, defendant had engaged in extensive prior drug transactions.

Id., at p. 619.

Applying the Watson standard, this court found it reasonably probable that a more beneficial result would have occurred but for the error. Indeed, the court found that even the trial court's admonitions and instructions to the jury to disregard the insinuations were ineffective to cure the harm done. Id., at p. 621.

Similarly, in People v. Evans (1952) 39 Cal.2d 242, this Court held that admonitions from the court are often insufficient to repair the damage done by this kind of prosecutorial misconduct. In that case, the prosecutor asked the defendant a number of questions insinuating that the defendant

had accosted and molested a little girl in a park at night. After listing the improper questions the prosecutor had asked, this court stated:

> In none of the instances above quoted did the prosecution make any attempt to prove the truth of the matters asserted in the questions. It seems apparent that the only purpose of the form of the questions was to get the statements before the jury. Although objections were not made to all of these questions, it would appear that the case was one in which an admonition would not have purged the harmful effect of the remarks. In cases where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal where no objection was made or admonition requested on behalf of the accused. ([Citations omitted].)

Id., at 248-249.

The prosecutor's questions to witnesses discussed above included all the information he wanted the jury to hear in the question itself, so it was not necessary for the question to be answered in order for it to have its intended prejudicial effect. People v. Williams (1997) 16 Cal.4th 153, 252. The bell could not be unrung. See Bruton v. United States (1968) 391 U.S. 123, 129; Tanford, *The Law and Psychology of Jury Instructions*, 69 Neb. L.Rev. 71, 86-87, 96-97 (1990).

Like the prosecutors in Wagner and Evans, the prosecutor here committed irreparable misconduct by questioning witnesses without a good faith basis for believing that the questions would produce admissible evidence. His questions to Sheila Jones, Dauras Cyprian, and Bruce Greenwood impressed upon the jury that the prosecutor possessed

documentary evidence of Appellant's trip to New York to bolster the prosecution's case that otherwise relied on accomplice testimony, without attempting to admit that evidence. The prosecutor represented to the court that he would call as a witness Robert Song, Custodian of Records of the Hotel Stanford to authenticate the records at issue, but he never did. (18 RT 1741-1742.) Although recognizing that the failure to admit the New York hotel records could have misled the jury, 27 RT 2915, the prosecutor nevertheless engaged in a persistent pattern of misconduct. Like the situations in Wagner and Evans, the sole purpose for his questions in both instances appears to have been to get before the jury the implications of the questions themselves, namely, that inadmissible documentary evidence existed of Appellant's alleged trip to New York after the crime.

Also like the Wagner and Evans situations, the prejudice from the prosecutor's questions was incurable by either admonition or instruction. The implication was that the circumstances suggested that there was more to the story which the prosecutor wanted the jury to see, but that he was prevented from presenting it by the defense and the court – a bell that was impossible to unring. Even if some sort of judicial admonition might have helped dissipate the cloud of prejudice caused by the misconduct, the actions taken by the trial court to address the problem in this case were ineffective.

Prosecutorial misconduct rises to the level of a due process violation if the conduct is so egregious it renders the trial fundamentally unfair. See Darden v. Wainwright (1986) 477 U.S. 168, 181. Such a circumstance occurs when a prosecutor makes inappropriate comments that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637). See United States v. Vera (11th Cir. 1983) 701 F.2d 1349, 1361 (a prosecutor may not go beyond evidence presented in pursuing a conviction under the 14th Amendment of the U.S. Constitution).

In evaluating whether instances of prosecutorial misconduct rise to the level of a constitutional violation of due process, the Supreme Court in Donnelly cited several determinative factors: [1] whether the misconduct infringes upon a right specifically protected by the Bill of Rights; [2] whether the trial court gave a curative instruction; and, [3] whether the comments were isolated. Donnelly, 416 U.S. at 645-48.

The United States Supreme Court has not held that the Donnelly factors are exclusive or even controlling. Instead, that Court held that the analysis should be driven by the particular circumstances of a case. Thus, "the process of constitutional line drawing in this regard is necessarily imprecise." Id. at 645. In Darden, the Court identified additional factors to be considered in evaluating whether prosecutorial comments rendered the

trial fundamentally unfair. In addition to those factors articulated in Donnelly, the Court also considered [4] whether the prosecutor manipulated or misstated the evidence; [5] whether the defense attorney invited many of the comments; [6] the intent of the prosecutor; [7] whether defense counsel objected to the conduct; and, [8] the weight of the evidence against the defendant. Darden, 477 U.S. at 181-83.

Here, all of the above factors cited by the Donnelly and Darden courts demonstrate that the prosecutor's pattern of misconduct violated Appellant's due process rights under the federal and state constitutions. First, the prosecutor's misconduct in repeatedly displaying the Hotel Stanford blowup and asking questions to witnesses about the New York hotel records specifically infringed upon Appellant's Sixth and Eighth Amendment rights to confront evidence against him and for a reliable, fair jury determination of guilt.

Second, the trial court did not provide a curative instruction for the misconduct during the direct examination of Sheila Jones. The trial court, though, sustained defense counsel's objections to the prosecutor's mentioning of the inadmissible evidence. Beyond this step, however, a curative instruction or admonishment would have been futile, in that it would have drawn more attention to the inadmissible evidence as discussed supra under Appellant's Eighth Amendment arguments.

Regarding the third and fourth Darden factors, the prosecutor's misconduct occurred throughout the trial and was not merely an isolated incident. From the time of the prosecutor's opening statement, 16 RT 1291, to his examination of Sheila Jones, 18 RT 1741-1745, Dauras Cyprian, 19 RT 1808-1909, 2904, and Bruce Greenwood, 23 RT 2394, the prosecutor misstated and made repeated references to inadmissible evidence to bolster the People's case that Mr. Williams fled to New York which otherwise rested on accomplice testimony.

Fifth, defense counsel did not invite any of these comments from the prosecutor; rather, he repeatedly objected to the prosecutor's use of the inadmissible evidence.

Sixth and seventh, the intent of the prosecutor to bootstrap inadmissible evidence into the jury's determination of guilt can be determined from his persistent pattern of repeatedly displaying inadmissible evidence and questioning witnesses about it despite defense counsel's repeated objections.

Eighth, the admissible evidence against Appellant regarding the trip to New York rested entirely on testimony from Appellant's alleged accomplice. No physical or documentary evidence was admitted at trial connecting Mr. Williams to the alleged trip to New York after the crime. The prosecutor would not have attempted to bolster the unreliable

accomplice testimony with the inadmissible Hotel Stanford records if that testimony could have stood alone to demonstrate Appellant's consciousness of guilt.

When prosecutorial misconduct violates a specific federal constitutional right, rather than the general due process right to a fair trial, that violation is itself constitutional error and is tested by the standard of Chapman v. California (1967) 386 U.S. 18, 24), which requires reversal unless the error is harmless beyond a reasonable doubt. (See Donnelly, supra, 416 U.S. at pp. 642-643; People v. Bell, supra, 49 Cal.3d at p. 534; Paxton v. Ward (10th Cir. 1999) 199 F.3d 1197, 1217.) Otherwise, there is no federal constitutional error unless the misconduct renders the trial fundamentally unfair. The individual and cumulative effect of the instances of misconduct described above distorted the record and encouraged the jurors to make a decision based on emotion rather than reason. In addition, as noted earlier in connection with the discussion of the individual errors, many of the prosecutors' transgressions also violated other specific constitutional rights.

Moreover, all of the instances of misconduct, considered singly and collectively, involved deceptive and reprehensible methods of persuasion which rendered Appellant's trial fundamentally unfair and violative of due process. Thus reversal is required under both state and federal law.

(Donnelly, supra, 416 U.S. at p. 643; People v. Brown (1988) 46 Cal.3d 432, 447-448.)

Applicable law provides that cumulative prejudice inuring from prosecutorial misconduct that violated Due Process protections requires reversal under the federal and state constitutions. United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1219-1225 (misconduct warranting reversal included admission of inadmissible hearsay statements of a third person through cross-examination); People v. Hill (1998) 17 Cal.4th 800, 828 (cumulative prejudice of multiple errors, including misstatement of facts; misstatements of law; reference to facts not in evidence; and disparagement of counsel warranted reversal).

Here, the cumulative prejudice of the prosecutor's misconduct spanned the trial, from opening statement, examination of witnesses to closing argument, thereby violating Mr. Williams' rights under the federal and state constitutions to Due Process, and reversal is required.

## IX. MR. WILLIAMS' MURDER CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT EFFORTS TO SUPPRESS EVIDENCE AND FLIGHT COULD BE CONSIDERED AS EVIDENCE OF GUILT.

Mr. Williams was charged with two counts of first degree murder. One of the state's theories was that the murders were premeditated and deliberate. (CT 344-345.) Recognizing that the jury might find a malicious killing **without** premeditation, the trial court also instructed the jury on second degree murder. (CT 349.)

At the prosecutor's request, however, the court instructed the jury in accord with CALJIC 2.04 that if it found that Mr. Williams attempted to fabricate evidence, such an attempt could be considered "as a circumstance tending to show a consciousness of guilt . . . ." (CT 311; 27 RT 2935.) Similarly, at the prosecutor's request the court instructed the jury in accord with CALJIC 2.06 and 2.52 that any attempt to suppress evidence, or any flight after the crime, could be considered to establish guilt. (CT 313, 323; 27 RT 2936; 27 RT 2940.)

Under the circumstances of this case – where the jury had been given the option to consider a lesser included offense – all three instructions were improper. They allowed the jury to consider flight, fabrication and suppression (if proven) as circumstances in deciding defendant's "guilt" of the charged offenses. As discussed more fully

below, although this evidence (if established) supports an inference that Mr. Williams was conscious of committing a crime, the evidence does not logically support an inference of those elements necessary to establish first degree murder (necessary for a conviction on the charged offense). At most, the evidence permitted the jury to infer that the defendant had committed **a** crime. Since the defense theory presupposed commission of a crime, these instructions should never have been given.

There is a federal constitutional dimension to this error. The inference permitted by these instructions falls into the category of a permissible inference. (Mullaney v. Wilbur (1975) 421 U.S. 684, 703 fn.31.) The validity of a permissible inference under the Due Process Clause of the Fourteenth Amendment "depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' [citation]." (United States v. Gainey (1965) 380 U.S. 63, 66.) Thus a permissive inference is invalid if the fact proved (the false statements and the flight) and the ultimate fact inferred (the elements necessary for a first degree murder conviction) are logically unconnected: "the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." (Tot v. United States (1943) 319 U.S. 463, 467-68.) On the other hand, the "jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience

support the inference." (Tot v. United States, supra, 319 U.S. at p. 467) (emphasis added.) Proof of a defendant's false statements or suppression of evidence has no connection in reason or experience with the various mental states required for a "consciousness of guilt" of murder in the first degree (as opposed to any lesser level of criminal homicide), of an intentional killing (necessary for the special circumstance finding) or of robbery (as opposed to being an accessory after the fact). Thus, the inferences permitted by these instructions are arbitrary and it is a denial of the Due Process Clause of the Fourteenth Amendment to so instruct the jury. (See, Mullaney v. Wilbur, supra, 421 U.S. 684 (holding a jury instruction to violate the Due Process Clause).) Consequently, the Chapman standard applies to this error, requiring the People's "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.)

In this case, the state will be unable to meet this burden. The jurors' wrestled mightily with the guilt-phase evidence and debated Mr. Williams' role, deliberating more than one and one-half days on the issue of Mr. Williams' guilt. (See RT Vols 29-30.) Accordingly, there is not simply a reasonable but a very real probability that the court's error in instructing

the jury that efforts to suppress evidence and flight could be considered as evidence of his guilt affected the verdict in this case.[23]

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[23] Mr. Williams recognizes that the Court has rejected this argument in a number of cases. For example, in People v. Bacigalupo (1991) 1 Cal.4th 103, the Court faced a similar argument, rejecting a capital defendant's claim that several standard instructions improperly permitted the jury to infer guilt of first degree murder as opposed to a lesser form of homicide. (1 Cal.4th at pp. 127-128.) For the reasons explained above, Appellant submits that this part of Bacigalupo is incorrectly decided and should be reconsidered. In addition, to the extent Bacigalupo (or any of the Court's other precedents) control resolution of this issue, Mr. Williams nevertheless raises the issue here to preserve his rights to further review. (See Smith v. Murray (1986) 477 U.S. 527 (holding that even issues settled under state law must be raised to preserve the issue for federal habeas corpus review).)

X. BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE THE TESTIMONY OF ACCOMPLICES CYPRIAN AND LEE AS TO THE ROBBERIES, AND BECAUSE THE COURT ALLOWED THE JURY TO CONVICT MR. WILLIAMS OF A FELONY-MURDER SPECIAL CIRCUMSTANCE THAT WAS NEVER CHARGED, BOTH THE ROBBERY AND FELONY MURDER SPECIAL CIRCUMSTANCE CHARGES MUST BE REVERSED.

The prosecutor charged Mr. Williams with two counts of murder (counts one and two) and two counts of robbery (counts three and four). (CT 139-141.) In addition, the prosecutor alleged that each of the murders occurred during "the commission of the crime of Robbery." (CT 139, 140.) The jury was told it could rely on robbery as the predicate felony for application of the felony murder rule in convicting Mr. Williams of murder. (CT 342.)

The prosecutor's theory as to the charged robberies was simple. According to accomplices Cyprian and Lee, wallets were taken from each of the victims before they were killed. (RT 1774-1775, 2785.) During the instructional conference held near the end of the guilt phase, the prosecutor made clear that the robberies charged in counts two and three were "the robbery [sic] of their wallets . . . ." (RT 2882.)

Yet the state also introduced evidence of attempted robbery. According to Linton, the reason the victims were restrained in the first place was to attempt to steal cocaine from them under the guise of a fake drug deal. (RT 1560.) Although the information itself had not charged an

**attempted** robbery special circumstance, at the instructional conference near the end of the guilt phase the prosecutor for the first time suggested that this attempted robbery of cocaine was a crime "which the jury can also find as a basis for the special circumstance . . . ." (RT 2882.)

Because neither victim actually possessed any cocaine at the time of the homicide, pursuing an attempted robbery theory required that the jury be instructed on the concept of constructive possession. Because the prosecutor had decided to pursue the attempted robbery as an alternative basis for the special circumstance allegation, he therefore requested instructions on constructive possession. (RT 2881-2882.) Defense counsel objected to these instructions. (RT 2883.) The court overruled the objection and agreed to provide the constructive possession theory of attempted robbery. (RT 2883-2884.)

Moments later, the parties discussed the special circumstance allegation. The prosecutor requested that the jurors be told they could find the special circumstance true by finding that the murder occurred "during the commission or attempted commission of a robbery." Defense counsel objected to that portion of the special circumstance instruction which permitted jurors to rely on "attempted commission of a robbery." Once again, the court overruled the objection. (RT 2887.) The court instructed the jury it could find the special circumstance true if it found the murder

"was committed while the defendant was engaged in the commission or attempted commission of a robbery." (CT 363.)

During his closing argument, the prosecutor turned to the felony-murder special circumstance allegation. (28 RT 2965, 2992-93; .) He discussed the robbery of the wallets. (RT 3095.) He also discussed the attempted robbery of the cocaine. (RT 3094-3095.) He concluded his argument on the felony-murder special circumstance by making clear, in no uncertain terms, that the jury could rely on **either** of these offenses to find the felony-murder special circumstance true. "[T]here are a couple of robberies . . . two robberies are actually occurring at the same time . . . ." (28 RT 3091.):

> [T]he basis for the special circumstance is either one of them. . . . And that fact of the matter is, he committed a robbery of the wallets; he committed an attempt (sic) robbery of the cocaine; and both of those serve to substantiate the special circumstance.

(RT 3096.)

As more fully discussed below, both the robbery convictions in counts three and four and the felony-murder special circumstance allegations must be reversed. As to the robbery convictions (which involved the theft of wallets), there was insufficient evidence to corroborate the testimony of accomplices Lee and Cyprian. Accordingly, the convictions in counts three and four must be reversed. Moreover,

because the jury reached a general verdict of guilt on the murder charges after having been instructed on felony-murder as a theory of first degree murder, reversal of the predicate felonies requires reversal of the murder convictions as well.

Separate and apart from the error in connection with the robbery charges, the felony-murder special circumstance allegations must also be reversed. This is so for two reasons. First, the jury instructions (and the prosecutor's explicit argument) left open the possibility that the jury found true a special circumstance with which Mr. Williams had never been charged and of which he had no notice – attempted robbery.

But even if attempted robbery had properly been pled in this case, the felony-murder special circumstance would have to be reversed. The instructions and arguments told the jury there were two separate predicates for the felony-murder special circumstance: (1) robbery of the wallets and (2) attempted robbery of the cocaine. However, the jury was never instructed that it had to be unanimous in deciding which of these two different allegations formed the charge. For this reason too the felony-murder special circumstance must be reversed.

A. Because The Trial Court Misinstructed The Jury On The Level Of Corroboration Needed To Obtain A Conviction Based On Accomplice Testimony, And Because There Was Insufficient Evidence To Connect Mr. Williams With The Robbery, Reversal Is Required.

As noted above, the charged robberies in this case were premised on the theft of the wallets. Accomplices Cyprian and Lee testified that wallets were taken from each of the victims before the shootings. (RT 1774-1775, 2785.) The trial court properly instructed the jury that it could not rely on this accomplice testimony to convict Mr. Williams of this offense "unless such [accomplice] testimony is corroborated by other evidence." (CT 333.) The court went on to tell the jury that this corroborating evidence was sufficient if it "tends to connect the defendant with the commission of the crime charged." (CT 334.)

As more fully discussed below, the robbery charges in this case must be reversed for two reasons. First, the trial court was obligated to instruct the jury that the corroborative evidence must relate to some act or fact **which is an element of the crime**. The trial court's instruction improperly allowed the jury to rely on accomplice testimony which was not corroborated by evidence specifically connecting Mr. Williams to even a single element of the offense. Second, applying the appropriate standard, there was insufficient corroboration of the accomplices in this case.

1. The trial court committed prejudicial error in failing to instruct the jury that before it could find Mr. Williams guilty of robbery based on the testimony of an accomplice, the accomplice's testimony had to be corroborated by evidence relating to an element of the crime.

Penal Code section 1111 governs the treatment of accomplice testimony. Section 1111 provides that a conviction may not be based upon such testimony unless it is corroborated by other evidence. That section also provides that such corroborating evidence must go to something more than the commission of the crime itself:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; **and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof**."

In applying section 1111, this Court has said time and again that although every element of the crime need not be corroborated, the corroborative evidence "must relate to some act or fact **which is an element of the crime**." (See, e.g., People v. Rodrigues (1994) 8 Cal.4th 1060, 1128. Accord, People v. Zapien (1993) 4 Cal.4th 929, 982; People v. Sully (1991) 53 Cal.3d 1195, 1228; People v. Garrison (1989) 47 Cal.3d 746, 773; People v. Bunyard (1988) 45 Cal.3d 1189, 1206; People v. Hathcock (1973) 8 Cal.3d 599, 617; People v. Perry (1972) 7 Cal.3d 756, 769; People v. Luker (1965) 63 Cal.2d 464, 469; People v. Lyons (1958) 50 Cal.2d 245, 257. See also, People v. Lohman (1970) 6 Cal.App.3d 760, 765; People v. Lloyd (1967) 253 Cal.App.2d 236, 241; People v. Reingold (1948) 87 Cal.App.2d 382, 393.) Where the corroborative evidence does not connect defendant to an element of the crime, but merely corroborates

the commission of the crime, it is insufficient. (See, e.g., People v. Martinez (1982) 132 Cal.App.3d 119; People v. Boyce (1980) 110 Cal.App.3d 726; People v. Lloyd, supra, 253 Cal.App.2d at p. 241-242.) Thus, evidence which merely casts suspicion on a defendant or shows that he had the opportunity to commit the crime is insufficient to corroborate the testimony of an accomplice within the meaning of section 1111. (See, e.g., People v. Boyce, supra, 110 Cal.App.3d at p. 737.)

In People v. Martinez, supra, for example, the Court of Appeal held that accomplice testimony had been insufficiently corroborated. There, defendant was charged with several robberies. An accomplice testified and implicated defendant. No other witness identified the defendant as one of the robbers. The state presented corroboration of the accomplice's testimony as to the number of robbers, the sex of the robbers, the time of the robbery, the place of the robbery, the number of guns used in the robbery, the use of a pillowcase to take money from the victims, the use of a flashlight during the robbery and the use of a motorcycle before the robbery. Nevertheless, because this evidence merely corroborated the commission of the offense, but did not connect defendant to an element of the crime, it was insufficient and defendant's conviction was reversed. (132 Cal.App.3d at pp. 133, 145.)

Similarly, in People v. Boyce, supra, the Court of Appeal held that an accomplice's testimony had not been sufficiently corroborated where the corroborating evidence did not connect defendant with an element of the crime. There, defendant was convicted of receiving stolen property. An accomplice testified against defendant and implicated him in the crime. Corroborating evidence showed that a burglary had occurred, defendant knew the victims, and knew they would be away at the time of the burglary, defendant was a friend of the accomplice in whose house the burglarized goods were discovered, and defendant was present at the house when those goods were delivered. Nevertheless, because this corroborative evidence did not connect defendant to an element of the crime, the appellate court held it was insufficient and reversed defendant's conviction. (110 Cal.App.3d at p. 737.)

Despite the overwhelming authority from this Court holding that corroborative evidence must relate to an act or fact which is "an element of the crime," the trial court in this case failed to so instruct the jury. Instead, the court broadly instructed the jury that corroborative evidence must be "related to the crime which, if believed . . . tends to connect the defendant with the commission of the crime charged." Under this instruction, the jury could have corroborated Cyprian and Lee's testimony by relying on evidence that did not relate to an element of the offense.

The prosecutor in this case took full advantage of the court's error, using his closing argument to repeatedly point to evidence that corroborated Defendant's opportunity to commit a crime, or his presence at the crime scene, or flight, but that in and of itself did not relate to an element of the crime. See, e.g., 28 RT 2966 ("The evidence shows there is a beeper [at the crime scene]. . . . Let's see what we have . . . to tie this beeper to the defendant"); 28 RT 2968-69 (What were George's [finger]prints doing [at the crime scene]?"); 28 RT 2969 ("Why is [Mr. Williams] checking into a Travelodge in Inglewood?") Significantly, however, these pieces of corroborating evidence did not "relate to some act or fact **which is an element of the crime**." (See, e.g., People v. Rodrigues, supra, 8 Cal.4th at p. 1128.) More importantly, the jury was never instructed that corroboration must relate to an element of the crime.

Mr. Williams recognizes that under the court's instruction the jury was not **precluded** from considering any corroborative evidence that properly connected him to an element of the crime (if such evidence existed). The vice in the court's instruction was not that it **precluded** the jurors from relying on the proper type of corroborating evidence, but that it **did not require** them to do so.

In other words, the instruction improperly allowed the jury to rely on corroborating evidence which this Court has long held insufficient to

properly corroborate accomplice testimony. Given the instructions and evidence in this case, and especially in light of the prosecutor's closing argument, even if proper corroborating evidence existed it is impossible to discern if the jury relied on it to corroborate the accomplice testimony. Because the accomplice's testimony and statements constituted the critical evidence against Mr. Williams in connection with the robbery charges, reversal is required. (See, e.g., Leary v. United States (1969) 395 U.S. 6, 31-32 ["It has long been settled that when a case is submitted to the jury on alternate theories the unconstitutionality of any of the theories requires that the conviction be set aside."]; People v. Macedo (1989) 213 Cal.App.3d 554, 562 ["[w]here the reviewing court cannot determine upon which theory the jury convicted defendant and one of the theories is an improper basis for conviction, 'it must find the error to have been prejudicial.'"].)[24]

2. There was insufficient evidence to corroborate the accomplices' testimony as to the robbery.

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[24] Because defendant's conviction for robbery must be reversed, the first degree murder conviction cannot be sustained on the robbery felony-murder theory given to the jury. (People v. Marshall (1997) 15 Cal.4th 1, 37.) In addition, the robbery special circumstance finding must be reversed. (Id. at pp. 40-41.) Moreover, because the jury was told at the penalty phase it must weigh all of the aggravating factors on death's side of the scale in determining if death was the appropriate sentence on the facts of this case, consideration of an invalid aggravating factor requires that the penalty be set aside. (Cf. People v. Pensinger (1991) 52 Cal.3d 1210, 1271 [recognizing that consideration of an invalid special circumstance finding at the penalty phase is error].)

As noted above, Penal Code section 1111 precludes a conviction based on the testimony of an accomplice unless that testimony is corroborated. To determine if the corroboration is sufficient, a reviewing court "must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence . . . ." (People v. Fauber (1988) 201 Cal.App.3d 1540, 1543.) As also noted above, although the corroborating evidence need not corroborate "every element of the crime," it "must relate to some act or fact which is an element of the crime" so that it directly connects defendant to the charged offense. (See, e.g., People v. Luker, supra, 63 Cal.2d at p. 469; People v. Lyons, supra, 50 Cal.2d at p. 257.) Evidence which does not connect defendant to an element of the crime, but merely corroborates the commission of the crime, is insufficient. (People v. Martinez, supra, 132 Cal.App.3d at p. 133; People v. Boyce, 110 Cal.App.3d at p. 737.) One accomplice may not corroborate the testimony of another. (People v. Boyce, supra, 110 Cal.App.3d at p. 737.)

Pursuant to these rules, corroborative evidence which merely shows suspicious circumstances is insufficient to corroborate the testimony of an accomplice. (People v. Fauber, supra, 201 Cal.App.3d at p. 1543.) Thus, evidence which merely connects the defendant with the accomplice (as opposed to the crime) is not sufficient to corroborate the testimony of an

accomplice. "There can be no question that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime . . . ." (People v. Robinson (1964) 61 Cal.2d 373, 400.) Similarly, "[e]vidence of mere opportunity to commit a crime is not sufficient corroboration." (People v. Boyce, supra, 110 Cal.App.3d at p. 737.)

Nor is "corroboration . . . sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value . . . ." (People v. Fauber, supra, 201 Cal.App.3d at p. 1543.) In other words, the corroborating testimony must stand on its own to connect defendant to the charged offense.

Applying these cases here, there was insufficient corroboration of Mr. Williams's role in a robbery. Accomplices Cyprian and Lee both testified that wallets were taken from the victim before the shootings. (RT 1774-1775, 2785.) Cyprian added that the purpose in removing the wallets was to scare Barron and Thomas. (RT 1775.)

Of course, pursuant to Boyce, neither Cyprian nor Lee can corroborate each other's testimony. The question then becomes whether there was any other evidence that corroborated their testimony.

Several witnesses connected Mr. Williams to the accomplices. For example, Irma Sazo testified that she saw Mr. Williams with Linton,

Cyprian and Lee shortly after hearing the shots. (21 RT 2152.) Other witnesses connected Mr. Williams to accomplice Linton. (See, e.g., 16 RT 1325, 1329 (Marcella Pierre); 20 RT 1979 (Dietrich Pack). As discussed above, this testimony was patently insufficient to corroborate either Lee or Cyprian. (See People v. Robinson, supra, 61 Cal.2d at p. 400 ["There can be no question that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime . . ."].)

Finally, the state introduced into evidence a photograph of the crime scene – exhibit 134. (RT 2556.) This picture showed the two wallets in a kitchen cabinet. (RT 2556.) The state also introduced the wallets themselves. (RT 2557-2558.) But standing on their own, neither the photographs nor the wallets themselves "relate to some act or fact which is an element of the crime" so that they directly connect defendant to the charged offense. (See, e.g., People v. Luker, supra, 63 Cal.2d at p. 469.) While they may corroborate commission of the crime, that is not enough. (See People v. Martinez, supra, 132 Cal.App.3d at p. 133; People v. Boyce, 110 Cal.App.3d at p. 737.)[25]

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[25] The State also introduced evidence that Mr. Williams' fingerprints were found in the apartment where the killings occurred. But such evidence does not tie Mr. Williams to the crime; rather it shows merely that at some point in time Mr. Williams – who frequented the apartment (28 RT 2968) – was present at the crime scene. Accordingly, such evidence is insufficient to corroborate the co-defendants' testimony that Mr. Williams participated

Put another way, this physical evidence – standing on its own – does nothing to tie Mr. Williams to the crime. To the contrary, it does not connect him to the crime absent "interpretation and direction . . . furnished by the accomplice's testimony . . . ." (People v. Fauber, supra, 201 Cal.App.3d at p. 1543.) Accordingly, it too is insufficient to corroborate Cyprian's and/or Lee's testimony as to the robbery. Absent such corroboration, the robbery convictions cannot stand.[26]

B. The Trial Court Erred In Permitting The Jury To Convict Mr. Williams Of An Attempted Robbery Special Circumstance Which Had Never Been Charged.

Penal Code section 190.2, subdivision (a)(17) provides that a defendant may receive a death sentence if he commits a murder while engaged in "the commission of [or] attempted commission of . . . (i) [r]obbery . . . ." In this case, the prosecutor elected **not** to charge Mr.

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in a robbery. See U.S. v. Samaniego (9th Cir. 1971) 437 F.2d 1244, 1246 ("mere presence at the scene of [a crime] . . . is not sufficient evidence to convict a defendant of . . . participating in a crime.")

[26] Once again, because defendant's conviction for robbery must be reversed, the first degree murder conviction cannot be sustained on the robbery felony-murder theory given to the jury. (People v. Marshall, supra, 15 Cal.4th at p. 37.) In addition, the robbery special circumstance finding also must be reversed. (Id. at pp. 40-41.) Moreover, because the jury was told at the penalty phase it must weigh all aggravating factors on death's side of the scale in determining if death was the appropriate sentence, consideration of an invalid aggravating factor on the facts of this case requires that the penalty be set aside. (Cf., People v. Pensinger, supra, 52 Cal.3d at p. 1271 [recognizing that consideration of an invalid special circumstance finding at the penalty phase is error].)

Williams with murder during the **attempted** commission of a robbery. Instead, the information in this case charged **only** that Mr. Williams committed the murders while engaged in a **completed** robbery, providing "that the murder . . . was committed by defendant . . . while the said defendant . . . was . . . engaged in the commission of the crime of robbery, within the meaning of Penal Code Section 190.2(a)(17)." (CT 140.) The prosecutor would make clear that the robbery which occurred in this case involved the theft of wallets from the victims. (RT 2882.)

As noted above, however, shortly before closing arguments the prosecutor suggested that the jury could convict of the special circumstance allegation **not** by relying on the charged robbery of the wallets, but by relying on an uncharged attempted robbery of cocaine. (RT 2882.) Defense counsel's specific objection to instructions on attempted robbery were overruled. (RT 2887.) Both the trial court and the prosecutor then told the jury it could find the special circumstance true by relying on this attempted robbery of cocaine. (CT 363; RT 3095-3096.)

As discussed more fully below, because the information in this case did not allege an **attempted** robbery special circumstance, the jury's true finding on the felony-murder special circumstance violates the Fifth, Sixth and Eighth Amendments. Accordingly, the special circumstance allegation must be stricken.

1. Because the attempted robbery had never been charged as a basis for the special circumstance allegation, the jury's true finding violated due process.

The due process clauses of the federal and state constitutions require that an accused be advised of all specific charges against him so that he may adequately prepare his defense. (People v. Hernandez (1988) 46 Cal.3d 194, 208; People v. Lohbauer (1981) 29 Cal.3d 364, 368.) In accord with this rule, Penal Code section 190.3 requires that special circumstance allegations must be charged. Section 190.4 goes on to require that the jury "make a special finding on the truth of each alleged special circumstance." The purpose of these requirements "was to impose an express notice requirement in capital cases by commanding that the constituent felony be alleged in the accusatory pleading and that the elements of the constituent felony be proved beyond a reasonable doubt 'pursuant to the general law applying to trial and conviction of crime.'" (People v. Morris (1988) 46 Cal.3d 1, 17.)

It is true, of course, that a defendant may properly be convicted of a charged offense or any lesser offense which is included in that charge. (Pen. Code § 1159; People v. Heffindton (1973) 32 Cal.App.3d 1, 11.) It is equally true that attempted robbery can be a lesser included offense to robbery. (People v. Crary (1968) 265 Cal.App.2d 534, 540.)

But this rule does not save the special circumstance in this case. Here, the charged robbery involved the theft of wallets from the victim. The attempted robbery on which the jury was told it could rely in this case was an attempted robbery of cocaine. This attempted robbery was simply not a lesser offense of the robbery; to the contrary, they were two separate offenses. In short, the jury instructions permitted (and the prosecutor urged) the jury to convict Mr. Williams of an attempted robbery felony-murder special circumstance with which he had never been charged. The jury's true finding must be reversed.

2. Because the attempted robbery had never been charged as a basis for the special circumstance allegation, the jury's true finding violated the Sixth Amendment right to the effective assistance of counsel.

The Sixth and Fourteenth Amendments to the United States Constitution, and Article I, section 15, of the California Constitution, guarantee criminal defendants the right to the effective assistance of counsel at all critical stages of the proceedings. (United States v. Gouveia (1984) 467 U.S. 180, 187; Coleman v. Alabama (1970) 399 U.S. 1, 9-10.) Given the fundamental role played by defense counsel in ensuring a reliable result, the right to counsel is not satisfied by the mere appointment of counsel. (Strickland v. Washington (1984) 466 U.S. 668, 685.) Instead,

the Sixth Amendment requires counsel "who plays the role necessary to ensure that the trial is fair." (Id. at p. 685.)

There are two general ways in which counsel can fail to play this critical role. First, counsel can make an error – or a series of errors – and thereby "fail[] to render 'adequate legal assistance.'" (Id. at p. 686.) The Court has termed this type of failure as "actual ineffectiveness." (Id.)

Alternatively, state interference can cause even the most diligent of counsel to be unable to play the role necessary to ensure a fair trial. Thus, a trial court may itself violate a defendant's right to the effective assistance of counsel by rulings which interfere with the ability of counsel to respond to the state's case or conduct a defense. (Id.; accord Geders v. United States (1976) 425 U.S. 80 [defendant denied Sixth Amendment right to effective counsel where trial court precluded him from consulting with counsel during an overnight recess in trial]; Herring v. New York (1975) 422 U.S. 853 [defendant denied right to effective counsel where trial court refused to allow his counsel to make closing argument in bench trial]; Brooks v. Tennessee, (1972) 406 U.S. 605 [defendant denied Sixth Amendment right to effective counsel where trial court required that he testify first if he wished to testify at all].)

The "state interference" strand of the Court's Sixth Amendment jurisprudence recognizes that the right to assistance of counsel is not

satisfied by appointing even diligent counsel under circumstances which make counsel unable to effectively represent the defendant. As the High Court noted long ago, the right to counsel "is not discharged by an assignment [of counsel] at such a time **or under such circumstances** as to preclude the giving of effective aid in the preparation and trial of the case." (Powell v. Alabama (1932) 287 U.S. 45, 71 [emphasis added].)

The lower federal courts have recognized some of the varied instances in which a trial court can prevent counsel from rendering effective assistance of counsel. The general rule from these cases is that where trial counsel makes critical tactical decisions based on an awareness of the charges against a client and the available defenses, and the trial court undercuts the basis for those tactical decisions by injecting new theories of culpability or eliminating defenses, the defendant has been denied his right to the meaningful assistance of counsel. (See, e.g., Sheppard v. Rees (9th Cir. 1989) 909 F.2d 1234, 1237; United States v. Gaskins (9th Cir. 1988) 849 F.2d 454, 460; United States v. Harvill (9th Cir. 1974) 501 F.2d 295, 295-296; Wright v. United States (9th Cir. 1964) 339 F.2d 578, 579; Hintz v. Beto (5th Cir. 1967) 379 F.2d 937, 942; see also, Mudd v. United States (D.C.Cir. 1986) 798 F.2d 1509, 1511-1512; United States v. Green (D.C. Cir. 1982) 680 F.2d 183, 189; Green v. Arn (N.D.Ohio 1985) 615 F.Supp. 1231, 1236, aff'd. 809 F.2d 1257 (6th Cir. 1987), vacated for a

determination of mootness, 108 S.Ct. 52 (1988), aff'd. 839 F.2d 300 (6th Cir. 1988).) As the Fifth Circuit Court of Appeals has succinctly stated, "[t]he actions of the trial court may cause the ineffectiveness of counsel's assistance." (Bradbury v. Wainwright (5th Cir. 1983) 658 F.2d 1083, 1087.)

For example, where defense counsel in a criminal case makes critical tactical decisions without notice of a particular theory of culpability – and the trial court undercuts the basis of those decisions by instructing the jury on such a theory – the defendant has been denied his right to the effective assistance of counsel. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at pp. 1236-1237; United States v. Gaskins, supra, 849 F.2d at p. 460.) The reason is simple: to effectuate the constitutional right to counsel, and to permit defense counsel to prepare an adequate defense, the defendant must be clearly informed of the charges against him and the theories of culpability upon which he will be prosecuted. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at p. 1236.) Where the jury convicts the defendant on a theory of culpability that defense counsel had no meaningful opportunity to address, the right to counsel has been violated. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at p. 1238; United States v. Gaskins, supra, 849 F.2d at p. 456. Cf. Suniga v. Bunnell (9th Cir.1993) 998 F.2d 664, 670; People v. Sanchez (1976) 83 Cal App.3d Supp. 1, 7.)

Sheppard v. Rees, supra, is instructive. There, the Ninth Circuit Court of Appeals reversed defendant's first degree murder conviction where the jury was permitted to convict defendant under a theory of felony-murder of which the defense had not been given notice in the information. There, defendant was charged with one count of murder. The information did not mention felony-murder. The prosecution proceeded throughout trial on the sole theory that the killing was premeditated and deliberate. After both sides rested, the prosecution requested instructions on robbery and felony-murder in conjunction with the premeditated murder instructions. The trial court gave the requested felony-murder instructions. The jury subsequently convicted defendant of first degree murder without saying on which legal theory it relied.

Writing for a unanimous panel, Judge Trott reversed, holding that because the defendant did not know the prosecution would proceed under a felony-murder theory, defendant was denied his constitutional right to be notified of the nature and cause of the charges against him. (Sheppard v. Rees, supra, 909 F.2d at pp. 1236-1237.) Moreover, the lack of notice also violated defendant's constitutional right to counsel throughout the case; had counsel been aware of the fact that a felony-murder theory could play a role in the jury's calculus, he "would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at

the outset what he was up against." (Id. at p. 1237.) As the Court noted, the right to counsel "is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the charges against which he or she must defend." (Id.) Defendant's right to counsel was violated precisely because "counsel had no occasion to defend against the felony-murder theory during the evidentiary phase of the trial" and the court correctly concluded that the "error affected the composition of the record." (Id.; accord, United States v. Gaskins, supra, 849 F.2d at pp. 458-460 [right to counsel violated where jury permitted to rely on aiding and abetting theory of culpability of which defense counsel had no notice]; People v. Sanchez, supra, 83 Cal.App.3d Supp. at p. 7 [defense counsel rendered ineffective during closing argument due to trial court materially modifying agreed upon instructions in middle of counsel's argument].)

The above principles govern this case as well. Here, the state charged a special circumstance occurring **not** in the course of an attempted robbery, but in the course of a completed robbery. Under the circumstances of this case, this could have meant only one thing – the state was relying on the theft of the wallets to prove the truth of the special circumstance allegation. Nothing in the jury voir dire, opening statement or presentation of evidence suggests that defense counsel had even the slightest hint that the felony-murder special circumstance allegation was

based **not** on the theft of the wallets, but on the attempted theft of the cocaine. (See 1 RT 1 through 26 RT 2879.) To the contrary, the record affirmatively shows that the defense tailored its case to the state's specific felony-murder theory, presenting evidence and arguing that the theft of the wallet did not constitute robbery. (See, e.g., 16 RT 1334; 16 RT 1340 [-- p. 55]; 25 RT 2617-18; 26 RT 2795-97.) In other words, at the critical stages of these proceedings, Mr. Williams had counsel making tactical decisions as to the felony-murder special circumstance **without even knowing what the true predicate felony was**. The trial court's decision to depart from the information, and submit to the jury an attempted robbery basis for the special circumstance allegation violated Mr. Williams's right to the effective assistance of counsel.

This error requires that the felony-murder special circumstance be reversed. In this regard, the Supreme Court has articulated two different standards to be applied in assessing when a Sixth Amendment violation will require reversal. In cases of "actual ineffectiveness" – where defense counsel has performed in a negligent manner – the defendant must show "that the deficient performance prejudiced the defense." (Strickland v. Washington, supra, 466 U.S. at p. 687; accord Perry v. Leeke (1989) 488 U.S. 272, 279.) This requires the defendant to show that but for counsel's

errors there is a "reasonable probability" that the result of the proceeding would have been different. (466 U.S. at pp. 688, 693.)

The standard applied in cases involving "state interference" with counsel's performance is "a different matter." (Perry v. Leeke, supra, 488 U.S. at p. 279.) State interference with defense counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (Id. at p. 280.)

Thus, in cases involving state interference, the Court has never applied a harmless error test. (See, e.g., Geders v. United States, supra, 425 U.S. 80; Herring v. New York, supra, 422 U.S. 853.) As the Eleventh Circuit Court of Appeals has concluded, the Strickland harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." (Crutchfield v. Wainwright (11th Cir. 1986) 803 F.2d 1103, 1108; accord United States v. Green, supra, 680 F.2d at p. 189; Green v. Arn, supra, 615 F.Supp. at p. 1236.) Judge Trott has explained the rationale behind this distinction, noting that when a trial court's ruling at the end of a case undercuts the tactical decisions upon which the entire trial record was based, "[t]he record is too tainted" to permit harmless error analysis. (Sheppard v. Rees, supra, 909 F.2d at p. 1237.)

Pursuant to these authorities, a harmless error analysis would be manifestly inappropriate in this case.

Ultimately, however, there is no need to even address the question; under any standard of prejudice, reversal would be required.

Here, as discussed above, the record affirmatively establishes that at virtually every critical stage of the proceedings, Mr. Williams's counsel made tactical decisions based on an understanding of the felony-murder special circumstance that was wrong. Of course, when a court's ruling adversely effects a portion of closing argument alone, reversal is required even where the defense lawyer has provided entirely effective advocacy in voir diring the jury, rebutting the state's case and presenting a defense. (See, e.g., Herring v. New York, supra, 422 U.S. 853; United States v. Harvill, supra, 501 F.2d at pp. 295-296; Wright v. United States, supra, 339 F.2d at p. 579.) Here, the court's decision to add an attempted robbery basis for the felony-murder special circumstance adversely affected virtually every stage of the proceedings prior to closing argument. Under this circumstance, and under any proper standard of review, "[t]he record is too tainted to" permit a conclusion that the Sixth Amendment violation was harmless. (See Sheppard v. Rees, supra, 909 F.2d at p. 1237.) Reversal of the special circumstance allegation is required.

3. Because the attempted robbery had never been charged as a basis for the special circumstance

allegation, the jury's true finding violated the Eighth Amendment right to a reliable determination.

The United States Supreme Court has recognized the death penalty is a qualitatively different punishment than any other. (See, e.g., Beck v. Alabama (1980) 447 U.S. 625, 638, n.13; Woodson v. North Carolina (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (See, e.g., Caldwell v. Mississippi (1985) 472 U.S. 320, 323; Beck v. Alabama, supra, 447 U.S. at p. 638, n.13.) This heightened need for reliability applies in both the guilt and penalty phases of trial. (See, e.g., Beck v. Alabama, supra, 447 U.S. 625; Gardner v. Florida (1977) 430 U.S. 349, 357.)

Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (See, e.g., Lankford v. Idaho (1991) 500 U.S. 110, 127; Gardner v. Florida, supra, 430 U.S. at p. 362; Lockett v. Ohio (1978) 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (See, e.g., Beck v. Alabama, supra, 447 U.S. at p. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not].)

Here, as discussed above, the trial court's provision of an attempted robbery theory of culpability for the felony-murder special circumstance violated due process and the Sixth Amendment. Separate and apart from those claims, however, is the fact that inserting this theory of culpability into the special circumstance trial rendered the jury's verdict on this allegation unreliable. To the extent the jury relied on the attempted robbery theory of complicity in finding this special circumstance true, it relied on a crime (1) which had not been pled in the information, and (2) of which defense counsel did not have notice until the instructional conference. Even if a verdict in this situation does not violate due process, it does violate the more demanding reliability requirements of the Eighth Amendment in capital cases. Thus the felony-murder special circumstance must be reversed.

C. The Trial Court Erred In Failing To Instruct The Jury That It Must Unanimously Agree On The Special Circumstance Allegation.

Under the California Constitution, a criminal defendant has the right to a unanimous verdict. (Cal. Const., art I, § 16; People v. Jones (1990) 51 Cal.3d 294, 321.) Under the federal constitution, although a state criminal defendant does not have an independent constitutional right to a unanimous jury, he does have a Sixth Amendment right to a super-majority of jurors agreeing on his guilt. (See Brown v. Louisiana (1980) 447 U.S.

323, 333 [precluding a criminal conviction on the vote of five out of six jurors].) Moreover, under the Due Process Clause of the Fifth and Fourteenth Amendments, where state law unambiguously provides the right to a fully unanimous jury, the state may not arbitrarily deprive a citizen of that right. (See Hicks v. Oklahoma (1980) 447 U.S. 343, 346.)

When a defendant is prosecuted for a crime under several different **legal theories**, the trial court need **not** instruct the jury that it must unanimously agree on the legal theory upon which it convicts the defendant. (People v. Failla (1966) 64 Cal.2d 560, 567.) However, when a defendant is prosecuted for a crime under which any one of several **acts** is alone sufficient to constitute the offense, the trial court must instruct the jury that it must unanimously agree on the act constituting the offense. (See, e.g., People v. Diedrich (1982) 31 Cal.3d 263, 281; People v. Failla, supra, 64 Cal.2d 560 at p. 567; People v. Crawford (1982) 131 Cal.App.3d 591.) This instruction is required sua sponte. (People v. Crawford, supra, 131 Cal.App.3d at p. 596; People v. Epps (1981) 122 Cal.App.3d 691, 700, 704, disapproved on other grounds in People v. Anderson (1987) 43 Cal.3d 1104, 1123; People v. Madden (1981) 116 Cal.App.3d 212, 219.)

The failure to give a jury unanimity instruction is federal constitutional error and requires reversal unless the beneficiary of the error can prove it harmless beyond a reasonable doubt. (See, e.g., People v.

Gordon (1985) 165 Cal.App.3d 839, 855; People v. Metheney (1984) 154 Cal.App.3d 555, 563-564; People v. Dunahoo (1984) 152 Cal.App.3d 561, 574.) When the record shows that the jurors could reasonably disagree about which act the defendant committed, yet still convict him of the offense, reversal is required under this standard. (See, e.g., People v. Gonzalez (1983) 141 Cal.App.3d 786, 792; People v. Delleto (1983) 147 Cal.App.3d 458, 473.) Thus, when a juror believing one of the acts took place would not necessarily believe the other took place as well, reversal is required. (See, e.g., People v. Diedrich, supra, 31 Cal.3d at p. 283; People v. Gordon, supra, 165 Cal.App.3d at p. 856; People v. Crawford, supra, 131 Cal.App.3d at p. 598-600.)

But that is not the only situation in which reversal is required for failing to give a unanimity instruction. In this connection, it is clear that jurors have two functions: not only do they decide the facts, but they apply the law to the facts as well. (People v. Figueroa (1986) 41 Cal.3d 714, 730.) Where jurors agree that certain acts occurred, but where it is reasonably possible that the jurors could disagree about the characterization of those facts, the failure to give a unanimity instruction is also prejudicial. (People v. Espinoza (1983) 140 Cal.App.3d 564, 569.)

In this case, to determine the truth of the special circumstance allegations the jurors were required to resolve two issues: (1) did Mr.

Williams commit either a robbery or an attempted robbery and (2) if so, did the homicide occur during the commission of that robbery or attempted robbery? Pursuant to Gordon, Delleto, Gonzales and Crawford, if the jurors in this case could reasonably disagree about whether robbery or attempted robbery were committed, the failure to give the unanimity instruction would require reversal of the special circumstance allegation. Under Figueroa and Espinoza, reversal would also be required even if the jurors could **not** reasonably disagree as to whether these acts took place, so long as one or more jurors could reasonably disagree whether the homicide occurred during the commission of these offenses.

In this case, reasonable jurors could have disagreed on both issues. For example, in connection with the theft of the wallets, one of the state's own witnesses testified that no property was taken from either of the victims. (RT 1645.) Another disagreed, but said that the purpose of taking the wallets was not to steal the wallets or their contents, but to scare the victims. (RT 1775.) Nothing was even taken from the wallets. (RT 2796.) On this record, jurors could plainly have disagreed about whether a robbery occurred.

The same is true with respect to the attempted robbery. As the prosecutor noted when defense counsel objected to instructions on the attempted robbery theory because there was insufficient evidence to show

constructive possession of the cocaine, the jurors could disagree about whether either victim ever had constructive possession of the cocaine:

> "That's an issue for the trier of fact. Goes to weight, not whether the instruction [on constructive possession] should be given. And I'm certainly entitled to argue it." (RT 2883-2884.)

Similarly, reasonable jurors could also have disagreed about whether the homicide occurred during either the robbery or the attempted robbery. The jury was told it could not find the special circumstance allegation true based on the testimony of an accomplice unless that testimony was corroborated. (CT 368.) In connection with the theft of the wallets – and as to the critical timing aspect of the special circumstance allegation requiring proof that the homicide occurred during the commission of the robbery – there was no evidence at all to corroborate the testimony of accomplices Cyprian and Lee as to when the wallets were taken. (RT 1774-1775, 2785.) Under this circumstance, a reasonable juror could certainly find that this robbery could not form the basis of the special circumstance allegation. Indeed, this may explain why the prosecutor insisted on presenting the jury with an uncharged attempted robbery option as to the special circumstance allegation.

In short, the instructions and arguments in this case permitted the jurors to pick and choose which of two different crimes they would rely on to support the special circumstance allegation. However, reasonable jurors

could have disagreed not only as to which crime was committed, but whether the homicide occurred during the actual commission of either offense. Accordingly, the jury may have found the special circumstance allegation true without ever having unanimously agreed on what special circumstance the state had actually proved. Under these circumstances, the trial court's failure to give a unanimity instruction violated Mr. Williams's state right to a unanimous jury and his federal constitutional right to at least a super-majority of jurors agreeing on his offense. In addition, because the arbitrary deprivation of a state-created right also violates the Due Process Clause, the failure to either give a unanimity instruction violated the federal constitution as well. (See Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)[27]

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[27] This same error also requires reversal of the murder conviction itself. During the instructional conference, the prosecutor made clear that the attempted robbery theory applied only to the felony-murder special circumstance allegation. (RT 2882.) Yet in instructing the jury, the trial court repeatedly explained that in applying the felony-murder rule to determine if defendant was guilty of murder, the jury could rely on either the completed robbery or an attempted robbery. (CT 342, 346, 348.) Because the jury reached a general verdict, it may well have relied on a felony-murder theory to convict of murder. But because the jury was not given a unanimity instruction, it is impossible to determine if the jury relied on (1) the robbery of the wallets, (2) the attempted robbery of the cocaine or (3) a combination of both. For the same reasons as discussed above, instructions which permit a conviction of murder without a unanimous (or even super-majority) jury not only violate state law, but the Fifth and Sixth Amendments as well. The murder conviction must therefore be set aside.

XI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED MR. WILLIAMS'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS, BY ADMITTING STALE EVIDENCE OF UNCHARGED CRIMINAL ACTIVITY IN THE PENALTY PHASE AND THEN TELLING THE JURY IT COULD SENTENCE MR. WILLIAMS TO DIE IF IT FOUND HE WAS "INVOLVED IN" THIS UNCHARGED CRIMINAL ACTIVITY.

A. Introduction.

Penal Code section 190.3, subdivision (b) provides that in seeking to obtain a death judgment in a capital case, the state may rely on "the presence . . . of criminal activity by the defendant which involved the use of force or violence of the express or implied threat to use violence." Section 190.3 also provides that the state may not use such evidence "unless notice of the evidence to be introduced [in aggravation] has been given to the defendant . . . ."

Pursuant to these sections, prior to trial the prosecutor gave notice that he intended to rely on four "factor b" incidents at the penalty phase. (1 RT 5-6.) The State presented the following four incidents at penalty phase:

(1) A May 1983 assault with a deadly weapon on Kenneth Moore;

(2) A December 1983 assault with a deadly weapon on Carl Sims;

(3) A July 1985 assault with a deadly weapon and robbery of Mona Thomas and David Williams; and

(4) A December 1985 possession of a concealed firearm.

The prosecutor reiterated these four incidents to the jury in his penalty phase opening statement. (32 RT 3175-3181.)

As more fully discussed below, a new penalty phase is required in this case for five reasons. First, because the state was permitted to introduce evidence of crimes far beyond the applicable statutes of limitations, Mr. Williams due process and Eighth Amendment rights to a reliable penalty phase were violated. This was not an academic point in this case; for whatever reason, the memories of numerous witness who had provided exculpatory evidence at or near the time of these crimes had changed dramatically. Second, because Mr. Williams had already been prosecuted in connection with two of these four offenses, the state's subsequent prosecution for those offenses in the context of this penalty phase violated double jeopardy. Third, as to as many as three of the four prior factor (b) incidents, Mr. Williams's culpability for the offense was (if anything) vicarious. Application of basic principles of statutory construction to section 190.3, subdivision (b) shows that the legislature never intended to permit vicarious liability under section 190.3. Fourth, even if vicarious liability were appropriate under section 190.3, subdivision (b), the trial court here fundamentally misinstructed the jury on the principles of accomplice liability; rather than give any standard

accomplice liability instructions, the trial court told the jury it could hold Mr. Williams's liable for criminal activity committed by others if the state had broadly proven he was somehow "involved in" that activity. Finally, in his closing argument to the jury, the prosecutor for the first time relied on a factor (b) crime of which he had given the defense utterly no notice, asking the jury to sentence Mr. Williams to die because he had committed a prior murder. For any or all of these reasons, a new sentencing phase is required.

B. The Relevant Facts.

The state's case in aggravation was devoted almost entirely to proving the four factor (b) crimes of which the defense had notice. As the prosecutor noted in his penalty phase opening statement, "I'm going to provide the jury with additional evidence, in addition to the crimes which the defendant has already been convicted, which I believe will lead the jury to an appropriate sentence in this case. . . . Essentially, I'm presenting evidence of four crimes that the defendant's been involved in." (32 RT 3175.) The prosecutor was true to his word. The entire penalty phase was devoted to these four crimes. (See RT Volumes 32-33.)

As to the last of these four prior uncharged acts – the 1985 concealed weapon charge – there was no factual dispute. As defense counsel conceded, during a 1985 traffic stop for driving an unregistered

car, police saw a revolver in Mr. Williams's car; Mr. Williams was arrested for possession of a concealed weapon. (34 RT 3400, 35 RT 3474-3475.) The prosecutor stipulated, however, that police did not even bring criminal charges based on this incident. (33 RT 3298.) In connection with the other three uncharged acts, however, the evidence was in stark conflict.

1. The May 1983 assault.

The prosecutor alleged that the jury could rely on Mr. Williams's commission of a May 1983 assault with a deadly weapon in determining if Mr. Williams would receive a death sentence. (CT 406.) The jury was instructed that "assault with a deadly weapon on Kenneth Moore" was a factor it could consider in the death calculus. (35 RT 3488.)

As to this incident, defense counsel conceded (and the evidence showed) that defendant was convicted of misdemeanor assault in 1983. (33 RT 3298, 34 RT 3400, 35 RT 3469-3470.) The assault involved defendant assaulting Kenneth Moore with his fists. (33 RT 3298.) Of course, this would have permitted the prosecutor to rely on a fistfight in the penalty phase calculus.

But that is not what the prosecutor wanted. Instead, the prosecutor alleged that defendant committed an assault with a deadly weapon. (35 RT 3428, 3488).

But even this was not what the prosecutor really wanted. According to the prosecutor's penalty phase opening statement, the 1983 incident did not involve either simple assault (which was conceded) **or** assault with a deadly weapon (which was charged). Instead, it involved the commission of murder. Thus, the prosecutor told the jury he expected to call a witness who would testify that "she saw not the defendant – keep that clear in your mind – but she saw [Eddie Jackson] kill the young boy. Essentially, that's the first crime." (32 RT 3177.)

The prosecutor made the same point in his closing argument. There was nothing subtle about it; according to the prosecutor, the jury was fully entitled to consider the 1983 murder as a circumstance in aggravation:

> "In terms of his true culpability for the [1983] crime, he is a murderer. . . . [H]is true culpability . . . his culpability for the crime was that of a murderer. He . . . should have . . . been tried and convicted of murder."

(35 RT 3438.) In rhetorically powerful terms, the prosecutor asked the jurors to consider what crime defendant "was truly guilty of" in connection with the 1983 crime, and then told them that the crime was murder. (35 RT 3428.)

The 1983 incident involved the shooting death of Kenneth Moore. As the prosecutor recognized, Mr. Williams was **not** the shooter. (35 RT 3428.) Instead, the shooter was Eddie Jackson. (32 RT 3184.) Beyond

this, however, the evidence as to defendant's exact role in the 1983 offense was very much in dispute.

The prosecutor called eyewitness Latrece Abraham to testify about the 1983 incident. At the 1991 penalty phase – more than 8 years after the actual events of 1983 – Ms. Abraham recalled that on May 28, 1983, a group of boys from the Five-Nine-Hoover Crips attacked a group of bicycle riders (including Kenneth Moore) as they rode on Figueroa street. (32 RT 3191.) Several of the Crips hit and kicked Mr. Moore. (32 RT 3184.) She saw Eddie Jackson shoot Mr. Moore. (32 RT 3184.)

Not long after the assault Ms. Abraham spoke to the police about the assault. (33 RT 3298-3299.) Abraham told the officers that "I did see [Williams] standing over there when they were hitting the boy, **but I don't remember if [Williams] was kicking the boy or not**." (32 RT 3274-3275, emphasis added.) The state stipulated to the fact that in her more contemporaneous statement to police, Ms. Abraham did not recall whether Mr. Williams was even involved in the assault. (33 RT 3299.)

Eight years later, however, during the prosecutor's direct examination at the penalty phase, Abraham's recollection changed. Now she recalled that Mr. Williams was one of the boys who hit and kicked Mr. Moore. (32 RT 3187-3194.) When asked during cross-examination exactly which boys she saw hitting Moore, Abraham immediately retreated

from her direct examination testimony, stating only that "[t]he ones I named in my statement [to police] is [sic] those ones I seen actually kicking him and hitting him." (RT 3193.) Of course, as noted above, in her statement Ms. Abraham said that she did **not** see Mr. Williams assault Mr. Moore.

Plainly, Mr. Williams's role in the eight year old assault was very much in dispute. There was, however, one point which was not in dispute. As the prosecutor conceded, it was Eddie Jackson who assaulted Mr. Moore with the gun and killed him. Thus, jurors could not find Mr. Williams culpable for the 1983 crime – whether it was Jackson's assault with a deadly weapon (as the prosecutor charged) or Jackson's murder (as the prosecutor argued) – without understanding principles of accomplice liability that would make Mr. Williams liable for Jackson's actions. In other words, unless Mr. Williams was liable for Jackson's act, jurors could not consider in aggravation, and impose death based on, either an assault with a deadly weapon or a murder.

Of course, proper accomplice liability instructions would have told the jurors they could not factor Jackson's armed assault into the penalty phase calculus unless Mr. Williams shared Jackson's intent to assault Mr. Moore. Similarly, accomplice instructions would have explained that the jurors could not rely on Jackson's murder of Mr. Moore to aggravate this

crime unless the state had proved beyond a reasonable doubt that Mr. Williams either (1) shared Jackson's intent to kill (assuming a premeditation theory of first degree murder) or (2) acted with an intent to permanently deprive the victim of property before the fatal wound was inflicted (assuming a robbery felony-murder theory of murder).

No such instructions were ever given in this case. To the contrary, the jury was never properly instructed how to assess Mr. Williams's culpability for Jackson's actions.

To be sure, the jury was properly told that in deciding whether Mr. Williams would live or die, it could consider "[t]he presence . . . of criminal activity by the defendant . . . which involved the use or attempted use of force or violence . . . ." (35 RT 3486-3487.) But in determining whether such violent criminal activity had been committed "by the defendant," the jury was not instructed on accomplice liability.

Instead, the jury was given two possible theories of culpability. First, the jury was given an "actual perpetrator" theory of culpability, instructed that it could rely on the 1983 assault/murder if the state proved "that the defendant . . . did in fact commit such criminal acts . . . ." (35 RT 3489.) Alternatively, the jury was given a vicarious liability theory of culpability, instructed that it could rely on the 1983 assault/murder if it found the state broadly proved defendant "was involved in such criminal

acts . . . ." (35 RT 3489.) The court provided no explanation of its "involved in" standard of culpability.

2. The December 1983 assault.

The prosecutor also alleged that in deciding if Mr. Williams should die, the jury could rely on a December 1983 assault with a deadly weapon on police officer Carl Sims. (CT 406.) Thus, the court told the jury that "assault with a deadly weapon on Carl Sims" was a factor it could consider in the death calculus. (35 RT 3488.)

The prosecutor called officer Sims to testify at the 1991 penalty phase. In his penalty phase testimony, Sims recalled that eight years earlier – on December 3, 1983 – he was standing outside his squad car at 102nd Street in Los Angeles, just completing the arrest of a burglary suspect. (33 RT 3279.) From the west he heard gunshots and bullets went flying by his head. (33 RT 3280-81) A nearby tow truck driver warned him to look out. (33 RT 3281.) Sims saw a black man standing behind a palm tree fifty to seventy-five feet away facing in the direction from which shots were fired. (33 RT 3282.)

Sims's contemporaneous police report told a far different story. In his police report – prepared within days of the actual incident – Sims said he did not know from which direction the shots were fired. (33 RT 3289-90.) In his police report, Sims did not mention bullets flying by his head.

(33 RT 3291.) He also did not mention either the palm tree or the warning from the tow truck driver. (33 RT 3290-92.)

In any event, according to Sims's penalty phase testimony, when Sims aimed his shotgun at the man behind the palm tree, the man fled north on Wall Street. (33 RT 3282.) Sims followed him to a group of ten to eleven young men climbing into the flatbed of a Chevrolet truck. (33 RT 3282-83.) When Sims approached the truck, the man whom he had chased appeared to be reaching for a gun. (33 RT 3284.) Sims ordered everyone to raise their hands and they were taken into custody. (33 RT 3278-3285.) Sims identified Williams as the man behind the palm tree. (33 RT 3285-3286.) The gun was a fully loaded .38 Smith & Wesson. (33 RT 3286, 3292.) This suggests either that (1) it had **not** been fired moments earlier or (2) it had been fired and somehow reloaded. The prosecutor would later stipulate that although Mr. Williams was arrested after this incident, he was never even charged with an offense. (33 RT 3298.)

The jury was told it could rely on this offense in sentencing Mr. Williams to die. Again, however, the jury was given two distinct paths to relying on this offense. First, it was told that it could rely on this offense if the state had proved that Mr. Williams "did in fact commit" the offense. (RT 3489.) Alternatively, the jury was told that it could rely on this

offense in the death calculus if the state had merely proven that Mr. Williams "was involved in" the offense. (RT 3489.)

3. The July 1985 assault.

Finally, the prosecutor alleged that in deciding whether Mr. Williams would die, the jury could rely on a July 1985 assault with a deadly weapon and robbery of Mona Thomas and David Williams. (CT 406.) Thus, the court told the jury that "assault with a deadly weapon on and robbery of Mona Thomas and David Williams" were factors it could consider in the death calculus. (RT 3488.) Once again, the evidence as to defendant's specific role in this offense was very much in dispute.

This incident involved a July 1985 attack on Mona Thomas and David Williams. Mona Thomas testified that on the evening of July 7, 1985, she and her father were driving near 10th Avenue. As the car stopped, a group of young men surrounded the car. Someone threw a brick at the window and the gang pulled her and her father from the car and beat them. (RT 3250.)

At the penalty phase, two police officers testified that Ms. Thomas identified Mr. Williams as one of the people who pulled her and her father from the car. (RT 3276-3277; 3263-3266.) Ms. Thomas herself was not so sure; she recalled speaking with an officer at the scene and pointing to an assailant, but she could not identify Williams as the one she indicated to

the police on the day of the attack. (RT 3250-3262.) In court, when shown an arrest photograph of Williams, Thomas was unable to say whether that person attacked her. (RT 3250-3262.)

Indeed, in the prosecutor's own penalty phase opening statement he would concede that "the extent of his involvement is difficult because there are 15 people participating in the crime . . . ." (RT 3166.) He would concede that it was someone else who threw the brick through the car and that it "was not the Defendant" who performed the actual assault with a deadly weapon. (RT 3166.)

Although the jury was again being asked to find Mr. Williams culpable for the acts of other people, the jury was not instructed on any proper principles of accomplice liability. Instead, as noted above, the jury was told it could rely on any violent criminal activity if the state had proved that defendant (1) "did in fact commit such criminal acts" or (2) "was involved in such criminal acts . . . ." (RT 3489.)

C. The Trial Court Violated Mr. Williams's Federal Due Process Right To Effectively Confront The Evidence Against Him And The Eighth Amendment's Requirement Of Heightened Reliability By Admitting Stale Evidence At The Penalty Phase.

The penalty phase in this case occurred in 1991. The four offenses which were the subject of the state's penalty phase case consisted of three

assaults and a possession of a concealable firearm. As discussed above, evidence as to several of these offenses was very much in dispute.

For example, in connection with the May 1983 assault on Kenneth Moore, eyewitness Abraham told police shortly after the crime itself that she did **not** see Mr. Williams having any part in the assault. (RT 3274-3275, 3299.) Similarly, in connection with the December 1983 assault on Carl Sims, at the time of the crime itself Sims prepared a report stating that he did not know which direction the shots came from or whether the bullets were aimed at him. (33 RT 3290.) Eight years later, at the penalty phase of this capital trial, the state's case on each offense had changed dramatically: (1) Ms. Abraham now expressed uncertainty over whether Mr. Williams was involved; and (2) Mr. Sims now recalled that the shots were aimed at him and they came from where defendant was standing. (32 RT 3187-3194, 33 RT 3285-86.) As to both offenses, however, the statute of limitations had long passed. (See Penal Code section 801 [providing three year statute of limitations for assault].) Under the circumstances of this case, prosecution for these stale assaults at the 1991 penalty phase violated due process and the Eighth Amendment.

Mr. Williams recognizes that this Court has held that criminal statutes of limitation have no place in determining whether the state may introduce evidence under factor (b). Or, put another way, the Court has

held that there is no time limitation in connection with factor (b) evidence. (People v. Heishman (1988) 45 Cal.3d 147, 192.) Appellant submits that this ruling should be reconsidered because it is incompatible with the Eighth Amendment mandate of reliability in capital cases.

In this regard, the Supreme Court has made clear that the death penalty is a different kind of punishment from any other. (Woodson v. North Carolina (1976) 428 U.S. 280, 305; Gardner v. Florida (1977) 430 U.S. 349, 357.) In light of this qualitative difference the Supreme Court has repeatedly recognized the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (Caldwell v. Mississippi (1985) 472 U.S. 320, 340. Accord, Lockett v. Ohio (1978) 438 U.S. 586, 604 ("the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.")

Pursuant to this constitutional mandate, an accused cannot be sentenced to death on the basis of information that he did not have a fair opportunity to confront. (Ake v. Oklahoma (1985) 470 U.S. 68, 83-84; Gardner v. Florida, supra, 430 U.S. 349.) Where circumstances prevent effective cross-examination of the evidence upon which a death sentence is based, the reliability of that death sentence is called into question and the sentence may not stand. (Gardner v. Florida, supra, 430 U.S. at p. 359-62;

Proffit v. Wainwright (11th Cir. 1982) 685 F.2d 1227, 1253-54, cert. denied, 464 U.S. 1002, 1003; Gholson v. Estelle (5th Cir. 1982) 675 F.2d 734, 738-39; Smith v. Estelle (5th Cir. 1979) 602 F.2d 694, 698-703, affirmed on other grounds, Estelle v. Smith (1981) 451 U.S. 454.)

In Gardner v. Florida the Supreme Court reversed a death sentence because the sentencer had relied on information that the defendant could not properly confront. Defendant had been convicted of capital murder. At his sentencing hearing the judge ordered preparation of a presentence report. This report contained a confidential portion not disclosed to either counsel. In imposing a death sentence the trial court indicated it had relied, in part, on the presentence report. The Supreme Court found a violation of due process in relying on such information to impose a death sentence. It made clear that the overriding vice of such a procedure was the risk of an unreliable determination.

First, the Supreme Court noted the "risk that some information accepted in confidence may be erroneous, or may be misinterpreted by the . . . sentencing judge." (430 U.S. at p. 359.) This risk of unreliability was created by denying the opportunity for "counsel to challenge the accuracy or materiality of [the] information." (Id. at 362.) The Supreme Court went even further, however, and stressed the role of adversarial debate in

"evaluating the relevance and significance of aggravating and mitigating" evidence. (Id. at 360.)

In sum, the trial court required Mr. Williams to defend against charges of criminal conduct over eight years old. The record shows quite clearly that the passage of time enhanced the state's case. In contrast to her contemporaneous statements to police, Ms. Abraham was now equivocal about defendant's participation in the May 1983 assault. In contrast to his contemporaneous police report, Mr. Sims could now recall that the bullets came from where defendant was standing. And while Mr. Williams was permitted to present the prior recollections of these witnesses, as a real-life practical matter that presentation paled by comparison to the substantive testimony from these witnesses he could have presented had their memories not faded and or changed so dramatically with the passage of eight years. In short, the state's reliance on such old offenses –deprived Mr. Williams of an effective opportunity to rebut the evidence against him.[28]

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[28] The Ninth Circuit Court of Appeal has recently recognized these same concerns in holding that the federal government could not present evidence to show the nature of prior crimes for purposes of federal enhancement statutes:

> "The problems with such hearings are evident. Witnesses would often be describing events years past. Such testimony is highly unreliable. . . [T]he witnesses might be persons who did not even testify at the earlier criminal proceeding. In many cases, witnesses to the events in question might be

Indeed, it is significant that Mr. Williams could not have been prosecuted for either of the 1983 assaults because by 1991 the three-year statute of limitations had long run. (See Penal Code section 801.) As this Court has observed, such statutes recognize the difficulty "faced by both the government and a criminal defendant in obtaining reliable evidence . . . as time passes following the commission of a crime." (People v. Zamora (1976) 18 Cal.3d 538, 546. Accord, Lackner v. LaCroix (1979) 25 Cal.3d 747, 751; People v. Imbesi (1976) 38 N.Y.2d 629, 631.)

The United States Supreme Court, too, has recognized this fundamental purpose of limitations statutes. Such statutes provide a time limit "beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (United States v. Marion (1971) 404 U.S. 307, 322.) They are designed "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time . . . " (Toussie v. United States (1970) 397 U.S. 112, 114-15.)

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unreliable altogether. Additionally, there would likely be substantial problems with court records and transcripts relating to earlier convictions. These problems become especially difficult in a case . . . where, because the conviction was based on a guilty plea, there is little or no contemporaneous record developed." (U.S. v. Sherbondy (9th Cir. 1988) 865 F.2d 996, 1008.)

Pursuant to these authorities, Mr. Williams could not have been prosecuted for the 1983 events precisely because of the difficulty in "obtaining reliable evidence" given the eight-year time period since the events occurred. (People v. Zamora, supra, 18 Cal.3d at p. 546.) His right to a fair trial on these charges would be prejudiced because the basic facts "have become obscured by the passage of time." (Toussie v. United States, supra, 397 U.S. at p. 114.)

Although Mr. Williams technically was not being prosecuted for the 1983 events, his fundamental rights under the Eighth and Fourteenth Amendments were implicated. In this sense, this case is comparable to Gardner, supra. Both involve situations preventing a capital defendant from meaningfully rebutting the state's case. In Gardner, secrecy prevented meaningful rebuttal. In this case, the passage of eight years has prevented such rebuttal. The harm in both cases is comparable: without a meaningful opportunity to rebut the state's case, the reliability of the sentencing determination is called into question. As such, pursuant to the principles of Gardner, the state should not have been allowed to rely on these offenses in seeking death.[29]

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[29] As noted above, in People v. Heishman, supra, 45 Cal.3d at p. 192, this Court held that factor (b) evidence could be admitted even though prosecution would violate the statute of limitations. Undoubtedly because of Heishman, defense counsel did not object below on this ground. Because the trial court would have had no option but to follow Heishman, counsel's failure to object does not waive appellate review of this issue.

As a practical matter, the harm in allowing the evidence barred by the statute of limitations to be used in aggravation against Mr. Williams is undeniable when one considers the meager aggravating evidence with which the State would been left had the stale evidence been kept out. When the December 1983 and the July 1985 assault, are removed from consideration, the aggravating evidence with which the State was left was a 1983 misdemeanor assault involving a fistfight, and the possession of a concealed weapon that took place nearly six years earlier and for which Mr. Williams was never even charged. Mr. Williams lacked any felony record. (35 RT 3412.) It defies reason to believe that Mr. Williams' jury would have considered one misdemeanor offense (seven years earlier), and an arrest on a misdemeanor offense for which no charges were filed (five years earlier) to be so aggravating as to warrant his execution.[30]

But even if this stale evidence is not removed from the case, the harm is still apparent – in the form of unreliable evidence being placed on the death side of the scale. When the testimony of the State's own witnesses is compared to statements or reports made by those witnesses at or near the time of the incidents, what is conspicuous (but not surprising) is

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(People v. Birks (1998) 19 Cal.4th 108, 116, n.6.)

[30] Indeed, under other California sentencing schemes, the insignificance of Mr. Williams' rap sheet would have rendered him eligible for various diversion and probation programs had his underlying offense been nonviolent. See, e.g., Pen. Code §1210.1(b).

that the State's witnesses could recall few, if any, incriminating details that were corroborated by other evidence. Indeed, the disparities between the witnesses' stories at Mr. Williams' trial, and their contemporaneous recollections at the time of the incidents, spotlight the untrustworthy nature of the witnesses' memories about these long-past events. The dated nature of the incidents also likely foiled Defendant's ability to effectively confront his accusers and rebut their stories insofar as other witnesses to those incidents were no longer available or their memories, too, had faded. And yet, the jury was allowed to consider this stale evidence in determining whether Mr. Williams should live or die. As a result, the Eighth Amendment's "heightened need for reliability" in capital cases was violated and Mr. Williams' sentence requires reversal.

Against this backdrop of stale aggravating evidence, it must be recognized that the penalty trial was a close case. The jury was told how Mr. Williams showed great respect to his entire family, provided compassion and care to retarded children who lived in his parents' home, and was quick to help anyone at anytime. The jury struggled mightily with its verdict and was clearly troubled about the what penalty to impose. After a full day of penalty deliberations, the jury asked the court what would happen if it could not "come to a conclusion." (36 RT 3492.) In light of the weight of the aggravating evidence erroneously admitted, the

weakness of the remainder of the State's case in aggravation, the power of the mitigating evidence presented, and the demonstrable difficulty the jury had in fixing Mr. Williams' penalty, the error discussed above cannot be deemed harmless and a penalty reversal is required.

D. The Trial Court Violated Mr. Williams's Federal Double Jeopardy Rights By Allowing The Prosecutor To Relitigate The Assault Of Which Mr. Williams Was Convicted In 1983.

As discussed above, in connection with the May 1983 assault, Mr. Williams pled guilty to misdemeanor assault. Nevertheless, eight years later the state litigated the facts

of this assault by presenting testimony at the penalty phase of Mr. Williams's capital trial. This was a clear violation of the federal double jeopardy clause.

The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life and limb . . . ." This provision is applicable to the states through the Fourteenth Amendment's due process clause. (Benton v. Maryland (1969) 395 U.S. 784.)

In resolving the double jeopardy issue present in this case, there are two questions to answer. The first question is whether Mr. Williams was placed in "jeopardy" when he pled guilty to misdemeanor assault in 1983. If so, the second question is whether subsequent presentation of evidence

at the penalty phase of a capital trial constitutes the type of second "jeopardy" within the meaning of the double jeopardy proscription.

1. Mr. Williams's guilty plea to misdemeanor assault in 1983 placed him in jeopardy for that offense.

One of the most basic protections provided by the double jeopardy clause is the protection against a second prosecution for the same offense after a conviction. (Illinois v. Vitale (1980) 447 U.S. 410, 415; North Carolina v. Pearce (1969) 395 U.S. 711, 717.) In this context, it is well established that a defendant is placed in jeopardy for an offense not only upon his conviction by a jury, but upon his plea of guilty to that offense as well. (Gonzales v. Municipal Court (1973) 32 Cal.App.3d 706, 714; People v. Sturdy (1965) 235 Cal.App.2d 306, 314; People v. Ayala (1955) 138 Cal.App.2d 243, 248; People v. Mims (1955) 136 Cal.App.2d 828, 831-32.) "A guilty plea is equivalent to a conviction and bars a subsequent prosecution for the same offense." (Ellsworth v. Superior Court (1985) 170 Cal.App.3d 967, 972.) This Court has agreed:

> "Where a defendant pleads guilty, and his plea is entered of record . . . he stands convicted in the eye of the law as fully as he would have been by a verdict of guilty. He is convicted by his plea, and there is, therefore, no occasion for a trial, and nothing remains to be done except to pronounce judgment. On the question of former conviction there can be no distinction between a plea and a verdict of guilty, for both are followed by the same consequences." (People v. Goldstein (1867) 32 Cal. 432, 433.)

Pursuant to this authority, Mr. Williams's guilty plea to misdemeanor assault placed him in jeopardy for that offense. Under the double jeopardy clause, he could not again be placed in jeopardy for that offense.

2. Mr. Williams was again placed in jeopardy for the assault conviction when the prosecutor introduced testimony about the assault during the penalty phase.

By its own terms, the double jeopardy clause "is written in terms of potential or risk of trial and conviction, not punishment." (Price v. Georgia (1970) 398 U.S. 323, 329.) Given this language, the Supreme Court has made clear the fundamental purpose of the double jeopardy clause is to protect defendants from the ordeal of a second prosecution:

> Because of [the] purpose and potential consequences [of a criminal action], and the nature and resources of the state, such a proceeding imposes heavy pressures and burdens – psychological, physical, and financial – on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offence."

(Breed v. Jones (1975) 421 U.S. 519, 529-30.)

Given this purpose, once an accused has been placed in jeopardy for an offense the Court has not restricted the double jeopardy proscription to subsequent criminal trials for that offense. Rather, the Court has more broadly defined the type of subsequent jeopardy proscribed by the double jeopardy clause: "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal

punishment to vindicate public justice.'" (Breed v. Jones, supra, 421 U.S. at p. 529.)

In making this determination the Supreme Court has generally looked at two elements to determine whether subsequent litigation is barred by the double jeopardy clause. First, the Court has examined the procedural trappings – including the applicable burden of proof – of the subsequent action. Where these trappings resemble the trappings traditionally associated with criminal trials, double jeopardy may apply. (One Lot Emerald Cut Stones v. United States (1972) 409 U.S. 232, 235; Helvering v. Mitchell (1938) 303 U.S. 391, 397.) Second, the Court has examined the nature of the sanction imposed in the subsequent action. Where the sanction imposed is punitive in nature, double jeopardy may apply. (One Lot Emerald Cut Stones v. United States, supra, 409 U.S. at p. 235-36; Standlee v. Rhay (9th Cir. 1977) 557 F.2d 1303, 1306.)

In Bullington v. Missouri (1981) 451 U.S. 430 the Court applied these concepts and explicitly held that litigation at the penalty phase of a capital trial constitutes jeopardy within the meaning of the double jeopardy clause. There, defendant was convicted of murder. At a separate sentencing hearing he was sentenced to life imprisonment. Defendant's conviction was reversed on appeal. The question presented was whether

the double jeopardy clause applied to the penalty phase of a capital trial and precluded the state from seeking the death penalty on retrial.

In holding that the double jeopardy clause did apply, the Court looked at the two possible penalties involved – life imprisonment and death. (451 U.S. at p. 434.) In addition, the Court looked at the procedures employed at the penalty phase. Missouri law required a separate penalty phase hearing, the state was required to give notice of the aggravating evidence upon which it intended to rely, the jury had to be convinced of its decision beyond a reasonable doubt and its decision had to be unanimous. (451 U.S. at p. 434-35.) In light of these procedures, the sentencing "hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment . . . . " (451 U.S. at p. 438.) As such, the Supreme Court held that defendant was entitled to "the protection afforded by the Double Jeopardy Clause" at the sentencing hearing. (451 U.S. at p. 446.)

The punishments and procedures used in the penalty phase of a California capital trial are identical in all significant respects to those considered in Bullington. Proof of prior criminal activity in a California penalty phase requires the state to give notice of the aggravating evidence and to prove the activity beyond a reasonable doubt. The hearing is

adversarial in nature. Like Bullington, the hearing is "itself a trial on the issue of punishment." Moreover, the two penalties involved – life without possibility of parole or sentence – are both clearly punitive in nature. Under these circumstances, Mr. Williams submits, he was again placed in jeopardy when the state marshaled its resources and litigated the May 1983 assault during the penalty phase of his 1991 trial.[31]

Sound practical considerations support this result. Indigent defendants are not in a position of financial equality with the state. They do not have the same means to induce witnesses to come and testify. To allow the prosecution to relitigate the circumstances of that crime imposes an unreasonable burden on capital defendants, a burden which implicates the core concerns of the double jeopardy clause.

Appellant recognizes that in People v. Melton (1988) 44 Cal.3d 713 this Court concluded that double jeopardy does not apply "when the details of misconduct which has already resulted in conviction and punishment, or in dismissal pursuant to a plea bargain . . . are presented in a later proceeding on the separate issue of the appropriate penalty for a subsequent offense." (Id. at 756, n.17.) Citing In re Coughlin (1976) 16

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[31] To be clear, Mr. Williams does not claim that it would be per se unlawful for the State to rely on the May 1983 incident as an argument in aggravation. For example, the double jeopardy clause would not have been implicated had the State simply introduced otherwise valid proof of the assault **conviction** through documentary evidence. But the prosecution went far beyond this at Williams's 1991 trial.

Cal.3d 52, this Court reasoned that "[s]uch a procedure is proper, in our view, even if defendant must thereby endure the 'ordeal' of a second 'trial.'" (Ibid.)

Mr. Williams respectfully submits that Melton's conclusion is incorrect because its reliance on Coughlin ignores the precise elements the United States Supreme Court has indicated are crucial to the double jeopardy determination.

In Coughlin this Court held that double jeopardy principles did not preclude the state from moving to revoke a defendant's probation on the basis of a subsequent criminal offense of which the defendant had been acquitted. There, defendant was convicted of burglary and given probation. While on probation he was charged with and acquitted of another burglary. The state then moved to revoke defendant's probation on the first burglary because of the second burglary. Defendant argued that the double jeopardy clause precluded such revocation. In rejecting this argument Coughlin focused on the two main elements discussed above – the burden of proof and the sanction involved. First the Court noted that the two proceedings involved significantly different burdens of proof – the criminal trial required proof beyond a reasonable doubt while the probation revocation merely required a preponderance of the evidence. (16 Cal.3d at p. 56-59.) Second, the Court noted that the probation revocation hearing

was not "intended to authorize criminal punishment" because it merely allowed punishment "for an offense of which he previously was properly convicted." (16 Cal.3d at p. 61.)

The penalty phase hearing in this case is distinguishable from the probation revocation hearing addressed in Coughlin on both grounds. First, unlike Coughlin, the burden of proof in the penalty phase the state must meet to show that Mr. Williams committed prior violent activity is identical to that in the prior criminal trial – both proceedings require proof beyond a reasonable doubt. Second, and again unlike Coughlin, the punishment involved in the penalty phase of this case was not for the offense of which Mr. Williams had "previously" been convicted. Rather, it was a criminal punishment for the current capital crime of which Mr. Williams was accused. For these reasons, application of Coughlin to the double jeopardy analysis of a capital penalty phase hearing is unwarranted.

Mr. Williams also recognizes that in the years since Melton, this Court has frequently cited it for the proposition that there is no double jeopardy barrier to the state's penalty phase presentation of other crimes evidence which had already been the subject of a prosecution. (See, e.g., People v. Lewis (2001) 25 Cal.4th 610, 660; People v. Garceau (1994) 6 Cal.4th 140, 199-200.) But repeating the rule of Melton does not make it

correct. Appellant submits that Melton was wrongly decided and should be reconsidered.[32]

The error in permitting the jury to consider the May 1983 assault on Kenneth Moore was not harmless. Indeed, the State repeatedly emphasized this incident in its closing argument to the jury, and urged the jury give it far greater weight and significance than it would a typical misdemeanor conviction.

Exhibit number one for the State at the penalty trial was a photograph of Kenneth Moore lying on the ground, dead. (35 RT 3406; CT 394, 397.) As defense counsel noted in his objection to the exhibit as unnecessarily prejudicial, "it is the body of a young man that my client did not shoot . . . ." (35 RT 3407.) Then, in his penalty closing, the prosecutor focused several pages of his argument on the killing of Mr. Moore. After describing Mr. Moore as simply a kid on a bike (35 RT 3427), the prosecutor stated that Mr. Williams was "one of the main perpetrators of this attack." (35 RT 3429.) "But for [Mr. Williams'] conduct . . . this boy never would have been killed. . . . ." Id. See also 35 RT 3435 (arguing Mr. Williams was involved in killing three people: Moore, Barron and

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[32] Undoubtedly because of Melton, defense counsel did not raise a double jeopardy objection at trial. Because the trial court would have been duty bound to follow Melton, the issue is properly before this Court notwithstanding the absence of an objection on this ground. (People v. Birks, supra, 19 Cal.4th at p. 116, n.6.)

Thomas); 35 RT 3419 (same). The prosecutor characterized the Moore attack as "so morally bankrupt that it is impossible for any people in a normal society" to comprehend it. (35 RT 3427.) "It is antisocial." Id.

The prosecutor then drew a direct (but misleading) analogy between the attack on Mr. Moore and the killing of Jack Barron and Willie Thomas. Observing that someone in the group of men who attacked Moore – not Mr. Williams, but some unidentified person – shouted before the attack "Hey, cuz, get a bike," the prosecutor posed a rhetorical question for the jury: "Does the attack on [Moore] sound like a robbery? Does the attack . . . sound like a robbery? Is that what's going on?" (35 RT 3428.) In framing the question in this manner, the prosecutor was asking the jurors to recall his previous closing argument, made only a few days earlier, that Mr. Williams was guilty of robbing Barron and Thomas before killing them. The prosecutor then seized upon this purported pattern – a robbery turned murder – to argue something quite remarkable. Instead of claiming that the jury should take seriously Mr. Williams' misdemeanor assault conviction for hitting Mr. Moore, the prosecutor argued that this assault had been improperly "minimized ever since 1983" (35 RT 3428) and that it was incumbent upon the jury to now assign to Mr. Williams "his true culpability for [that] crime." Id. Thus, the prosecutor asked the jury to treat Mr. Williams as a "murderer" for his participation in the 1983

incident – even though the State acknowledged that someone *else*, Eddie Jackson, shot and killed Moore.

But the prosecutor did not stop there. He pushed the Moore incident even further to argue that it showed that Mr. Williams continued, and would forever be, a potent danger, whether in society at large or to "other inmates, prison guards, *anybody else*." (35 RT 3434.) (Emphasis added.) The prosecutor likened Mr. Williams to "a lion . . . [who] can and will become incredibly violent." (35 RT 3434.) He drew upon the Moore assault to argue that "the person we're trying, the person who really committed all these acts . . . that potential for violence *is always going to exist*. You can't eliminate that. And just like he was involved in the killing of Kenneth Moore, Jack Barron and Willie Thomas, *he's not going to change*, and *he hasn't changed*." (35 RT 3435.) (Emphases added.)

Against this backdrop, it cannot be said that the erroneous introduction of Mr. Williams' 1983 misdemeanor conviction for assault at his penalty trial was harmless. Indeed, this Court has observed that where the State regards evidence as particularly important, one must presume that the jury accords that evidence similar weight. (See People v. Powell (1967) 67 Cal.2d 32, 55-57, "we have seen how important [the evidence was] to the People's case, and 'There is no reason we should treat this evidence as any less "crucial" than the prosecutor – *and so presumably the*

*jury* – treated it.'").) See also People v. Polk (1965) 63 Cal.2d 443, 450, cert. denied, 384 U.S. 1010) ("Evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty.")

What is more, this was a close case. As noted above, the jury struggled with its penalty verdict, and indicated at one point that it was deadlocked (36 RT 3492). Had the 1983 conviction been excluded as aggravating evidence on the grounds that it violated Mr. Williams' right not to be placed in double jeopardy, the outcome of the penalty trial would almost certainly have been different. For the above reasons, Mr. Williams' penalty verdict requires reversal.

E. The Trial Court's Admission Of Evidence Of Violent Criminal Activity Committed By Persons Other Than Mr. Williams Constituted Error Under State And Federal Law.

As noted above, much of the evidence introduced at the penalty phase involved actions committed not by Mr. Williams, but by others. For example, in connection with the 1983 assault on Kenneth Moore, the state introduced evidence of Eddie Jackson's assault with a firearm on Mr. Moore and his (Jackson's) firing the gun as well. As to the 1985 assaults on Mona Thomas and David Williams, the state introduced evidence that someone assaulted the victims with a brick.

The trial court's admission of this evidence violated California law. As more fully discussed below, basic principles of statutory construction

show that the legislature did not intend to authorize reliance on violent criminal activity of anyone other than the defendant in imposing a death penalty.

1. Fundamental principles of statutory construction compel a conclusion that the legislature did not intend section 190.3(b) to authorize reliance on violent criminal activity performed by persons other than the accused.

Penal Code section 190.3 provides, in relevant part, as follows:

> "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . [¶] (b) The presence or absence of criminal activity **by the defendant** which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (emphasis added.)

The question presented in this case is whether the Legislature intended section 190.3(b) to authorize use of criminal activity involving violence by someone **other** than the defendant.

This Court has made clear that the fundamental objective of statutory interpretation is to ascertain and implement legislative intent. (People v. Overstreet (1986) 42 Cal.3d 891, 895.) The first step in determining such intent is an examination of the words used in the statute. (People v. Overstreet, supra, 42 Cal.3d at p. 895.) When the language used in a statute is clear and unambiguous, there is no need for judicial construction of the statute. (People v. Belleci (1979) 24 Cal.3d 879, 884.) In such circumstances the Court is "required to give effect to statutes

'according to the usual, ordinary import of the language employed in framing them.'" (People v. Belleci, supra, 24 Cal.3d at p. 884.)

In this case, the language used in section 190.3(b) is quite clear. It explicitly authorizes reliance on violent criminal activity "by the defendant." Under this circumstance there is neither room nor need for judicial construction of this statute. The "usual, ordinary import of [this] language" compels a conclusion that violent criminal activity committed by someone other than defendant does not fall within the plain language of section 190.3(b). Testimony regarding the conduct of others involved in the 1983 and 1985 assaults should not have been admitted under section 190.3(b).

2. Principles of accomplice liability do not alter the clear intent of section 190.3(b).

In admitting evidence of violent conduct committed by others, the trial court in this case was undoubtedly relying on this Court's holding that under section 190.3, subdivision (b) the state may present evidence showing that a defendant "has previously aided and abetted a violent criminal offense . . . ." (People v. Hayes (1990) 52 Cal.3d 577, 633.) Appellant submits, however, as a matter of statutory construction Hayes was wrongly decided.

Although Hayes does not address the question of legislative intent, it appears to rely on the policy expressed in Penal Code section 31, which

provides that aiders and abettors are considered principals in any crime. The flaw in this analysis, however, is this Court's explicit holding that although section 31 may be used to impose derivative responsibility for the acts of another it may not be used to enhance punishment by reason of another's personal conduct. To the contrary, this Court has made clear that the imposition of derivatively increased punishment requires specific legislative direction **other** than section 31. (See, e.g., People v. Walker (1976) 18 Cal.3d 232.)

In Walker this Court interpreted the provisions of section 12022.5, an enhancement statute which provided an additional five years in prison for "any person who uses a firearm in the commission of" certain enumerated offenses. The question presented was whether the legislature had intended this enhancement to apply to a defendant whose accomplice had used a firearm. The Court recognized that for a statute to impose derivative liability on a defendant "there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act." (18 Cal.3d at pp. 241-42.) Although Penal Code section 31 could constitute such direction, that statute permitted derivative liability for the acts of others only in connection with substantive offenses; section 31 "does not also purport to impose additional derivative **punishment** grounded on an accomplice's personal conduct, as those statutes which

provide for such increased punishment 'do not define a crime or offense but relate to the penalty to be imposed under certain circumstances.'" (18 Cal.3d at p. 242.) Walker concluded that "the rules which make an accused derivatively liable for a crime which he does not personally commit, do not at the same time impose a derivatively increased punishment by reason of the manner in which a confederate commits the crime." (18 Cal.3d at pp. 242.)

Walker supports the interpretation of section 190.3(b) compelled by the principles of statutory construction discussed above. Like the statute at issue in Walker, section 190.3(b) does not define a crime but merely relates to "the penalty to be imposed under certain circumstances." Like the statute at issue in Walker, section 190.3(b) contains no explicit legislative direction showing an intent to impose derivative liability. Moreover, Walker explicitly rejects the notion that section 31 authorizes the use of an accomplice's personal conduct to impose increased punishment. Pursuant to Walker, section 190.3(b) was not intended to authorize reliance on violent criminal activity committed by people other than defendant.[33]

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[33] When the legislature intends to impose derivatively increased punishment based on the actions of an accomplice, its language is quite explicit. (See, e.g., Section 12022(a), providing a one year arming enhancement applicable "to any person who is a principal in the commission . . . of a felony if one or more of the principals is armed with a firearm, whether or not such person is personally armed with a firearm.") (Emphasis added.)

Significantly, Walker was decided in 1976. Both the electorate and the legislature are deemed to have been aware of Walker's holding. (See, e.g., People v. Clark (1990) 50 Cal.3d 583, 602 [electorate]; Estate of McDill (1975) 14 Cal.3d 831, 839 [legislature].) Thus, the drafters of the 1978 death penalty law are presumed to have been aware that "the rules which make an accused derivatively liable for a crime which he does not personally commit, do not at the same time impose a derivatively increased punishment by reason of the manner in which a confederate commits the crime." (People v. Walker, supra, 18 Cal.3d at pp. 241-242.) In light of Walker, the absence of any language in section 190.3, subdivision (b) explicitly permitting enhancement of a defendant's sentence based on the conduct of persons **other** than defendant is not a mere accident; it is a persuasive reflection of the purpose of that subdivision. Because Hayes did not even consider the issue of legislative intent, and because it did not address the significance of Walker at all (much less in light of accepted principles of statutory construction), it should be reconsidered.

There is a federal constitutional dimension to this error as well. The United States Supreme Court has made clear the "constitutional significance of individualized sentencing in capital cases . . . ." (Sumner v. Shuman (1987) 483 U.S. 66, 85. See also Woodson v. North Carolina (1976) 428 U.S. 280, 303-05; Skipper v. South Carolina (1986) 476 U.S. 1,

4-5; Eddings v. Oklahoma (1982) 455 U.S. 104, 112.) The sentence imposed at the penalty phase of a capital trial "should reflect a reasoned moral response to the **defendant's** background, character, and crime." (Sumner v. Shuman, supra, 483 U.S. at p. 76, n.5, emphasis added.) The decision as to whether the defendant should be executed must be based on "the character of the individual and the circumstances of the crime." (Zant v. Stephens (1983) 462 U.S. 862, 879.)

Permitting the jury to impose death on Mr. Williams because Eddie Jackson fired a gun in the 1983 assault squarely conflicts with the Eighth Amendment's requirement of "individualization." Allowing the state to base a death sentence on the past conduct of someone other than defendant clearly shifts the jury's focus away from the defendant's character and the circumstances of the crime defendant committed.

In short, separate and apart from the question of statutory construction, the decision to sentence Mr. Williams to die cannot constitutionally be premised on someone else's conduct. The fact that eight years before the penalty phase in Mr. Williams's case someone else decided to shoot Mr. Moore is a totally arbitrary basis upon which to sentence Mr. Williams to die. What in Mr. Williams's character, or the circumstances of the crime he committed, would make him less deserving of death had Eddie Jackson decided not to shoot Mr. Moore? Eddie

Jackson's conduct is completely irrelevant to the jury's constitutional obligation to make "a reasoned moral response to the **defendant's** background, character, and crime." (Sumner v. Shuman, supra, 483 U.S. at 76, n.5, emphasis added.) For this reason this evidence also violated Mr. Williams's Eighth Amendment rights.[34]

3. The Error was Prejudicial and Requires Reversal

Even though persons *other than* Mr. Williams were primarily responsible for the harm inflicted in the May 1983 assault on Kenneth Moore and the July 1985 assault on Mona Thomas and David Williams, the State repeatedly emphasized both incidents in its closing argument to the jury, urging the jury give those incidents great weight in the calculus of death. Thus, the error in permitting the jury to consider these incidents almost certainly prejudiced the jury's sentencing deliberations.

As discussed at some length in the preceding section (which Defendant here incorporates), the prosecution urged the jury to regard Mr. Williams' assault on Moore not as a misdemeanor for which he was convicted – which, the State argued, would "minimize" its significance (35

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[34] In light of Hayes, defense counsel did not object to the state's evidence on this ground at trial. Because the trial court would have been duty bound to follow Hayes, however, the issue is properly before this Court notwithstanding the absence of an objection on this ground. (People v. Birks, supra, 19 Cal.4th at p. 116, n.6.)

RT 3428) – but rather as a full-fledged "murder" for which, the State asserted, he was "tru[ly] culpab[le]." (35 RT 3428.) The State also tried to draw an equivalence between the assault on Moore and the killings of Barron and Thomas, arguing that both incidents involved robbery-murder, and thus suggesting that there was a pattern to Mr. Williams' conduct. (35 RT 3428.) Then, from this alleged pattern, the prosecution argued that Mr. Williams' should be given the death penalty because this pattern proved that Mr. Williams would forever pose a danger to others: "hasn't changed," that "he's not going to change," and that his potential for violence "is always going to exist," even in prison. (35 RT 3434-35.)

The prosecution in his closing also re-described the July 1985 attack on Mona Thomas and David Williams and argued that this incident was an important piece of aggravating evidence that weighed in favor of death. (35 RT 3436-37). See also 35 RT 3432 (emphasizing July 1985 attack as "factor b" evidence); 35 RT 3433 (same).

Against this backdrop, it would be both incongruous and inaccurate to claim that the erroneous introduction of the May 1983 and July 1985 assaults at Mr. Williams' penalty trial was harmless. Indeed, this Court has observed that where the State regards evidence as particularly important, one must presume that the jury accords that evidence similar weight. (See People v. Powell (1967) 67 Cal.2d 32, 55-57, "we have seen how

important [the evidence was] to the People's case, and `There is no reason we should treat this evidence as any less "crucial" than the prosecutor – *and so presumably the jury* – treated it.'".) In addition, this Court has long recognized that evidence of prior crimes "may have a particularly damaging impact on the jury's determination whether the defendant should be executed . . . ." (People v. Polk (1965) 63 Cal.2d 443, 450, cert. denied, 384 U.S. 1010.) "Evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty." (People v. McClellan (1969) 71 Cal.2d 793, 804 n.2, citing Special Issue, A Study of the California Penalty Jury In First-Degree-Murder Cases (1969) 21 Stan.L.Rev. 1297, 1326-36.) As noted above, the State placed substantial weight on these prior crimes as reasons why Mr. Williams should be sentenced to death. Thus, it cannot now be argued that this aggravating evidence was immaterial to the penalty verdict.

What is more, this was a close case. As discussed above, the jury struggled with both its guilt and penalty verdicts. In fact, with respect to its sentencing deliberations, the jury indicated at one point that it was deadlocked (36 RT 3492). Had the May 1983 and July 1985 incidents been excluded as aggravating evidence on the grounds that those assaults were in fact committed by people other than Mr. Williams, the outcome of

the penalty trial would almost certainly have been different.[35] For the above reasons, Mr. Williams' penalty verdict requires reversal.

F. Because The Jury Was Never Given Proper Accomplice Liability Instructions In Connection With The May 1983, December 1983, And July 1985 Assaults, The Sentence Must Be Reversed.

1. The trial court erred in failing to give proper accomplice instructions and in telling the jury it could instead sentence Mr. Williams to die based on violent offenses committed by others, so long as Mr. Williams was somehow "involved" in the prior offenses.

As noted above, section 190.3, subdivision (b) provides that in seeking to obtain a death judgment in a capital case, the state may rely on "the presence . . . of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use violence." Pursuant to this subdivision, the state may rely on "violent criminal activity by the defendant, whether or not it led to prosecution and conviction . . . ."

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[35] As discussed above, the evidence also suggests that someone *other than* Mr. Williams could have been the principle in the December 1983 assault with a deadly weapon on Officer Sims. Thus, this incident, too, should properly have been excluded from the State's case at the penalty trial. Yet the prosecutor, in his closing, relied on this incident, as well, to argue for death. See, e.g., 35 RT 3429 (emphasizing Defendant's alleged remorselessness); 35 RT 3431 (drawing link to the weapon Mr. Williams' allegedly possessed in December 1983 to the weapon used to kill Barron and Thomas); 35 RT 3432 (urging December 1983 assault be considered as "factor b" evidence); 35 RT 3433 (same). Thus, the error of admitting evidence of prior crimes committed by others should properly take into account the harm caused by the State's use of the December 1983 assault in urging Mr. Williams' execution.

(People v. Douglas (1990) 50 Cal.3d 468, 525.) Although a defendant need not yet have been prosecuted or convicted for factor (b) acts, factor (b) "evidence is limited to conduct demonstrating the commission of an actual crime – e.g., the violation of a penal statute." (Ibid.; accord, People v. Clair (1992) 2 Cal.4th 628, 672.)

In proving crimes of violence under section 190.3, subdivision (b), the state is free to introduce evidence showing that the defendant personally committed the violent offense. Assuming the Court does not overrule Hayes (see Argument *-E, supra), the state is not limited to an actual perpetrator theory in connection with factor (b) evidence. To the contrary, the state may also present evidence showing that a defendant "has previously aided and abetted a violent criminal offense . . . ." (People v. Hayes, supra, 52 Cal.3d at p. 633).

When the state seeks to impose culpability on a defendant as an aider and abettor, however, the trial court has a sua sponte duty to provide standard accomplice liability instructions. (See People v. Gonzales (2002) 99 Cal.App.4th 475, 483 ("[T]here is a sua sponte duty to give standard accomplice instructions."]; People v. Patterson (1989) 209 Cal.App.3d 610, 167 and n.5; Use Note to CALJIC 3.00 (7th Ed. 2003) at p. 101.) These standard instructions explain the intent requirement necessary for a conviction. (See CALJIC 3.01.) Accordingly, the failure to provide such

instructions is federal constitutional error. (People v. Prettyman (1996) 14 Cal.4th 248, 271; Martinez v. Borg (9th Cir. 1991) 937 F.2d 422, 423.)

Here, as to the May 1983 and July 1985 assaults with a deadly weapon, it is clear the state was asking the jury to impose death because Mr. Williams was liable for those crimes not as the actual perpetrator but, if at all, as an aider and abettor. For example, in the May 1983 offense, Mr. Williams assaulted Kenneth Moore with his fists and was convicted of misdemeanor assault. The prosecutor sought to go far beyond this, introducing evidence that Eddie Jackson thereafter assaulted Mr. Moore with a deadly weapon (a gun) and "executed him." (RT 3428.)

The jurors were not told they could rely on the fisticuffs as a basis for imposing death. Instead, the judge told them that if the state had carried its burden of proof, they could impose death by relying on Jackson's assault with a deadly weapon. The prosecutor went further than the judge, telling the jury it could impose death by relying on Jackson's act in murdering Moore.

But neither the judge not the prosecutor told the jurors that they could not properly rely on either assault with a deadly weapon or murder unless they found Mr. Williams culpable for Jackson's acts under proper accomplice liability principles. Instead, the jurors were broadly told they

could rely on these offenses in aggravation if the state had proven Mr. Williams was "involved in" these offenses.

The same is true in connection with the July 1985 assault. Once again, it was clear that Mr. Williams himself did not commit the actual assault with a deadly weapon (a brick) or the robberies. Instead, the prosecutor sought to impose culpability on Mr. Williams for the acts of others. And once again, the trial court told the jurors they could rely on these offenses in aggravation if the state had broadly proven that Mr. Williams was "involved in" them.

This homespun characterization of accomplice liability was fundamentally improper. As to the 1983 offense, it did not tell the jury that in order to find Mr. Williams culpable for Jackson's assault with a deadly weapon, it would have to find that Mr. Williams (1) committed an act which aided Jackson's assault with a deadly weapon/murder, (2) knew Jackson's intended to assault or murder, and (3) intended to facilitate Jackson's assault or murder. (CALJIC 3.01.) Nor did it tell the jury that neither Mr. Williams's presence at the crime scene, nor his knowledge that a crime was occurring and his failure to prevent it, were sufficient for aiding and abetting liability. (CALJIC 3.01.)

Similarly, as to the July 1985 assault and robbery, the court's instructions did not tell the jury that in order to find Mr. Williams culpable

for the assault and robbery, it would have to find that he (1) committed an act which aided the assault and robbery, (2) knew that assault and robbery were intended and (3) personally intended to facilitate both crimes. (CALJIC 3.01.) It did not tell the jury that presence at the crime scene, or knowledge that a crime was occurring and failure to prevent it, were insufficient for aiding and abetting. (CALJIC 3.01.)

In short, the jury could not impose death based on either the May 1983 or the July 1985 offenses without properly understanding the rules of accomplice liability. Accordingly, the trial court's failure to provide such instructions was federal constitutional error. (See People v. Prettyman, supra, 14 Cal.4th at p. 271; Martinez v. Borg, supra, 937 F.2d at p. 423.)[36]

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[36] Although the state's theory of culpability as to the December 1983 assault of Officer Carl Sims did not explicitly involve aiding and abetting liability, the trial court's "involved in" instruction was error there as well. As to that offense the jury was also given two distinct theories of culpability on which it could find Mr. Williams culpable and rely on the assault to impose death. The first theory was entirely proper – the jury was told it could rely on this assault in imposing death if the state proved Mr. Williams "had committed" the December 1983 assault on Sims. (RT 3489.)

But the jury was also told it could rely on this offense to impose death if it found Mr. Williams was 'involved in" the assault. While the state's theory was that Mr. Williams was the actual shooter in that offense, that conclusion was not beyond doubt. Mr. Williams was arrested in a group of 11 or 12 other men, the gun he had was fully loaded (and so did not appear to have been shot recently) and in Officer Sims's original police report – prepared within days of the actual event – he failed to recall not only the direction of the bullets, but whether they were even aimed at him. Moreover, although the incident involved a police officer being shot at, Mr. Williams was released and never charged in the matter. In light of all these facts, the trial court's "involved in" instruction permitted the jury to rely on

2. Because the state is unable to prove the error harmless, a new penalty phase is required.

Mr. Williams concedes the trial court's failure to provide proper accomplice instructions did not taint either the guilt verdict or the special circumstance findings. Instead, the error permitted the jury to impose a death sentence by relying on other crimes for which he was not culpable under state law. The question is whether the state is able to prove beyond a reasonable doubt that this error is harmless.

Logically, there are two ways the state could establish that this error harmless. First, the state could prove that a properly instructed jury would have found Mr. Williams liable for the three assaults. If this is true, then the court's instructional error would have been harmless. Alternatively, the state could argue that even if a properly instructed jury could have disagreed as to whether Mr. Williams was liable for these assaults, the jury's consideration of those assaults in the calculus that lead to death was still harmless because the remaining aggravating evidence was so overwhelming that death was the only possible sentence.

As more fully discussed below, neither of these harmless error approaches has merit in this case. Mr. Williams will discuss them each in turn.

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this assault without necessarily finding beyond a reasonable doubt that Mr. Williams actually committed it. This was error.

a. The state cannot prove beyond a reasonable doubt that a properly instructed jury would have unanimously agreed he was liable for the May 1983, December 1983 or 1985 assaults as an accomplice.

As an initial matter, there is a legitimate question as to whether it is even open to the state to argue that a properly instructed jury would have found the three prior assaults true. It is true that the Supreme Court has held that a trial court's failure to instruct on an element of an offense is not a structural error, but is subject to constitutional harmless error analysis. (See Neder v. United States (1999) 527 U.S. 1.) This certainly supports an argument that harmless error analysis is appropriate here. But this Court has recognized that where a trial court fails to instruct on "substantially" all of the elements of an offense – and the jury does not resolve the factual questions posed by the missing instruction under other instructions – reversal is required without a harmless error analysis. (People v. Cummings (1993) 4 Cal.4th 1233, 1315) [finding failure to instruct on four of the five elements of robbery reversible per se].)

Here, the trial court not only failed to instruct on any elements of the factor (b) offenses, but it went further and gave the jury a fundamentally incorrect theory of culpability on which to hinge Mr. Williams's guilt for those offenses. Under this circumstance, it would be

manifestly inappropriate to try and cure the trial court's error now by an appellate finding that the factor (b) offenses were adequately proven.

Ultimately, however, there is no need to decide this issue. Even if a constitutional harmless error analysis were applied to the court's error, the error could not be found harmless. As discussed in some detail above, the evidence on the May and December 1983 assaults, as well as the July 1985 assault, was hotly disputed. As to the May 1983 assault on Kenneth Moore, for example, Latrece Abraham testified at the 1991 penalty phase that Mr. Williams assaulted Mr. Moore. (32 RT 3194.) But back in 1983, when her memory was fresher, she told police that she did **not** see Mr. Williams assault Mr. Moore. (35 RT 3470.) And when cross-examined at the penalty phase about exactly what she did see, Ms. Abraham testified that "[t]he ones I named in my statement [to police] is [sic] those ones I seen actually kicking him and hitting him." (32 RT 3193.) Given that Ms. Abraham had **not** named Mr. Williams in her "statement" to police, it seems plain that a properly instructed jury would likely have found the state had not proven beyond a reasonable doubt that Mr. Williams aided and abetted Jackson's assault with a gun on Mr. Moore. (See Neder v. United States, supra, 527 U.S. at p. 11 (instructional error as to element of the offense cannot be harmless where the factual question posed by the

error is contested and there is sufficient conflicting evidence to support a contrary finding).)

The record is equally ambiguous as to Mr. Williams's culpability for the July 1985 assault. Although the state presented two police witnesses who said that Mr. Williams had been identified as one of the people involved in the July 1985 assault, the victim of that assault herself could not identify him. (33 RT 3263-66, 3276-3277, 3250-3262.) Indeed, even the prosecutor would concede that "the extent of [defendant's] involvement is difficult [to prove] because there are 15 people participating in the crime . . . ." (32 RT 3165.) Based on the state's evidence, here too a properly instructed jury could well have found that the state had not proven beyond a reasonable doubt that Mr. Williams aided and abetted the July 1985 assault with a brick. (See Neder v. United States, supra, (1999) 527 U.S. at p. 11.)[37]

Finally, a properly instructed jury could also have found that the state had not proven beyond a reasonable doubt that Mr. Williams committed, or aided and abetted, the December 1983 assault on Carl Sims. Mr. Williams was arrested from among a group of 10 to 11 young men. (33 RT 3282-83; 3296.) Although Sims told the penalty phase jury in 1991

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[37] There was also a robbery component to this allegation. (CT 406; 35 RT 3488.) But since the prosecutor presented no evidence at all as to the robbery component of this charge, a properly instructed jury could also have found insufficient evidence to show that Mr. Williams aided a robbery.

that he recalled which direction the shots had come from in 1983, a his contemporaneous police report said just the opposite. (33 RT 3292.) When arrested, Mr. Williams did have a gun, but it was fully loaded, undercutting the theory that it had just been fired. (Id.) And as the prosecutor would stipulate, the contemporaneous decision-makers decided **not** to prosecute Mr. Williams for any criminal offense at all. (33 RT 3298.) As to this offense too, a properly instructed jury could have found the state had not proven Mr. Williams's complicity – either as the actual perpetrator or as an aider and abettor – beyond a reasonable doubt. (See Neder v. United States, supra, (1999) 527 U.S. at p. 11.)[38]

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[38] The prejudice from the use of "involved in" as a broad basis for vicarious liability in this case was compounded by the state's introduction of gang affiliation evidence. Gang expert Roger Magnuson testified at the penalty phase and gave his opinion that Mr. Williams was a "hard core" member of the Five Nine Hoover Crips" street gang. (32 RT 3238-3239.) According to Magnuson, the other people the prosecutor believed were involved in the 1983 assault on Mr. Moore were also gang members. (32 RT 3176, 3238.) Latrece Abraham, an eyewitness to the 1983 assault also testified that Mr. Williams was in a gang at the time. (32 RT 3184.)

The jury had also been told it could consider evidence introduced at the guilt phase. (CT 403, 407.) There too there was significant evidence suggesting that Mr. Williams was involved in street gangs. For example, Dauras Cyprian and Raymond Valdez both testified that Mr. Williams was part of a street gang. (18 RT 1755, 19 RT 1795-1796, 20 RT 1914.) Other witnesses testified to gang tattoos on Mr. Williams'. (20 RT 2004-2005.)

All of this evidence increased the likelihood of prejudice from the court's broad 'involved in" theory of culpability. The jurors were charged with determining whether Mr. Williams would live or die. In making this decision they were told they could consider whether he was "involved in" certain prior crimes. They were then presented with evidence showing that

b. The state cannot prove beyond a reasonable doubt that the jury's consideration of the May 1983, December 1983, and July 1985 assaults was harmless.

Because a properly instructed jury could have disagreed as to whether Mr. Williams was liable for the May 1983, December 1983 or July 1985 assaults, the only remaining question is whether the jury's consideration of those assaults in imposing death was somehow harmless. In answering this question, the Court must decide whether the remaining evidence in aggravation was so overwhelming that death was the only possible sentence. The answer to this question is "no" for four reasons: (1) the nature of the legitimate penalty phase aggravating evidence remaining without the three improperly considered violent offenses, (2) the nature of the improper evidence, (3) the prosecutor's repeated reliance on the improper factor (b) evidence, and (4) the presence of undisputed mitigating evidence on which the jury could have relied to give a life sentence.

First, aside from the three improper factor (b) aggravating circumstances, the only undisputed aggravating factor presented at the penalty phase was defendant's December 1985 possession of a concealable firearm. But as the state conceded, the defendant was not even charged

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Mr. Williams was involved in street gangs which may very well have been connected with these crimes. Under these circumstances, it is difficult to imagine any juror not relying on this evidence in deciding whether to impose a death sentence.

with a criminal offense arising out of this conduct. This offense was plainly not a major factor in the jury's decision to impose death.

Second, the nature of the improperly considered factors shows the error was prejudicial. The jury was improperly permitted to consider in aggravation three serious prior violent offenses – one of which resulted in a murder. This Court has long recognized that evidence of prior crimes "may have a particularly damaging impact on the jury's determination whether the defendant should be executed . . . ." (People v. Polk (1965) 63 Cal.2d 443, 450, cert. denied, 384 U.S. 1010.) "Evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty." (People v. McClellan (1969) 71 Cal.2d 793, 804 n.2, citing Special Issue, A Study of the California Penalty Jury In First-Degree-Murder Cases (1969) 21 Stan.L.Rev. 1297, 1326-36.)

Third, these three crimes were not simply introduced and ignored. It is true, of course, that in making his argument for death the prosecutor relied on the circumstances of the crime. (35 RT 3418-3426.) But after discussing those circumstances in eight pages, the prosecutor spent four pages discussing the May 1983 crime, asking the jury to impose death because "although he [Mr. Williams] didn't pull the trigger, . . . he is just as guilty as the person who did . . . ." (35 RT 3426-3429.) The prosecutor then spent an additional four pages talking about the December

1983 assault on Carl Sims. (35 RT 3429-3432.) He also spoke about the July 1985 assault on Mona Thomas and David Williams. (35 RT 3432, 3426-3437.) In other words, in asking for death the prosecutor himself put as great an emphasis on these three prior violent crimes as he did on the circumstances of the crime. (See People v. Powell (1967) 67 Cal.2d 32, 55-57 ("we have seen how important these statements were to the People's case, and `There is no reason we should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.'").)

Finally, there were powerful mitigating factors present. As the jury learned, George Williams always treated his adoptive parents and sisters with great respect and visited their home frequently after he moved out as an adult. (34 RT 3309, 3312 .) He helped bathe, dress and care for the half-dozen retarded children who resided at his parents' home. (34 RT 3314-15, 3346, 3378.) Indeed, he treated the disabled children with "compassion[]" (34 RT 3314), "just like they was [sic] his brothers or sisters." (34 RT 3378.) Williams also helped care for his aunt during in her final year before she succumbed to cancer and "was always there" if anyone in the family – or even a stranger – needed his assistance. (34 RT 3384, 3386.) Williams was also a loving husband and actively engaged father to his own children. (34 RT 3352; 3381.)

Even though his mother was "tough" on all of her children, Williams "held his cool" better than his siblings, and never raised his voice at her. (34 RT 3352.) In his sister's words, Williams was "a kind, gentle, soft-spoken, respectful person." (34 RT 3343.) According to his mother, Williams "was always nice and kind and never talked back, never raised his voice . . . never . . . [said] a bad word." (34 RT 3374.) His mother noted that George "would . . . go out of the way to do things for you" and "was always willing to help someone." (34 RT 3386; 3314.) Although George did not complete high school, he had no disciplinary problems in elementary or high school. At the time of his trial, Williams had no prior felony convictions, and only one misdemeanor conviction.

The jury was clearly moved by the mitigating evidence. The jury deliberated for more than two days about the penalty verdict. At the end of the second day of deliberations, the jury was clearly torn about the proper verdict leading one of the jurors to inquire of the court about what would happen with respect to Mr. Williams' sentencing if the jury "**can't come to a conclusion** . . . ." (36 RT 3492.)

Against this backdrop, on this record, it will be impossible for respondent to establish that the court's error was harmless in the sentencing decision. A new penalty phase is required.

3. The issue is properly preserved for appellate review.

CALJIC 8.87 is the standard jury instruction given when the state introduces violent crimes evidence under Penal Code section 190.3, subdivision (b). At the time of trial in this case, that instruction provided as follows:

> "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal [act[s]] [activity]: _____ which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a juror may consider any of such criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal [act[s]] [activity]." (CT 406.)

There are two distinct concepts conveyed in this instruction. The first sentence identifies and characterizes other-crimes evidence that the state has introduced during the penalty phase, describing it as evidence "showing that the defendant has committed" certain violent criminal acts. The second sentence limits the jury's use of such evidence, explaining that it can be used only if the state has proven beyond a reasonable doubt that the defendant committed these criminal acts.

Before closing arguments in this case, defense counsel expressed a concern about this standard instruction. Defense counsel accurately pointed out that the first sentence of this standard instruction "says that evidence has been introduced for the purpose of showing that George Williams has committed the following criminal acts or activities." (RT

3400.) He noted that several of the prior crimes on which the state was relying were "not crimes that [defendant] has committed." Instead, the state's evidence was that defendant was involved in those crimes, "not that he committed" them. (34 RT 3400-3401.) Accordingly, defense counsel objected to CALJIC 8.87's description of the state's evidence as "showing that the defendant has committed" these crimes.

Counsel's concern was certainly valid. In cases like this – where a defendant did not personally commit a prior crime of violence but is liable (if at all) as an accomplice – it is unfair to the defendant to tell the jury that the state has introduced evidence showing that "the defendant has committed" the crime. The court in this case agreed with counsel's concern, offering to instruct the jury that the state had introduced evidence showing that "defendant has committed or was involved in" certain crimes. (RT 3401.) Both defense counsel and the prosecutor agreed to this modification. (RT 3401.) The written instruction was properly altered to reflect this change. (CT 406.)

Several points are clear from this exchange. Defense counsel's concern was the first sentence of CALJIC 8.87, not the second. Put another way, defense counsel was trying to protect his client's interest by making sure the court's description of the state's other-crimes evidence – contained in the first sentence of CALJIC 8.87 – did not unfairly suggest to

the jury that the state's evidence showed Mr. Williams had committed these prior offenses. Defense counsel was not, for some unfathomable reason, trying to undercut his own client's interest by suggesting that the court broaden the jury's ability to rely on criminally violent activity beyond what was permitted under California law.

Unfortunately, although the court's written instruction precisely captured defense counsel's concern, its oral instruction did not. To be sure, in accord with the agreed-upon revision, the court instructed the jury that "[e]vidence has been introduced for the purpose of showing that the defendant George Brett Williams has committed or was involved in the following criminal acts or activity." (RT 3488.) After listing the four crimes on which the state had introduced evidence, however, the trial court instructed the jury that before it could consider "such criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant . . . did in fact commit such criminal acts or activity **or was involved in such criminal acts or activity**." (RT 3489.)

In other words, the court departed from the written instruction which had been approved by both lawyers and inserted the "involved in" language not just in the first sentence of CALJIC 8.87 (where it had been requested) but in the second as well (where it had not). Defense counsel's

request for (and agreement to) the "involved in" language in the first sentence of CALJIC 8.87 cannot possibly be construed as a request for (and agreement to) insertion of that language in the second sentence. The issue is cognizable on appeal.[39]

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[39] As noted above, the court's written instruction did not contain the improper language telling the jury it could rely on factor (b) evidence if the state proved merely that defendant was "involved in" a prior crime of violence. (CT 406.) Some courts have noted "minor discrepancies between written and oral instructions do not constitute reversible error." (People v. Murillo (1996) 47 Cal.App.4th 1104, 1107. Accord, People v. Crittendon (1994) 9 Cal.4th 83, 137-138 (inadvertent exclusion of the word "if" in reading a CALJIC instruction is not error).) Where there is a "minor discrepancy," the court should look to see if the arguments of counsel exploited or resolved the potential conflict in the instructions. (People v. Crittendon, supra, 9 Cal.4th at p. 138, citing People v. Webster (1991) 54 Cal.3d 411, 451-452, and People v. Howard (1988) 44 Cal.3d 375, 435-436.)

But this rule does not apply where the trial court "fails to read an instruction it said it would use." In that situation, the reviewing court will not assume the jury has read the correct instruction on its own. (People v. Murillo, supra, 47 Cal.App.4th at p. 1107.) Similarly, where the incorrect oral instruction is **not** a "minor discrepancy" – but fundamentally and incorrectly changes the meaning of a written instruction – this Court has made clear that error has occurred and the only remaining question is prejudice. (People v. Heishman (1988) 45 Cal.3d 147, 163-164.)

In this case, there is no reason to even decide whether the court's oral instruction was a "minor discrepancy" which would require resort to the arguments of counsel to see if the discrepancy was exploited. Here, nothing in the record suggests that the jury ever received a written copy of the penalty phase instructions. As this Court has noted, a "defendant has no federal or state constitutional right to instructions in writing . . . and the statutory right depends on an express request." (People v. Ochoa (2001) 26 Cal.4th 398, 447. See Penal Code section 1093, subdivision (f).) Nothing in the record suggests that either party requested the court to provide the jury with a copy of the penalty phase instructions. It would be an odd rule of harmless error indeed which presumed the jury had read and followed a

G. The Prosecution Gave No Notice That It Would Be Relying On A Prior Murder As An Aggravating Factor Under Section 190.3, Subdivision (b).

As noted above, section 190.3 provides that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court prior to trial." The purpose of this provision is to "afford [defendant] a reasonable opportunity to prepare

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written instruction which it was never given in the first place.

But even if the jury did have a copy of the written instructions, reversible error occurred here. Not only did the trial court "fail to read an instruction it said it would read," but its error was anything but a "minor discrepancy." The error in this case cannot reasonably be compared to a trial court's inadvertent failure to read the word "if" in a standard CALJIC instruction. (Compare, People v. Crittendon, supra, 9 Cal.4th at pp. 137-138.) Instead, the trial court's oral instruction here gave the jury a vastly broadened theory of accomplice liability that has never been a part of California law. This fundamental change in the instruction was error notwithstanding the written instruction. (See People v. Heishman, supra, 45 Cal.3d at pp. 163-164 [instruction which deleted the word "not" from a standard instruction, and as a result changed the meaning of that instruction, was error even though the written instruction was correct].)

Assuming arguendo this Court were inclined to view this error as a "minor discrepancy," then pursuant to Crittendon the appropriate approach would be to look at the closing arguments of counsel to see if those arguments resolved the conflict in the instructions. (People v. Crittendon, supra, 9 Cal.4th at p. 138.) Here they plainly did not; neither lawyer properly explained the principles of aiding and abetting to the jury. (RT 3410-3485.)

In sum, the fact that the written instruction did not track the court's incorrect oral instruction is beside the point. Error has occurred.

his defense at the penalty trial." (People v. Grant (1988) 45 Cal.3d 829, 854, citing People v. Howard (1988) 44 Cal.3d 375.) In light of this fundamental purpose, Section 190.3 requires "pretrial notice of the actual evidence on which the prosecution intends to rely to establish aggravating factors at the penalty phase." (People v. Jennings (1988) 46 Cal.3d 963, 986-87.)

In this case the prosecution indicated that it would be relying on a May 1983 assault with a deadly weapon. (1 RT 5) (noting Williams "was arrested and convicted . . . of a [Pen. Code Section] 245"). But that is not what happened.

As noted above, in his penalty phase closing argument, the prosecutor told the jury that it was entitled to characterize the 1983 crime as a murder, and TO rely on it to impose death.

> In terms of his true culpability for the [1983] crime, he is a murderer. . . . [H]is true culpability . . . his culpability for the crime was that of a murderer. He . . . should have . . . been tried and convicted of murder

(RT 3438.)

In choosing between life and death, the prosecutor asked the jurors to consider what crime defendant "was truly guilty of" in connection with the 1983 crime, and then told them that that crime was murder. (RT 3428.)

Mr. Williams recognizes that the prosecutor did not surprise the defense with new evidence at the penalty phase. Instead, what he did was surprise the defense with a characterization of that evidence that defendant could not have anticipated. But in light of the fundamental purpose behind the notice requirement contained in section 190.3, this is a distinction without a difference.

The purpose of the notice requirement, of course, is to permit defense counsel to marshal his resources and prepare a defense to the allegations. But preparing a defense to an assault charge is very different from preparing a defense to a murder charge. This is especially true here, where one of the prosecutor's explicit theories of murder was felony murder. (RT 3428.) According to the prosecutor, the jury could rely on murder as a circumstance in aggravation because the killing of Kenny Moore occurred during a robbery. (RT 3428.) Of course, the state gave no notice whatever that the defense would have to marshal evidence and argument on the question of vicarious liability for felony-murder. The prosecutor's argument urging the jury to rely on a 1983 murder plainly violated the notice provisions of section 190.3 and with it, the federal and state due process clauses as well.

In People v. Brown (1988) 46 Cal.3d 432 this Court held that state-law errors at the penalty phase of a capital trial require reversal whenever it

is reasonably possible that the error affected the verdict. Of course, since the notice error here violated due process, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (See Chapman v. California (1968) 384 U.S. 18, 24.)

Here there is no need to decide which of these standards applies. Under either standard, and for many of the same reasons discussed above, reversal would be required. Of the three prior violent offense which were in dispute, Mr. Williams's culpability for the murder is obviously the most serious. The crime itself is far more serious than the other alleged prior violent acts and the prosecutor's argument on this offense hammered the point repeatedly. (RT 3428-3432.)

The prosecutor described the crime as an "execution." (RT 3428.) He implored the jury to consider, in deciding whether Mr. Williams would live or die, the fact that "his culpability for the [May 1983] crime was that of a murderer." (RT 3428.) The prosecutor urged the jury to consider what he called "the real circumstances behind what he did." (RT 3429.) According to the prosecutor, "but for" the actions of Mr. Williams "this boy would never have been killed." (RT 3429.) Although Mr. Williams did not pull the trigger, in deciding whether he should live or die the jury should consider that "he is just as guilty as the person who did." (RT 3429.)

The prosecutor's improper arguments cannot be characterized as harmless. As noted above, Williams' jury grappled with powerful mitigating evidence including, but not limited to, the great respect George Williams showed his entire family, the compassion and care he provided retarded children who lived in his parents' home, his willingness to help anyone at anytime, and his lack of any felony record at the time of his trial. After a full day of penalty deliberations, the jury asked the court what would happen if it could not "come to a conclusion." (36 RT 3492.)

As the record reflects, this was a close case, and the jury was clearly troubled about the what penalty to impose. In light of the errors and for the reasons discussed above a new penalty phase is required.

## XII. THE TRIAL COURT'S INSTRUCTION PERMITTING JURORS TO IMPOSE DEATH BY BROADLY FINDING THAT MR. WILLIAMS WAS IN SOME WAY "INVOLVED IN" PRIOR CRIMINAL ACTIVITY VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The state's penalty phase was simple. It was devoted entirely to introducing evidence of four prior violent offenses as aggravating factors under section 190.3, subdivision (b). The prosecutor's penalty phase closing argument was equally simple; he urged the jury to impose death largely because of these prior offenses.

As discussed in Argument XI, above, however, Mr. Williams's actual role in three of these four offenses was very much in dispute. Rather than give specific instructions on accomplice liability, however, the trial court instructed the jury it could rely on these offenses as aggravating factors if the state had proven that Mr. Williams either (1) "did in fact commit" or (2) was "involved in" the prior offenses. (RT 3489.)

In Argument XI-F., above, Mr. Williams explained why the trial court's failure to provide proper accomplice liability instructions violated his federal and state constitutional rights to a jury trial. As discussed below, however, the trial court's unprecedented provision of an "involved in" theory of culpability for this aggravating factor violated the federal constitution in several other ways as well.

First, this aggravating factor was unconstitutionally vague in violation of the Eighth Amendment. Without some definition of "involved in," and without any proper accomplice liability instructions, there was no principled guidance to jurors deciding whether to rely on this aggravating factor in deciding if Mr. Williams should die. Second, even if this "involved in" aggravating factor passed muster under the Eighth Amendment, it remained fundamentally inconsistent with California law and deprived Mr. Williams of his state-created right to a jury determination of actual or accomplice liability before relying on a factor (b) aggravating factor. Third, since the trial court's unprecedented expansion of factor (b) could not have been anticipated by defense counsel, provision of the broad "involved in" theory of factor (b) culpability violated Mr. Williams's right to due process of law and the effective assistance of counsel. Finally, because the jury was permitted to impose death based on a theory of culpability of which defense counsel had no notice, the death sentence also violates the special reliability requirements of the Eighth Amendment. For any or all of these reasons, the penalty phase must be reversed.

A. An Aggravating Factor Which Permits Individual Jurors To Sentence A Defendant To Die Based On Criminal Activity Which He Is Somehow "Involved In" Violates The Eighth Amendment.

The trial court told the jurors in this case they could impose death if they believed Mr. Williams was 'involved in" prior violent offenses. (RT

3489.) It did not define the term "involved in" for the jury, nor did it give any standard instructions on accomplice liability. Instead, it told the jurors that they did not have to agree in order to aggravate based on this factor. (RT 3489.) Under this instruction, if any individual juror – applying their personal view of the meaning of "involved in" – thought the state had sufficiently proven Mr. Williams's involvement in prior crimes, that juror could impose death based on that factor. (RT 3489.)

The trial court's "involved in" aggravating factor violated the Eighth Amendment. In sub-argument A-1 below Mr. Williams will explain that the vagueness limitations of the Eighth Amendment apply to sentencing factors on which the jury relies to impose death. In sub-argument A-2, he will explain why the aggravating factor in this case was unconstitutionally vague. In sub-argument A-3, he will explain why a new penalty phase is required.

1. The vagueness limitations of the Eighth Amendment apply to sentencing facts under the California death penalty scheme.

In Godfrey v. Georgia (1980) 446 U.S. 420 the Supreme Court made clear that under the Eighth Amendment "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" (446 U.S. at p. 428. Accord, Lewis v. Jeffers (1990) 497 U.S. 764,

776.) The Supreme Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." (Maynard v. Cartwright (1988) 486 U.S. 356, 362.) This process also serves to "make rationally reviewable the process for imposing a sentence of death.'" (Lewis v. Jeffers, supra, 497 U.S. at p. 778; Godfrey v. Georgia, supra, 446 U.S. at p. 428.)

A state may rely on the presence of certain aggravating factors to accomplish this "constitutionally necessary narrowing function." (Pulley v. Harris (1984) 465 U.S. 37, 50.) In order to ensure that aggravating factors fulfill their role in "minimizing the risk of wholly arbitrary and capricious action," the Supreme Court has repeatedly held that such factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." (Lewis v. Jeffers, supra, 497 U.S. at p. 774; Godfrey v. Georgia, supra, 446 U.S. at 428; Gregg v. Georgia (1976) 428 U.S. 153, 198.) An aggravating factor is unconstitutionally vague "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence of absence of the factor." (Espinosa v. Florida (1992) 505 U.S. 1079, 1081.)

In applying this Eighth Amendment framework, the Supreme Court has never drawn a distinction between factors which a state uses in

determining if a defendant is eligible for the death penalty and factors used in selecting the actual sentence. To the contrary, the Court has time and again applied its Eighth Amendment vagueness analysis to assess sentencing factors which played no role in determining if the defendant was death-eligible, but was solely used in the weighing process leading to death. (See, e.g., Arave v. Creech (1993) 507 U.S. 463 (applying vagueness analysis to aggravating factor used in determining sentence even though remaining, unchallenged aggravating factor made defendant death eligible); Espinosa v. Florida, supra, 505 U.S. at p. 1082 (same); Sochor v. Florida (1992) 504 U.S. 527 (same); Walton v. Arizona (1990) 497 U.S. 639 (same).) In Stringer v. Black (1992) 503 U.S. 222 the Court explicitly rejected any distinction between eligibility and selection factors in applying the Eighth Amendment's vagueness analysis:

> If a state uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practice matter fail to guide the sentencer's discretion.

(Id. at p. 235.)

Despite these authorities, in People v. Bacigalupo (1993) 6 Cal.4th 457, this Court held that although Eighth Amendment vagueness principles applied to eligibility factors under California law, it did **not** apply to sentencing factors which a California jury considered in the penalty phase of a capital trial. (Id. at p. 463, 476.) Mr. Williams recognizes that

pursuant to Bacigalupo, the vagueness analysis of Godfrey v. Georgia and Maynard v. Cartwright, would **not** apply to the expanded factor (b) aggravating circumstance in this case.

Several months after this Court's decision in Bacigalupo, however, the United States Supreme Court issued its decision in Tuilaepa v. California (1994) 512 U.S. 967. Although Tuilaepa upheld parts of California's death penalty scheme, it made clear that this Court's rationale in Bacigalupo was wrong.

In Tuilaepa, the defendant argued that several of section 190.3's sentencing factors were vague under the Eighth Amendment. The Supreme Court noted the distinction between eligibility factors and sentencing factors. (512 U.S. at p. 973.) Because the state was required to "guard against bias or caprice" in both areas, the Supreme Court not only recognized that "we examine eligibility and selection factors for vagueness" but went on to note "that eligibility and selection factors . . . may not be 'too vague.'" (Id.) It then applied its traditional Eighth Amendment vagueness analysis to the section 190.3 factors which defendant had challenged. (Id. at pp. 975-977.) In short, in Tuilaepa the Supreme Court discredited this Court's view that sentencing factors considered by the jury in deciding whether a defendant should die are

immune from the traditional vagueness analysis of the Eighth Amendment.[40]

It is true, of course, that Tuilaepa held that the standard sentencing factors given to California jurors are not unconstitutionally vague. Significantly, however, Mr. Williams's challenge to the "involved in" aggravating factor in this case does **not** involve any of the standard sentencing factors considered in Tuilaepa. Instead, in this case the trial court departed from the standard factors approved in Tuilaepa and gave the jurors an expanded, undefined and unprecedented factor on which to rely – "involvement" in prior criminal activity. That is the aggravating factor being challenged here.

The only remaining question is whether this factor was impermissibly vague under the Eighth Amendment. It is to that question Mr. Williams now turns.

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[40] Justice Blackmun dissented in Tuilaepa. Like the majority, however, he too made clear that the Eighth Amendment applied **both** to eligibility and sentencing factors. He was explicit on the point:

> "Nor does it matter for Eighth Amendment purposes that California uses one set of factors . . . to determine eligibility and another . . . in the weighing or selection process. Whether an aggravator is used for narrowing or for weighing, or for both, it cannot be impermissibly vague." (512 U.S. at p. 985, n.1.)

Justice Blackmun went on to observe, correctly, that "[t]he Court recognizes as much by subjecting the challenged factors to a vagueness analysis." (Id.)

2. Permitting jurors to impose death based on their individual opinion as to whether a defendant was "involved in" prior criminal activity, without a definition of that phrase or proper instructions on accomplice liability, creates a genuine risk of arbitrary sentencing in violation of the Eighth Amendment.

As noted above, an aggravating factor is unconstitutionally vague under the Eighth Amendment "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence of absence of the factor." (Espinosa v. Florida, supra, 505 U.S. at p. 1081.)[41] Here, the jurors were told they could impose death if they found that Mr. Williams was "involved in" prior violent criminal activity. (RT 3489.) The jurors were told they did not have to agree; any juror who believed that Mr. Williams was "involved in" the prior activity could rely on that to support a death judgment.

Without a definition of "involved in," or proper instructions on accomplice liability, this aggravating factor was impermissibly vague.

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[41] In applying an Eighth Amendment vagueness analysis, the Supreme Court has identified two distinct types of sentencing factors. First, there are what the Court has termed "propositional factors" – factors which present "a specific proposition that the sentencer had to find true or false . . . ." (Tuilaepa v. California, supra, 512 U.S. at p. 974.) Second, there are non-propositional factors – factors which do "not require a yes or no answer to a specific question, but instead point[] the sentencer to a subject matter." (Id.) The Supreme Court has concluded that the risk of randomness with which the Eighth Amendment is concerned is implicated to a greater degree when the vague sentencing factor is propositional. (Id.) Here, the aggravating factor at issue was plainly proposition as the Court uses that term – it asked the jury if defendant was 'involved in" prior crimes of violence.

Opinions on what a defendant must do to be "involved in" a criminal offense – and thus whether this factor could be relied on to support a death judgment – will vary from juror to juror and from jury to jury. Is knowledge of the actual perpetrator's intent required and, if so, what must the defendant know? Must the accomplice share that intent, or is knowledge enough? Whatever the knowledge requirement, is knowledge enough or must a defendant perform an act with the requisite knowledge? Is presence at the crime scene sufficient? Is knowledge that a crime is going to occur enough? Is it enough when combined with a failure to stop the crime? These are all legitimate questions which, absent proper accomplice liability instructions, create the precise risk of arbitrary sentencing which the Eighth Amendment will not tolerate in a capital punishment scheme.

Several courts around the country have reached a similar result, invalidating aggravating factors based on prior criminal activity where these factors failed to provide the jury with clear guidelines. The Georgia Supreme Court held unconstitutionally vague a special circumstance allowing the death penalty where "murder [is] committed by a person who has substantial history of serious assaultive convictions." (Ga. Ann. Code § 27-2534.1(b)(1); Arnold v. State (Ga. 1976) 224 S.E.2d 386.) The court found that the aggravating circumstance was constitutionally defective

because it was "highly subjective" and left "too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal objective guidelines for its application . . . ." (224 S.E.2d at p. 391-92.) Similarly, the Louisiana Supreme Court found vague an aggravating factor which permitted the jury to impose death based on a "significant" history of criminal conduct. (State v. David (La. 1985) 468 So.2d 1126, 1129-1130.)

Just as in those cases, the trial court's "involved in" aggravating factor here did not provide the type of clear and specific guideline required by the Eighth Amendment. It allowed each juror to impose death based on that juror's idiosyncratic assessment of what the phrase "involved in" meant. This was especially problematic here, where evidence of defendant's "involvement" was sharply disputed as to three of the state's four factor (b) incidents. The sentencer's reliance on this unconstitutionally vague aggravating factor was constitutional error and a new penalty phase is required.[42]

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[42] Even accepting this Court's decision in Bacigalupo, however, constitutional error still occurred in this case. In Bacigalupo, this Court held that the vagueness traditionally applied under the Eighth Amendment did not apply to aggravating factors used to impose a death sentence. (6 Cal.4th at pp. 463, 476.) The Court went on to conclude that "[w]e do not suggest . . . that the Eighth Amendment imposes no standards whatsoever on . . . sentencing factors . . . ." (6 Cal.4th at p. 477.) Under this Court's analysis, even sentencing factors "[1] must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and [2] they must direct the sentencer to evidence relevant to and appropriate for the

B. Permitting The Jury To Impose Death By Finding That A Defendant Was In Some Way "Involved In" Prior Violent Criminal Activity Violates The Defendant's State Created Right To A Jury Determination That He Committed That Prior Criminal Activity.

As discussed above, it violates the Eighth Amendment to permit a jury to impose death because a defendant was "involved in" prior criminal activity without further defining the phrase "involved in." But even if such an aggravating factor passed muster under the Eighth Amendment, its use in this case would still be unconstitutional.

The reason is simple. Assuming that an "involved in" aggravating factor was constitutional, it is not the law of California. Under California law, a jury cannot rely on prior violent criminal activity unless the state proves beyond a reasonable doubt that the criminal activity was "by the

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penalty determination." (Id.) "[S]entencing factors should not inject into the individualized sentencing determination the possibility of 'randomness' or 'bias in favor of the death penalty.'" (Id.)

Here, absent proper accomplice liability instructions, the trial court's "involved in" aggravating factor fails on both counts. As discussed above, there are as many definitions of "involved in" as there are jurors. It would be sheer speculation to assume that even a single juror came to the correct understanding of accomplice liability in connection with this aggravating factor. And absent such an understanding, the court's "involved in" aggravating factor directed the jurors to evidence which was utterly irrelevant to whether Mr. Williams deserved death. Absent proper accomplice liability instructions, individual jurors could well have relied on evidence of prior crimes for which Mr. Williams was not criminally liable either as an aider and abettor or as the actual perpetrator. This is the precise impropriety with which this Court was concerned in Bacigalupo. Thus, even applying the rule from that case, constitutional error has occurred.

defendant . . . ." (Penal Code section 190.3, subdivision (b).) Although Mr. Williams has contended that as a matter of statutory construction this provision does not permit jurors to consider criminal activity which the defendant has not personally committed (Argument XI -E.), he recognizes that the Court has rejected this argument and held that jurors may also rely on violent acts which the defendant has aided and abetted. (People v. Hayes, supra, 52 Cal.3d at p. 633.)

Accepting the rule in Hayes, California law precludes jurors from relying on factor (b) crimes unless the defendant has personally committed the crimes or aided and abetted them. Put another way, under state law a juror may not rely on prior violent crimes to impose death unless he or she has first found beyond a reasonable doubt that the defendant personally committed or aided and abetted those crimes.

The trial court's instruction in this case deprived Mr. Williams of this state-created right. It permitted the jurors to rely on such crimes so long as Mr. Williams was somehow "involved in" them. This goes well beyond the California statute. Even if the "involved in" approach was not unconstitutionally vague, the trial court was not free to arbitrarily deprive Mr. Williams of his state-created right to a jury finding of actual or accomplice liability. Instead, as the United States Supreme Court made clear nearly a quarter-century ago, the arbitrary deprivation of state-created

right to jury trial violates due process. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346.)

Indeed, Hicks establishes that the jury trial violation in this case violated petitioner's federal due process rights. In Hicks, the Supreme Court addressed an Oklahoma law which gave defendants the right to jury sentencing. At defendant's state court trial, the jury convicted him of the charged offense. The trial court then instructed the jury to return a 40 year sentence. The jury did so. Although the 40 year sentence was within the range of possible sentences the jury could have imposed, defendant argued that the denial of his state-created right to have the jury actually determine the sentence nevertheless violated his federal due process rights.

The Supreme Court rejected the state's argument. Although it recognized that no federal substantive right was involved, the Supreme Court nevertheless held that the arbitrary deprivation of defendant's state created right to a jury trial violated Due Process. (447 U.S. at pp. 346-347.) The Supreme Court went on to reject the state's related argument that the "possibility that the jury would have returned" the same sentence rendered the error harmless. (447 U.S. at pp. 346, 347.)

This case is identical to Hicks. Here too defendant had a state-created right to a jury determination – in this case, of actual or accomplice liability in connection with any factor (b) crimes used in aggravation. Here

the trial court arbitrarily deprived defendant of that right, permitting the jury to rely on factor (b) crimes **without** such a finding. As in Hicks, due process has been violated. As in Hicks, the mere "frail conjecture" that the jury might have imposed the same sentence had it been properly instructed is not enough to sustain the verdict. (Hicks, supra, 447 U.S. at p. 346.) Indeed, as in Hicks, "had the members of the jury been correctly instructed" in Mr. Williams' case, "the possibility that the jury would have returned a [lesser] sentence . . . is . . . substantial." (Id.)

As a practical matter, the harm in allowing evidence of prior crimes in which Mr. Williams was allegedly "involved in" to be used in aggravation against him is manifest. If such evidence – the two 1983 assaults and the 1985 assault – had been kept out, the State would been left with only one piece of aggravating evidence: a single arrest, for possession of a concealed weapon, that occurred nearly six years earlier and for which Mr. Williams was never even charged. This lone incident does not constitute an aggravator sufficient to warrant death. What is more, because there was no evidence that Mr. Williams ever *used* the weapon at issue, it is far from clear that this offense could have been used in aggravation against Mr. Williams under Pen Code §190.3(b).

In short, it defies reason to believe that the jury that sentenced Mr. Williams – a defendant who lacked any felony record – would have

considered this single arrest to be so aggravating as to require his execution.

C. Because Defense Counsel Had No Notice That He Would Have To Defend Against A Broad "Involved In" Theory Of Culpability In Connection With The Factor (b) Offenses, The Court's Instruction On This Theory Deprived Mr. Williams Of Due Process of Law and The Effective Assistance Of Counsel.

As noted above, both the state and federal constitutions entitled Mr. Williams to the effective assistance of counsel. Effective counsel must "play the role necessary to ensure that the trial is fair." (Strickland v. Washington, supra, 466 U.S. at p. 685.) Where a trial court's actions interfere with counsel's ability to ensure a fair trial by responding to the state's case or conducting a defense, those actions deprive the defendant of adequate counsel. (Id. Accord Geders v. United States, supra, 425 U.S. 80; Herring v. New York, supra, 422 U.S. 853; Brooks v. Tennessee, supra, 406 U.S. 605.) Where trial counsel makes critical tactical decisions based on an awareness of the charges against a client and the available defenses, and the trial court undercuts the basis for those tactical decisions by injecting new theories of culpability or eliminating defenses, the defendant has been denied his right to the meaningful assistance of counsel. (See, e.g., Sheppard v. Rees (9th Cir. 1990) 909 F.2d 1234, 1237; United States v. Gaskins, supra, 849 F.2d at p. 460; United States v. Harvill, supra, 501 F.2d at pp. 295-296.)

As discussed in some detail in Argument XI, above, where defense counsel makes important tactical decisions without notice of a particular theory of culpability – and the trial court undercuts the basis of those decisions by instructing the jury on such a theory – the defendant has been denied his right to the effective assistance of counsel. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at pp. 1236-1237; United States v. Gaskins, supra, 849 F.2d at p. 460.) To effectuate the constitutional right to counsel, and to permit defense counsel to prepare an adequate defense, the defendant must be clearly informed of the charges against him and the theories of culpability upon which he will be prosecuted. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at p. 1236.) Where the jury relies on a theory of which defense counsel was unaware, and thus had no meaningful opportunity to address, the right to counsel has been violated. (See, e.g., Sheppard v. Rees, supra, 909 F.2d at p. 1238; United States v. Gaskins, supra, 849 F.2d at p. 456.)

Sheppard v. Rees, supra, is again instructive. There, defendant's first degree murder conviction was reversed because the jury was permitted to convict defendant under a theory of felony-murder of which defense counsel had no notice. Throughout defendant's murder trial, the state's theory was that the murder was premeditated. After the close of evidence, the state for the first time requested felony-murder instructions in addition

to premeditated murder instructions. The court gave both theories to the jury; the jury convicted without saying on which legal theory it relied.

Writing for a Ninth Circuit panel, Judge Trott found that the injection of a new theory of culpability at the end of the case violated defendant's right to counsel. Had counsel been aware of the fact that a felony-murder theory could play a role in the jury's calculus, he "would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at the outset what he was up against." (909 F.2d at p. 1237.) The right to counsel "is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the charges against which he or she must defend." (Ibid.) Because "counsel had no occasion to defend against the felony-murder theory during the evidentiary phase of the trial," the court granted relief, correctly concluding that the "error affected the composition of the record." (Ibid; Accord, United States v. Gaskins, supra, 849 F.2d at pp. 458-460 [right to counsel violated where jury permitted to rely on aiding and abetting theory of culpability of which defense counsel had no notice]; People v. Sanchez, supra, 83 Cal.App.3d Supp. at p. 7 [defense counsel rendered ineffective during closing argument due to trial court materially modifying agreed-upon instructions in middle of counsel's argument].)

The same result should apply here. Prior to trial, the only theories recognized in state law that were available to the state seeking to prove a factor (b) offense were actual liability and/or accomplice liability. Necessarily, these were the only theories defense counsel could have understood the state's penalty phase case to involve.

The record shows that counsel's defense to the state's penalty phase case was based precisely on this understanding. Through cross-examination, and introduction of witnesses' prior statements, defense counsel was able to raise serious questions about Mr. Williams's legal culpability for three of the four factor (b) incidents. Had the jury been given proper principles of accomplice liability – the principles of liability on which defense counsel had planned his case – defense counsel's evidentiary presentation could have persuaded jurors not to consider these factor (b) incidents in the sentencing decision.

Like Sheppard v. Rees, supra, however, the jury was **not** limited to the theory of culpability of which defense counsel had notice. Instead, the jury was given a broad "involved in" theory of which defense counsel was unaware and – as a consequence – which he did not contest. Just as in Sheppard v. Rees, relief is required; because "counsel had no occasion to defend against the [involved in] theory during the evidentiary phase of the trial" it seems plain that the "error affected the composition of the record."

D. Because Counsel Had No Notice That The Court Would Provide An "Involved In" Theory Of Culpability For The Factor (b) Aggravation, The Resulting Death Sentence Violated The Eighth Amendment Right To A Reliable Penalty Phase Determination.

Because of the qualitatively different nature of death as a punishment, there is a "heightened need for reliability" in capital cases. (See, e.g., Caldwell v. Mississippi, supra, 472 U.S. at p. 323; Beck v. Alabama, supra, 447 U.S. at p. 638, n.13.) This heightened need for reliability applies in both the guilt and penalty phases of trial. (See, e.g., Beck v. Alabama, supra, 447 U.S. 625; Gardner v. Florida, supra, 430 U.S. at p. 357.) Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (See, e.g., Lankford v. Idaho, supra, 500 U.S. at p. 127; Gardner v. Florida, supra, 430 U.S. at p. 362; Lockett v. Ohio, supra, 438 U.S. 586.)

Here, as discussed above, the trial court's provision of an "involved in" theory of liability for the factor (b) offenses was improper for a variety of reasons. Putting those reasons aside, however, the fact remains that injecting this theory of culpability into the penalty phase trial rendered the jury's penalty phase verdict unreliable. Factor (b) evidence was a major part of the state's plea for death. To the extent the jury found true the factor (b) aggravating factor (and imposed death) because Mr. Williams

was somehow "involved in" prior violent offenses, it relied on a factor (1) of which defense counsel had no notice, (2) on which no evidence was presented and (3) with legal parameters that are entirely unknown, both to counsel trying this case and to this Court reviewing it. Regardless of whether a death verdict in this situation violates any other provision of the constitution, it does violate the demanding reliability requirements of the Eighth Amendment in capital cases. A new penalty phase is therefore required. Citing, McMillan v. Pennsylvania, (1986) 477 U.S. 479, the state noted that there was no independent federal constitutional right to jury sentencing. Accordingly, the state argued "that all that is involved . . . is the denial of a procedural right of exclusively state concern." (477 U.S. at p. 346.)

XIII. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY PERMITTING JURORS TO SENTENCE HIM TO DIE BASED ON AGGRAVATING FACTORS WHICH A MAJORITY OF THE JURORS WERE NOT REQUIRED TO FIND TRUE.

In aggravation, and pursuant to Penal Code section 190, subdivision (b), the state introduced evidence of four criminal acts: three separate assaults and one possession of a loaded firearm. (32 RT 3175-3180.) The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if defendant should die. (35 RT 3486-3487.) The jurors were also told that before they could rely on this evidence, they had to find beyond a reasonable doubt that "defendant . . . [1] did in fact commit such criminal acts or activity or [2] was involved in such criminal acts or activity." (35 RT 3489.)

As discussed in Argument XII, supra, this instruction was unconstitutional because the jury was never instructed on how determine whether defendant "was involved in such criminal acts or activity." But even if this phrase were not in the instruction (or if it had been properly explained), reversal of the penalty phase would still be required. Although the jurors were told that all 12 of them must agree on the final sentence (35 RT 3491-1), they were never told that before they could rely on prior criminal activity as an aggravating factor in the weighing process they had to unanimously agree that, in fact, defendant had committed the prior acts.

If anything, the instructions given in this case conveyed just the opposite message. The jurors were specifically told that as to this aggravating factor "[i]t is not necessary for all jurors to agree." (35 RT 3489.) Any single juror who believed that defendant committed or "was involved in" this other criminal activity was free to rely on this in deciding if defendant should die. (35 RT 3489.)

As more fully discussed below, this instruction was unconstitutional. Under recent authority from the United States Supreme Court, defendants have a federal constitutional right to a jury trial on the factual allegations that can expose them to a death sentence. The instruction given in this case – which permitted jurors to impose death by relying on prior criminal activity involving violence on which they had not agreed – violates this right. In addition, without instructions requiring juror unanimity on the prior activity allegations, this instruction permits jurors to impose death based on factual findings which have never been deliberated, discussed or debated, in violation of the Eighth Amendment's ban on unreliable penalty phase procedures.

A. The United States Supreme Court's Decision In Ring v. Arizona (2002) 536 U.S. 584 Holding That The Sixth Amendment Right To A Jury Trial Applies To Aggravating Factors Used In Capital Sentencing Requires A New Penalty Phase In This Case.

The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment, does not require that the jury be unanimous in non-capital cases. (Apodaca v. Oregon (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; Johnson v. Louisiana (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (Williams v. Florida (1970) 399 U.S. 78 [approving the use of six person juries in criminal cases].)

Yet the High Court has also made clear that even in non-capital cases, when the Sixth Amendment **does** apply there are limits beneath which the states may not go. For example, in Ballew v. Georgia (1978) 435 U.S. 223 the Court struck down a Georgia law allowing criminal convictions with a five person jury. Moreover, the Court has also held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (Brown v. Louisiana (1980) 447 U.S. 323; Burch v. Louisiana (1978) 441 U.S. 130.) Thus, when the Sixth

Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[43]

Of course, prior to June of 2002, none of the High Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. The reason was simple; prior to June of 2002, the Sixth Amendment right to jury trial simply did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (Walton v. Arizona (1990) 497 U.S. 639, 649.) In light of Walton, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., People v. Taylor (2002) 26 Cal.4th 1155, 1178; People v. Hines (1997) 15 Cal.4th 997, 1077; People v. Ghent (1987) 43 Cal.3d 739, 773.) In Ghent for example, the Court held

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[43] The Supreme Court has often recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases which increase the reliability of the process. (See, e.g., Beck v. Alabama, supra, 447 U.S. 625; Gardner v. Florida (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death judgment, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that defendant committed the prior criminal activity before relying on it to impose death, however, there is no need to reach this question here.

that such a requirement was unnecessary under "existing law." (43 Cal.3d at p. 773.)

On June 24, 2002, the "existing law" changed. In Ring v. Arizona, supra, the Supreme Court overruled Walton and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (Id. at p. 2443. Accord id. at p. 2445 (Scalia, J., concurring) (noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s].".) In other words, instructions which permit jurors to rely on prior criminal activity in the absence of a numerical requirement of agreement violate the Sixth Amendment as applied in Ring. Because on this record there is no way to tell if all 12 jurors would have agreed that defendant "committed" or "was involved in" the prior criminal activity, the error cannot be deemed harmless. (See People v. Crawford (1982) 131 Cal.App.3d 591, 599 (instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors would necessarily have reached a unanimous agreement on the factual point in question); People v. Dellinger (1985) 163 Cal.App.3d 284, 302 (same).)[44]

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[44] This assumes that a harmless error analysis can apply to Ring error. In Ring, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under the appropriate standard of federal constitutional error, there is no need to

In making this argument, Mr. Williams is aware that this Court has recently rejected the argument that Ring requires application of the Sixth Amendment to the determination of sentencing factors under the California death penalty scheme. (See, e.g., People v. Cox (2003) 30 Cal.4th 916, 970-971.) In rejecting application of the Sixth Amendment, this Court has explained that the sentencing decision in a California capital case is "comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (Id.)

The factual premise for this Court's observation is accurate. The decision to impose death is, in fact, "comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." But the legal premise – the assumption that the decision to impose one prison sentence rather than another is not subject to the Sixth Amendment – is flat wrong.

At the close of its 2003 term, the Supreme Court made this explicit. In Blakely v. Washington (2004) ___ U.S. ___, 124 S.Ct. 2531, the Supreme Court squarely held that under the Sixth Amendment, a sentencing court could not impose an upper term of imprisonment based on facts which had not been proven beyond a reasonable doubt to a jury. In other words, the fact that the decision to impose death is "comparable to a

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decide whether Ring errors are structural in nature.

sentencing court's . . . decision to . . . impose one prison sentence rather than another" is no longer the reason to reject application of the Sixth Amendment to this context, it is the reason to apply the Sixth Amendment to this context.

B. The Trial Court's Failure To Require Jury Unanimity In Connection With The Section 190.3, Subdivision (B) Aggravating Factor Permitted The Jurors to Impose the Death Penalty Based on Unreliable Factual Findings That Had Never Been Deliberated, Debated or Discussed.

The United States Supreme Court has taken cognizance of the fact 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 (1990) 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 fact finder 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.)

In this case the California legislature has provided that evidence of a defendant's commission of violent acts can be presented during the penalty phase. (Penal Code section 190.3, subdivision (b).) Before the fact finder may consider such evidence it must find that the state has proven the conduct beyond a reasonable doubt. As noted above, however, under the instructions given in this case members of the jury may individually rely on this (and any other) aggravating factor that each juror deems proper so long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury which guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement on enhanced reliability in capital cases. (See Johnson v. Louisiana, supra, 406 U.S. at pp. 388-389 [Douglas, J., dissenting]; Ballew v. Georgia, supra, 435 U.S. 223; Brown v. Louisiana, supra, 447 U.S. 323.)

In Johnson v. Louisiana, supra, a Supreme Court plurality held that the Sixth Amendment, applied to the states through the Fourteenth Amendment, did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9-3. (406 U.S. at pp. 362, 364.) In dissent, Justice Douglas pointed out that permitting jury verdicts on less

than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This was so, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority." (406 U.S. at pp. 388-389.)

The Supreme Court has since fully embraced Justice Douglas's observations about the relationship between jury deliberation and reliable fact-finding. In striking down a Georgia law allowing criminal convictions with a five person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate fact-finding . . . ." (Ballew v. Georgia, supra, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (Brown v. Louisiana, supra, 447 U.S. at p. 333. See also Allen v. United States (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

These observations about the effect of jury unanimity on group deliberation and fact-finding reliability are even more applicable in this case, for two reasons. First, since this is a capital case, the need for reliable fact-finding determinations is substantially greater. Second, and unlike the Louisiana schemes involved in Johnson, Ballew and Brown, the instructions in this case did not even require a majority of jurors to agree that prior criminal conduct occurred before relying on such conduct to impose a death penalty. As such, once deliberations begin, "no deliberation at all is required" on this factual issue. (Johnson v. Louisiana, supra, 406 U.S. at p. 388, Douglas, J., dissenting.) Given the constitutionally significant purpose served by jury deliberation on factual issues, and the enhanced need for reliability in capital sentencing, a procedure which allows individual jurors to impose death on the basis of factual findings which they have neither debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty phase is required. (See Johnson v. Mississippi (1988) 486 U.S. 578, 590 (harmless error analysis inappropriate when trial court introduces evidence which violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing).)

## XIV. THE SENTENCING INSTRUCTIONS FAILED TO PROPERLY GUIDE THE JURY'S DISCRETION.

Because the punishment of death is qualitatively different from other punishments, there is a greater need for reliability in determining whether a death sentence is appropriate in a given case. (Woodson v. North Carolina (1976) 428 U.S. 280, 303-305.) Penalty phase instructions must guide the sentencer, without confusion or error, toward a reasoned moral response to the crime and the defendant. (Penry v. Lynaugh (1989) 492 U.S. 302, 319; see also Kelly v. South Carolina (2002) 122 S.Ct. 726, 733.) Consequently, a capital jury may not be given an instruction that confuses it, misstates the proper considerations, or restricts the application of mitigating evidence. (Mills v. Maryland (1988) 486 U.S. 367; Hamilton v. Vasquez (9th Cir. 1994) 17 F.3d 1149, 1162.)

Here, the penalty instructions failed to narrow and channel the jury's discretion, were unnecessarily confusing, and failed to properly define the consideration of mitigating factors.

The trial court instructed with the then-current version of CALJIC 8.85. (CT 1087-1089.) This instruction was flawed in a number of ways. It failed to delete the inapplicable sentencing factors, it failed to delineate between the aggravating and mitigating circumstances, and it contained factors that were vague and ill-defined. Other potentially mitigating factors were limited by language such as "extreme" or "substantial," and no

burden of proof either as to aggravation or the penalty decision was specified.

The penalty instructions given here discounted proper consideration of mitigating evidence, were unnecessarily vague and confusing, and skewed the process towards death. Because there is a "reasonable likelihood" that the jury applied the instructions in an unconstitutional manner, violative of the Eighth and Fourteenth Amendments, reversal of the sentence is required. (Boyde v. California (1990) 494 U.S. 370, 380; Hamilton v. Vasquez, supra, 17 F.3d at p. 1164.)

In making this argument, defendant recognized that this Court has repeatedly upheld this instruction against such challenges. (See, e.g., People v. Anderson (2001) 25 Cal.4th 543, 600 (failure to delete inapplicable sentencing factors); People v. Box (2000) 23 Cal.4th 1153, 1217 (challenges to the unitary list and/or general vagueness); People v. Coddington (2000) 23 Cal.4th 529, 642 (same); People v. Jackson (1996) 13 Cal.4th 1164, 1242-1244 (same).) Appellant nonetheless requests that the Court reconsider and, in this context, find the instruction erroneous. (See also Smith v. Murray, supra, 477 U.S. 527 (holding that even issues settled under state law must be re-raised to preserve the issue for federal review).)

Argument XV (pages 331-491) filed under seal.

## XVI. BECAUSE MR. WILLIAMS WAS GIVEN FUNDAMENTALLY INACCURATE INFORMATION WHEN HE WAIVED HIS BASIC RIGHT TO SELF-REPRESENTATION, THAT WAIVER IS INVALID AND A NEW PENALTY PHASE IS REQUIRED.

### A. Introduction.

Mr. Williams was present for the guilt phase. By the end of the guilt phase of trial, Mr. Williams was aware that Ronald LeMieux had made promise after promise to the jury which LeMieux had not kept. He was aware that the prosecutor skewered the defense in closing argument for these failures. He was aware that LeMieux was physically unable to taken even a single note during the state's case because of his trembling hands. He was aware that LeMieux had (1) not appeared for voir dire, (2) failed to file even a single pre-trial motion, (2) failed to seek discovery, (3) failed to locate, interview or present important witnesses for the defense, (4) failed to interview important witnesses for the prosecution, and (5) failed to examine any of the physical evidence.

Not surprisingly, after the jury convicted Mr. Williams on all charges, he moved to represent himself for the penalty phase. (30 RT 3133; 31 RT 3139.) Mr. Williams explained that he had expected to testify in the case. He had expected LeMieux to subpoena Tony Moreno. He had expected other evidence to be presented on his behalf. His family was not prepared to testify at the penalty phase. (31 RT 3141.)

The trial court explained to Mr. Williams that LeMieux had taken the case for the entire trial and "was prepared to go forward." (31 RT 3144.) The court emphasized this point, noting that LeMieux "said he was prepared to go on." (31 RT 3145.) The court told Mr. Williams that LeMieux "knows all about this case." (31 RT 3146.) The court went even further, giving LeMieux a glowing recommendation and advising Mr. Williams that "LeMieux . . . has done a great job for you. . . . He did a masterful job. He really did . . . . He has done an amazingly good job." (31 RT 3146-47.)

The court was ebullient in describing the excellent representation LeMieux had provided, insisting that "Mr. LeMieux did a really outstanding job." (31 RT 3147.) The court again emphasized that LeMieux was "prepared." (31 RT 3147.) According to the court, LeMieux had "lived with" the case and was "prepared." (31 RT 3147.) LeMieux was an "experienced attorney" who would assist him. (31 RT 3149-3150.) If Mr. Williams waived his right to represent himself, and kept LeMieux as his attorney, he would be "properly represented." (31 RT 3153.)

To persuade Mr. Williams to keep LeMieux as counsel, the court specifically vouched for the quality of defense that LeMieux was *going to present* for him at the penalty phase. The court assured Mr. Williams that

LeMieux "has been preparing" the penalty phase defense. (31 RT 3153.) "He has *all* the material" for a penalty phase presentation, "[a]nd he *is prepared*." (31 RT 3145.) (Emphasis added.)

In the face of these repeated assurances from the judge presiding at his trial about the quality of LeMieux's work and his preparedness for the upcoming penalty phase, Mr. Williams relented. He agreed to waive his right to represent himself and continue with LeMieux as his lawyer. (31 RT 3153.)

As discussed below, these assurances were false. Mr. Williams received materially inaccurate information and advice from the trial judge in deciding whether to waive his fundamental right to represent himself. Accordingly, that waiver was invalid, and a new penalty phase is required.[88]

### B. The Trial Court's Provision Of Patently Inaccurate Information To Mr. Williams When He Was Deciding Whether To Waive His Right To Self-Representation Requires A New Penalty Phase.

"[T]he United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself." (People v.

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[88] Although the invalidity of Defendant's waiver is technically a penalty phase issue, because so many of the predicate facts underlying this argument appear in the preceding argument concerning defense counsel's deficient performance, it appears here in the brief.

Marshall (1997) 15 Cal.4th 1, 20, citing Faretta v. California (1975) 422 U.S. 806.) As with any constitutional right, however, a defendant is free to waive his Sixth Amendment right to represent himself. (Cf. People v. Barnum (2003) 29 Cal.4th 1210, 1214-1215, 1220 (defendant may waive Sixth Amendment right to counsel and represent himself).) In order to waive a fundamental constitutional right, the waiver must be knowing and informed. (See Johnson v. Zerbst (1938) 304 U.S. 458, 464-465; Michigan v. Jackson (1986) 475 U.S. 625, 633.)

When a defendant is given materially false information in making the decision to waive a fundamental constitutional right, that waiver is invalid. (See, e.g., United States v. Erskine (9th Cir. 2004) 355 F.3d 1161 (waiver invalid where defendant waived right to counsel after being given inaccurate advice as to penal consequences).) That is just what happened here. After seeing LeMieux's work in the guilt phase, Mr. Williams made clear he wanted to represent himself in the penalty phase. The trial court then gave Mr. Williams the following multiple, enthusiastic assurances:

1. LeMieux "was prepared to go forward." (31 RT 3144.)

2. LeMieux "knows all about this case." (31 RT 3146.)

3. "LeMieux . . . has done a great job for you. . . . He did a masterful job. He really did. . . . He has done an amazingly good job" (31 RT 3146-47.)

4. "Mr. LeMieux did a really outstanding job." (31 RT 3147.)

5. LeMieux had "lived with" the case and was "prepared." (31 RT 3147.)

6. If Mr. Williams waived his right to represent himself, and kept LeMieux as his attorney, he would be "properly represented." (31 RT 3153.)

7. LeMieux "has been preparing" the penalty phase defense, "has *all* the material" for a penalty phase presentation, "[a]nd he *is prepared*." (31 RT 3145, 3153, emphasis added.)

In fact, however, as discussed in greater detail in Argument XV above, **none** of these assurances were accurate. As noted earlier, LeMieux, who had no prior capital experience whatsoever, fell below the standard of care required by the Sixth Amendment *in every aspect* of his representation – from his lack of pretrial preparation, to his failure to attend jury selection, to his reckless and unfounded opening statement, to his incoherent guilt phase closing argument. Nor did LeMieux fare any better at the sentencing portion of the trial. Notwithstanding the court's assurances to Mr. Williams that his counsel was prepared for the penalty phase, LeMieux was not merely *ill*-prepared to go forward with the penalty phase, *he had not yet begun to prepare* for this part of the trial as of the day before it began. The court simply had no basis for repeatedly assuring Mr. Williams that his lawyer was ready to represent him at penalty trial. In

fact, LeMieux was under the mis-impression that he would have an additional 30 days to prepare for this phase of the case. (CT 571), rather than having to start immediately after the completion of the guilt phase. As a result, when the penalty phase commenced, LeMieux had not interviewed any mitigation witnesses for the express purpose of preparing a penalty case; he had failed to retain any mitigation experts or investigators to help him unearth and present a penalty phase defense (CT 570); and he had not investigated any of the State's aggravating evidence. (52 RT 3776-77.) Indeed, LeMieux did not even obtain legible copies of the police reports concerning his client's alleged 190.3(b) conduct until the morning the penalty phase began, and he did not review those reports until the State's case in aggravation was well underway. (32 RT 3174.)

The trial court gave Mr. Williams materially inaccurate information when Mr. Williams was deciding whether to represent himself. In reliance on this information and advice, Mr. Williams waived this fundamental constitutional right, and then LeMieux's representation in the penalty phase was every bit as bad as it was during the guilt phase. It is not the proper role of a trial judge to paper over the glaring deficiencies of trial counsel in order to persuade the defendant to go forward with a lawyer whom the defendant perceives, correctly, as doing less than nothing to

represent him. A waiver made under these circumstances is invalid and a new penalty phase is required.

## XVII. DEFENDANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE CALIFORNIA DEATH PENALTY SCHEME, AS CONSTRUED BY THIS COURT IN 1993, FAILS TO PROVIDE A MEANINGFUL WAY TO DISTINGUISH THE FEW WHO ARE SELECTED FOR DEATH FROM THE MANY WHO ARE NOT.

### A. The Relevant Statutory Provisions And Legislative History.

In 1977, the California Legislature passed a death penalty statute. Under the 1977 law, a defendant convicted of first degree murder was eligible for a death penalty only if the state established the existence of one or more of seven "special circumstances." (See section 190.2, subds. (a), (b) & (c) [West. Supp. 1978].) One of these seven special circumstances was a felony-murder special that permitted death to be imposed if the murder was premeditated and occurred during any of five enumerated felonies. (See People v. Frierson (1979) 25 Cal.3d 142, 175.) After a special circumstance was found, defendant was entitled to a penalty phase where the jury would weigh enumerated aggravating and mitigating factors and select an appropriate punishment. (Id.)

In November of 1978, the 1977 law was repealed and replaced by a statute passed through the initiative process. The 1978 statute is the law that governs this case.

Under the 1978 death penalty statute, a defendant convicted of first degree murder is eligible for a death penalty if any of **19** "special

circumstances" are found true. (See Section 190.2(a).)[89] One of these special circumstances permitted a death penalty to be imposed if the murder occurred during any of **9** enumerated felonies. (Section 190.2(a)(17).)[90] Like the 1977 law, after a special circumstance is found, defendant is entitled to a penalty phase where the jury weighs enumerated aggravating and mitigating factors and selects an appropriate punishment. (Section 190.3.)

The explicit intent of the voters in passing the 1978 initiative was never in doubt. The information booklet distributed in 1978 to California voters argued that the 1977 law should be replaced by the 1978 law – known as Proposition 7 – "[b]ecause the Legislature's weak death penalty law **does not apply to every murderer**. Proposition 7 would." (1978 Voters' Pamphlet, p. 34 "Argument in Support of Proposition 7".)

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[89] As of 2000, the number of special circumstances which make a defendant eligible for death (including felony-murder special circumstances) has been expanded to 22. Moreover, one of those special circumstances – that the defendant "killed the victim by means of lying-in-wait" – has been broadly construed to include any murder in which the defendant did not reveal his murderous intent prior to the killing. (See Penal Code section 190.2, subdivision (a)(15); People v. Morales (1989) 48 Cal.3d 527, 557-558, 575.) Thus, in California, virtually any first degree murder renders a defendant eligible for death.

[90] As of 2000, this special circumstance has been expanded to permit a death penalty to be imposed if the murder occurred during any of **12** enumerated felonies. (Section 190.2(a)(17).)

B. Given The Breadth Of The 1978 Statute, The Language Of The Voter's Pamphlet And This Court's 1993 Decision In People v. Bacigalupo (1993) 6 Cal.4th 457, The 1978 Statute Violates The Eighth Amendment.

The Eighth Amendment prohibits "cruel or unusual punishment." In Godfrey v. Georgia (1980) 446 U.S. 420 the Supreme Court held that under the Eighth Amendment "a capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" (446 U.S. at p. 428 (quoting Furman v. Georgia (1972) 408 U.S. 238, 313 [White, J., concurring]). Accord Lewis v. Jeffers (1990) 497 U.S. 764, 774-775.) The Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." (Maynard v. Cartwright (1988) 486 U.S. 356, 362. See Smith v. Goguen (1973) 415 U.S. 566, 573.)

A state may rely on the presence of identified circumstances to accomplish this "constitutionally necessary narrowing function." (Pulley v. Harris (1984) 465 U.S. 37, 50.) In order to achieve this purpose, however, such circumstances must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Zant v. Stephens (1983) 462 U.S. 862, 877.) Given the

"constitutionally necessary narrowing function" required in a capital punishment scheme, and in order to ensure that the scheme "genuinely narrow[s] the class of persons eligible for the death penalty," states may not adopt a capital sentencing scheme which could fairly be said to make every murder defendant eligible for a death penalty. (Arave v. Creech (1993) 507 U.S. 463, 474.)

In 1984, the United States Supreme Court upheld portions of California's 1977 death penalty statute. (Pulley v. Harris, supra, 465 U.S. 37.) According to the Supreme Court, the 1977 law passed "minimized the risk of wholly arbitrary and capricious action" because it (1) required that one of seven special circumstances be proved and (2) provided jury guidance through a list of factors to be considered at the penalty phase. (465 U.S. at p. 53.) Significantly, the Court noted that under the 1978 law – which was not then before it – the number of special circumstances "are greatly expanded . . . ." (465 U.S. at p. 51, n.13.)

The Supreme Court's observation in Pulley was entirely correct. The 1977 law contained only 7 special circumstances, one of which permitted death if a premeditated murder occurred during the commission of 5 specified felonies. In contrast, the 1978 law contains 19 special circumstances plus a separate felony murder special which permits death if a murder occurred during the commission of 9 specified felonies.

The vast increase in the number of special circumstances which make a defendant death eligible under the 1978 law is entirely consistent with the stated intent of the electorate. As expressed so clearly in the voter's pamphlet, that intent was to make the 1978 law "apply to every murderer." In light of the sheer number and breadth of the special circumstances under the 1978 law, it can no longer be said that these findings "limit[] the death sentence to a small subclass of capital-eligible cases." (Pulley v. Harris, supra, 465 U.S. at p. 53.)

Thus, the question becomes whether the sentencing factors set forth in section 190.3 serve the narrowing function required by the Eighth Amendment. Put another way, do the section 190.3 factors serve to "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Zant v. Stephens, supra, 462 U.S. at p. 877.)

Whatever role the section 190.3 factors played under the 1977 scheme, this Court has held they have no role whatever in the narrowing process under the 1978 law. In People v. Bacigalupo, supra, 6 Cal.4th 457, this Court held that the section 190.3 sentencing factors were not subject to the full vagueness limitations of the Eighth Amendment precisely because they did **not** serve the narrowing function required by the Eighth

Amendment. (6 Cal.4th at p. 475.) The Court was explicit; section 190.3 factors "do not perform a `narrowing' function . . . ." (Id. at p. 477.)

Given this conclusion, it is not surprising that the United States Supreme Court has noted the extraordinary breadth of the California scheme and pointedly refrained from approving that scheme. In Tuilaepa v. California (1994) 512 U.S. 967 the Court addressed the constitutionality of several of the section 190.3 sentencing factors. In describing the special circumstance aspect of the California scheme the majority noted that the viability of that part of the scheme had not been raised and was not before the Court. (512 U.S. at p. 975.) Concurring Justices Stevens and Ginsburg were more pointed, noting "the assumption (unchallenged by these petitioners) that California has a statutory `scheme' that complies with the [Eighth Amendment's] narrowing requirement . . . ." (512 U.S. at p. 985.) The late Justice Blackmun also dissented, noting that the special circumstance component of the 1978 law "creates an extraordinarily large death pool," but "[b]ecause petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing." (512 U.S. at p. 994.)

Here, defendant asks this Court to address the issue noted by each of the opinions in Tuilaepa. He recognizes that in cases both before and after Bacigalupo, this Court has rejected the argument. (See People v.

Brown (1995) 6 Cal.4th 322, 339, n.16; People v. Smithey (1999) 20 Cal.4th 936, 1017.)

Yet none of these cases address the tension between the Supreme Court's decision in Pulley v. Harris and this Court's decision in People v. Bacigalupo, a tension which lies at the heart of the majority, concurring and dissenting opinions in Tuilaepa v. California.

In upholding the 1977 California scheme, the Supreme Court in Pulley relied on the narrowing role played by the aggravating and mitigating factors set forth in that statute in avoiding the "arbitrary and capricious action" condemned by the Eighth Amendment. (465 U.S. at p. 53.) Yet in Bacigalupo, this Court held that the aggravating and mitigating factors under the 1978 law "do not perform a 'narrowing' function . . . ." (6 Cal.4th at p. 477.) In light of this Court's recognition that the section 190.3 factors play no role in the constitutionally-required narrowing process, the premise of Pulley no longer exists in California.

The California scheme thus violates the Eighth Amendment. Defendant's death sentence must be reversed.

XVIII. THE FAILURE TO INSTRUCT THE JURY THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTS OUTWEIGH THE MITIGATING FACTS VIOLATED DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; REVERSAL IS REQUIRED.

As discussed above, the Supreme Court's recent decision in Ring v. Arizona, supra, 536 U.S.584, requires a new penalty phase because the jurors in this case were never instructed that their finding on the Penal Code section 190.3, subdivision (b) aggravating factor in this case had to be unanimous. The Ring decision compels reversal of the penalty phase in this case for a second reason as well. As more fully discussed below, under California law a jury cannot impose a death sentence absent a factual finding that aggravation outweighs mitigation. Once that finding is made, the jury must then select the appropriate sentence. Because this factual finding exposed defendant to a harsher sentence, Ring requires that it be made beyond a reasonable doubt. Because that was not done here, reversal is required.

The starting point for this analysis is the California death penalty scheme itself. In California, the punishment for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." (Pen. Code, § 190, subd. (a).) Thus, the maximum punishment for first

degree murder is death. Not everyone convicted of first degree murder gets the death penalty, however. There are two further steps in the process.

First, the jury must find true, beyond a reasonable doubt, one of the numerous statutory "special circumstances" enumerated in Penal Code section 190.2. Second, in a special adversarial, evidentiary hearing (known commonly as the penalty phase) conducted after the defendant has been found guilty of first degree murder with a special circumstance, the jury must make a further, factual finding that the "aggravating circumstances" (as defined in section 190.3) outweigh the "mitigating circumstances." Only at that point is death an option which the jury may consider; even where aggravation outweighs mitigation, however, the jury may still select life as an option. (See People v. Duncan (1991) 53 Cal.3d 955, 979; People v. Meyers (1987) 43 Cal.3d 250, 276.)

Thus, before the actual decision as to which sentence is appropriate – which is the actual sentencing under California law – the state must prove (and the jury must find) (1) the existence of at least one special circumstance, and (2) that the aggravating factors outweigh the mitigating factors.

For many years, capital litigants have been arguing that the requirement of proof beyond a reasonable doubt inherent in the Sixth Amendment right to a jury trial applied to factual determinations made in

the penalty phase. This Court has long rejected the argument. (See, e.g., People v. Farnam (2002) 28 Cal.4th 107, 192; People v. Ochoa (2001) 26 Cal.4th 398, 453; People v. Anderson (2001) 25 Cal.4th 543, 601; People v. Rodriguez (1986) 42 Cal.3d 730, 777.)

The Court's decision in Ochoa is instructive. There, defendant argued that the Sixth Amendment requirement of unanimity applied to the penalty phase. The Court rejected this argument, relying largely on Walton v. Arizona (1990) 497 U.S. 639, and specifically Walton's conclusion that there is no constitutional right to a jury determination of facts that would subject a defendant to the death penalty. (People v. Ochoa, supra, 26 Cal.4th at p. 453.) Yet in Ring, the Supreme Court specifically overruled Walton, making clear that the Sixth Amendment **does** apply to all factual findings necessary for imposition of a death sentence. (Ring v. Arizona, supra, 536 U.S. at p. 609.)

In light of Ring, and the demise of Walton, this Court's previous conclusions that there is no need for the jury to determine whether aggravating factors outweigh mitigating factors beyond a reasonable doubt must be reconsidered. Ring establishes that the Sixth Amendment right to a jury trial **does** apply to factual findings necessary for a death sentence, even when those factual findings are made at the penalty phase of a capital

trial. The right to proof beyond a reasonable doubt is part and parcel of this right.

Here, before any California jury may even consider death as an option, it must first find that aggravating factors outweigh mitigating factors. This is a factual finding which exposed defendant in this case to a significantly greater punishment than that authorized by the murder with a special circumstance finding alone. "Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (Ring v. Arizona, supra, 536 U.S. at p. 609.)

Other courts with similar schemes have reached this precise result. For example, the Nevada Supreme Court has held that the Sixth Amendment applies to the finding, in a capital case, whether the aggravating facts outweigh the mitigating facts. (Johnson v. Nevada (2002) 59 P.3d 450, 460-461.) In that case, defendant was found guilty of four counts of first-degree murder. Under Nevada law, before a jury could sentence a defendant to death, it was required to find (1) the existence of at

least one statutory aggravating factor and (2) that mitigating factors did not outweigh aggravating factors. (Id. at p. 460.) After the jury in Johnson failed to reach a verdict in the penalty phase, and pursuant to a state statute, a three-judge panel imposed the death sentence. Defendant appealed, contending that the three-judge panel's finding of aggravating factors violated his Sixth Amendment right to a jury trial under Ring.

The Nevada Supreme Court agreed. The Court acknowledged that one of aggravating factors necessary to impose the death penalty in Nevada (multiple convictions of murder) was necessarily found by the jury in their guilt-phase determination that defendant was guilty of four counts of murder. However, the Court stated, "[e]ven if the guilty verdicts necessarily entailed the jury's finding of the two aggravators found by the three-judge panel, the guilt phase verdicts did not and could not entail the required consideration of mitigating evidence." (Johnson v. Nevada, supra, 59 P.3d at pp. 460-461.) Accordingly, "there is no verdict form or other evidence showing that the jurors unanimously agreed that the mitigating circumstances did not outweigh the aggravating circumstances, making Johnson eligible for death." (Id.)[91]

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[91] Prior to Ring, many other states reached this same result by statute or by the independent force of their state constitutions. (See, e.g., Arkansas Code Ann., § 5-4-603(a)(2); New Jersey Stat. Ann., § 2c:11-3c (f)(3)(a) & (b); New York Crim. Proc. Law, § 400.27; Ohio Rev. Code, § 2929.03); People v. Tenneson (Colo. 1990) 788 P.2d 786, 791-792.)

The instructions in this case met the Sixth Amendment part way. The trial court instructed the jury that it was required to find beyond a reasonable doubt the charged special circumstances. The jury was also told it was to determine (1) the existence of aggravating and mitigating factors and (2) whether the aggravating factors outweigh the mitigating facts. However, the jury was **not** instructed that this latter should be made beyond a reasonable doubt. In this respect, the instructions violated the jury trial guarantee of the Sixth Amendment, the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment. The death sentence must be reversed.

Once again, in making this argument, Mr. Williams is aware that this Court has recently rejected it. (See, e.g., People v. Cox, supra, 30 Cal.4th at pp. 970-971.) As noted above, the Court explained in Cox that the sentencing decision in a California capital case is "comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (Id.) As also noted above, however, the United States Supreme Court has recently made clear that a trial court's decision to impose "one prison sentence rather than another" is subject to the Sixth Amendment and may not be based on facts which were not proven to the jury beyond a reasonable doubt. (Blakely v. Washington, supra, 124 S.Ct. 2531.) Cox must be reconsidered.

## XIX. BECAUSE PENAL CODE SECTION 190.3, SUBDIVISION (A) IS BEING APPLIED IN CALIFORNIA IN A MANNER THAT INSTITUTIONALIZES THE ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, THE CALIFORNIA DEATH PENALTY SCHEME MUST BE DECLARED UNCONSTITUTIONAL.

Penal Code section 190.3, subdivision (a) permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" which juries could understand and apply. (Tuilaepa v. California, 512 U.S. 967, 975.)

Unfortunately, however, an analysis of how section 190.3, subdivision (a) is actually being used by prosecutors shows that prosecutors have completely subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the "circumstances of the crime" factor shows beyond question that whatever "common sense core of meaning" it may once have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking which the Eighth Amendment condemns.

There is no dispute about the basic principles. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the

death penalty." (Sawyer v. Whitley (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (Maynard v. Cartwright (1988) 486 U.S. 356, 362.)

As applied in California, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, but it affirmatively institutionalizes such a risk.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that – from case to case – reflect starkly opposite circumstances. Thus, prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- Because the defendant struck many blows and inflicted multiple wounds,[92] or because the defendant killed with a single execution-style wound.[93]

- Because the defendant killed the victim for some purportedly aggravating motive (money, revenge,

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[92] See, e.g., People v. Morales, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No. S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT 160-61 (same).

[93] See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT 3026-27 (same).

witness-elimination, avoiding arrest, sexual gratification)[94] or because the defendant killed the victim without any motive at all.[95]

- Because the defendant killed the victim in cold blood[96] or because the defendant killed the victim during a savage frenzy.[97]

- Because the defendant engaged in a cover-up to conceal his crime,[98] or because the defendant did not engage in a cover-up and so must have been proud of it.[99]

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[94] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge).

[95] See, e.g., People v. Edwards, No. S004755, RT 10,544 (defendant killed for no reason); People v. Osband, No. S005233, RT 3650 (same); People v. Hawkins, No. S014199, RT 6801 (same).

[96] See, e.g., People v. Visciotti, No. S004597, RT 3296-97 (defendant killed in cold blood).

[97] See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[98] See, e.g., People v. Stewart, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No. S004464, RT 4192 (defendant did not seek aid for victim).

[99] See, e.g., People v. Adcox, No. S004558, RT 4607 (defendant freely informs others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- Because the defendant made the victim endure the terror of anticipating a violent death[100] or because the defendant killed instantly without any warning.[101]

- Because the victim had children,[102] or because the victim had not yet had a chance to have children.[103]

- Because the victim struggled prior to death,[104] or because the victim did not struggle.[105]

- Because the defendant had a prior relationship with the victim,[106] or because the victim was a complete stranger to the defendant.[107]

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[100] See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623.

[101] See, e.g., People v. Freeman, No. S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

[102] See, e.g., People v. Zapien, No. S004762, RT 37 (victim had children).

[103] See, e.g., People v. Carpenter, No. S004654, RT 16,752 (victim had not yet had children).

[104] See, e.g., People v. Dunkle, No. S014200, RT 3812 (victim struggled); People v. Webb, No. S006938, RT 5302 (same); People v. Lucas, No. S004788, RT 2998 (same).

[105] See, e.g., People v. Fauber, No. S005868, RT 5546-47 (no evidence of a struggle); People v. Carrera, No. S004569, RT 160 (same).

[106] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish (1990) 52 Cal.3d 648, 717 (same).

[107] See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

These examples show that although a plausible argument can be made that the circumstances of the crime aggravating factor may once have had a "common sense core of meaning," that position can only be maintained by ignoring how the term is actually being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

- **The age of the victim**. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[108]

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[108] See, e.g., People v. Deere, No. S004722, RT 155-56 (victims were young, ages 2 and 6); People v. Bonin, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); People v. Kipp, No. S009169, RT 5164 (victim was a young adult, age 18); People v. Carpenter, No. S004654, RT 16,752 (victim was 20), People v. Phillips, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was "elderly").

- **The method of killing**. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[109]

- **The motive for the killing**. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[110]

- **The time of the killing**. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[111]

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[109] See, e.g., People v. Clair, No. S004789, RT 2474-75 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S010723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

[110] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3544 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge); People v. Edwards, No. S004755, RT 10,544 (no motive at all).

[111] See, e.g., People v. Fauber, No. S005868, RT 5777 (early morning); People v. Bean, No. S004387, RT 4715 (middle of the night); People v. Avena, No. S004422, RT 2603-04 (late at night); People v. Lucero, No. S012568, RT 4125-26 (middle of the day).

- **The location of the killing**. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[112]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied establish that it is being relied upon as an aggravating factor in every case, by every prosecutor, without limitation. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

As applied, then, the "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright, supra, 486 U.S. at p. 363.) The fact that this factor may have a "common sense core of meaning" in the abstract should not obscure what

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[112] See, e.g., People v. Anderson, No. S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787 (same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41 (city park); People v. Carpenter, No. S004654, RT 16,749-50 (forested area); People v. Comtois, No. S017116, RT 2970 (remote, isolated location).

experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. The California scheme is unconstitutional and reversal is required.

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

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates Appellant's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection of the law.

### A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not

necessarily a requirement for finding a state's death penalty structure to be constitutional. In Pulley v. Harris (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Id. at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See People v. Farnam (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in Pulley v. Harris was premised upon untested assumptions about the California death penalty scheme:

> [I]n Pulley v. Harris, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting Harris v. Pulley, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in Pulley v. Harris.

(Tuilaepa v. California (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for Pulley v. Harris to be reevaluated since, as this

felony murder *simpliciter* case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (Furman v. Georgia, supra, 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[113]

The capital sentencing scheme in effect at the time of Appellant's trial was the type of scheme that the Pulley Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks

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[113] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433, 444; People v. Brownell (Ill. 1980) 404 N.E.2d 181, 197; Brewer v. State (Ind. 1980) 417 NE.2d 889, 899; State v. Pierre (Utah 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; Collins v. State (Ark. 1977) 548 S.W.2d 106, 121.)

on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Pulley v. Harris, supra, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See Tuilaepa v. California, supra, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony murder *simpliciter* works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore,

California is constitutionally compelled to provide Mr. Williams with intercase proportionality review. The absence of intercase proportionality review violates Appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

### B. The Lack Of Intercase Proportionality Review Violates Appellant's Right To Equal Protection Of The Law

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., Monge v. California (1998) 524 U.S. 721, 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

At the time of Appellant's sentence, California required intercase proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) – a comprehensive and detailed disparate sentence review. (See generally In

re Martin (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In People v. Allen (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in Allen also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning undergirding Allen, however, was flawed.

The Allen court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (People v. Allen, supra, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur

in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See McCleskey v. Kemp (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See Ford v. Wainwright (1986) 477 U.S. 399; Enmund v. Florida (1982) 458 U.S. 782; Coker v. Georgia (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in

particular circumstances. (See Pen. Code, § 190.4, subd. (e); People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the Allen Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (People v. Allen, supra, 42 Cal. 3d at 1287, italics added.) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright, supra, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence

and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in Allen relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (See People v. Allen, supra, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 & 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See Bush v. Gore (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Mr. Williams, who are condemned to death cannot be justified, as this Court ruled in Allen, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Appellant's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

## XXI. BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW THAT IS BINDING ON THIS COURT, THE DEATH SENTENCE MUST BE VACATED.

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See Atkins v. Virginia (2002) 536 U.S. 304, 316, n.21; Stanford v. Kentucky (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in

the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (see, Zschernig v. Miller (1968) 389 U.S. 429, 440-441; Edye v. Robertson (1884) 112 U.S. 580, 598-599), and this Court is bound by it.[114]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. This is especially so in this case, where the defendant has been on death row more than 13 years without having had appellate review of his death judgment by this Court. For these same reasons, the death

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[114] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate, 42 DePaul L. Rev. 1169 (1993); Posner & Shapiro, Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993, 42 DePaul L. Rev. 1209 (1993); Quigley, Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights, 6 Harv. Hum. Rts. J. 59 (1993).

sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In United States v. Duarte-Acero (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see Beazley v. Johnson (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (People v. Ghent (1987) 43 Cal.3d 739, 778-779; see also 43 Cal.3d at pp. 780-781 (conc. opn. of Mosk, J.); People v. Hillhouse (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See United States v. Duarte-Acero, supra, 208 F.3d at p. 1284; McKenzie v. Daye (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also Smith v. Murray, supra, 477 U.S. 527 (holding that even issues settled under state

law must be reraised to preserve the issue for federal habeas corpus review).) The death sentence here should be vacated.

## CONCLUSION

For all of the reasons set forth above, careful review of the record in this case requires that the guilt, special circumstances and penalty findings be set aside.

DATED: December 17, 2004

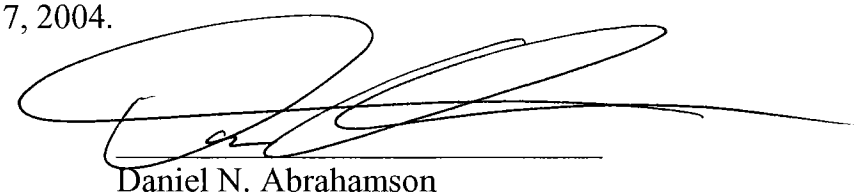
Respectfully submitted,
DANIEL N. ABRAHAMSON

By 
DANIEL N. ABRAHAMSON
Counsel for Appellant
George B. Williams

**CERTIFICATE OF COUNSEL**
**(CAL. RULES OF COURT, RULE 36(B)(2))**

I, Daniel N. Abrahamson, am counsel of record appointed by the Court to represent Appellant, George Brett Williams, in this automatic appeal. I hereby certify that I conducted a word count of this brief using WordPerfect word processing software. On the basis of that computer-generated word count, I certify that this brief is 125, 249 words in length excluding the tables and certificates.

Dated: December 17, 2004.



Daniel N. Abrahamson

**DECLARATION OF SERVICE**

**CASE:** People vs. (George Brett) Williams

**CASE NO:** California State Supreme Court Case No. S030553
Los Angeles County Superior Court Case No. TA006961

I am employed in the City of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 717 Washington St., Oakland, California 94607. On December 17, 2004, I served the following document(s):

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2. **APPLICATION FOR LEAVE TO FILEOPENING BRIEF IN EXCESS OF 95,200 WORDS; and**

3. **APPELLANT'S APPLICATION TO FILE PORTION OF APPELLANT'S OPENING BRIEF (CLAIM XV) UNDER SEAL, TO SEAL PORTIONS OF THE RECORD, AND FOR A PROTECTIVE ORDER**

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| **B** | Stephanie Miyoshi<br>Deputy Assistant Attorney General<br>Office of the State Attorney General<br>300 South Spring Street, Suite 500<br>Los Angeles, CA 90013 |
| **C** | California Appellate Project<br>Attn: Michael Millman<br>101 Second St., Suite 600<br>San Francisco, CA 94105 |
| **A** | Clerk: Death Penalty Desk<br>Los Angeles Superior Court — Criminal Division |

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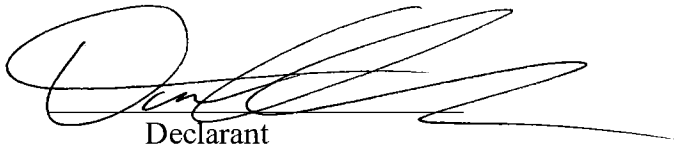
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th Day of December, 2004, at San Francisco, California.



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