IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REGIS DEON THOMAS, Defendant and Appellant.	No. S048337 Los Angeles County Superior Court No. BA075063

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angeles

The Honorable Edward Ferns, Judge

APPELLANT'S OPENING BRIEF

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N.J.S.A. 2C:11-3c(2)(a) 453

N.M. Stat. Ann. §§
31-20A-3 (Michie 1990) 453, 480
31-20A-4(c)(4) (Michie 1990) 483

Ohio Rev. Code Ann. §
2929.04 (Page's 1993) 453
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Okla. Stat. Ann. tit. 21§ 701.11 (West 1993) 453, 480

S.C. Code Ann. §§
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16-3-25(C)(3) (Law. Co-op. 1985) 483

S.D. Codified Laws Ann. §§
23A-27A-5 (West 1988) 453, 480
23A-27A-12(3) (1988) 483

Tenn. Code Ann. §§
37.071(c) (West 1993) 453, 480
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39-13-204(g) (1993) 480
39-13-206(c)(1)(D) (1993) 483

Tex. Crim. Proc. Code Ann, §
37.071(c) (West 1993) 453

Va. Code Ann. §§
17.110.1C(2) (Michie 1988) 483
19.2-264.4 (c) (Michie 1990) 453
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- 10.95.130(2)(b) (West 1990) 483

Wyo. Stat. §§
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- 6-2-102(d)(i)(A), (e)(I) (West 1992) 453
- 6-2-103(d)(iii) (1988) 484

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Sixth Amendment . . . . . *passim*
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TEXTS AND OTHER AUTHORITIES

1st Circuit Model Jury Instructions - Criminal (2002) 204

6th Circuit Pattern Jury Instructions (1991) 195

8th Circuit Model Jury Instructions - Criminal (2000) 193, 204

23 A.L.R. 5th 672, Admissibility in Evidence of Composite Picture or Sketch Produced by Police to Identify Offender 137

ABA Project on Minimum Standards for Crim.Justice, Stds. Relating to Joinder and Severance (Approved Draft 1978) 119

Abraham S. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960) 423

Abraham Abramovsky & Johnathan I. Edelstein, Anonymous Juries: in Exigent Circumstances Only, 13 St. John's J. Legal Comment 457 (1999) 48

Alaska Pattern Criminal Jury Instructions (Alaska Bar Association 1987) 195

Alex Kozinski and Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 (1995) 506

Amy K. Phillips, Thou Shalt Not Kill Nice People, 35 Am. Crim. L. Rev. 93 (1997) 305

TABLE OF AUTHORITIES (CONT.)

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TEXTS AND OTHER AUTHORITIES

Arkansas Model Jury Instructions - Criminal (Lexis, 2nd ed. 1997) 195

Bennett L. Gershman, Trial Error and Misconduct (1997) 96

Bryan A. Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing, 54 Ala. L. Rev. 1091 (2003) 459

Colorado Jury Instructions (West, 1983) 195

Comment, Joint and Single Trials under Rules 8 and 14 of The Federal Rules of Criminal Procedure, 74 Yale L.J. 553 (1965) 118

Comment, The Testifying Defendant--a Proposed Rule of Limited Waiver for the Trial of Joined Offenses, 118 U. Pa. L. Rev. 424 (1970) 118

Connecticut Selected Jury Instructions - Criminal (The Commission on Official Legal Publications Judicial Branch, 3rd ed. 1996) 195

Craig Haney, Aida Hurtado & Luis Vega, Death Penalty Attitudes: The Beliefs of Death Qualified Californians, 19 CACJ Forum No. 4 (1992) 332

Craig Haney, Lorelei Sontag & Sally Costanzo, Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death, 50 J. Soc. Issues 149 (1995) 333

Criminal Jury Instructions For The District of Columbia (Bar Association of the District of Columbia, 4th ed. 1993) 195

Criminal Jury Instructions--New York CJI (New York) (lst Ed. 1983) 204

C. Wright, Federal Practice and Procedure (3d ed. 2000) 242

Federal Judicial Center, Pattern Criminal Jury Instructions (1988) 195

TABLE OF AUTHORITIES (CONT.)

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TEXTS AND OTHER AUTHORITIES

Georgia Suggested Pattern Jury Instructions (Carl Vinson Institute of Government, University of Georgia, 2nd ed. 2000) 201

Idaho Criminal Jury Instructions (Idaho Law Foundation, Inc., 1995) 195

ICCPR art. VI, § 1 502-03

Instructions for Virginia & West Virginia (Lexis, 4th ed. 1996) 194

James Allen Fox & Marianne W. Zawitz, Homicide Trends in the United States, Bureau of Justice Statistics Web Site, http://www.ojp.usdoj.gov/bjs/homicide/ homtrnd.htm (accessed Nov. 29, 2004) 113

Jeffrie G. Murphy and Jean Hampton, Mercy and Legal Justice, in Forgiveness and Mercy (1988) 343

John Quigley, Human Rights Defenses in U.S. Courts, 20 Hum. Rts. Q. 555 (1998) 502

Kevin F. O'Malley, Jay E. Grenig & William C. Lee, Federal Jury Practice and Instructions (West, 5th ed. 2000) 193-94

Leonard B. Sand, et. al, Modern Federal Jury Instructions (1994) 204

Maryland Criminal Pattern Jury Instructions (Micpel, 1999) 195

Nancy J. King, Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich. L. Rev.63 (1993) 95

Marc O. Litt, "Citizen-soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors, 25 Colum. J. L. & Soc. Probs. 371 (1992). 46

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New Mexico Uniform Jury Instructions - Criminal (Lexis, 1998) 195

Oklahoma Uniform Jury Instruction Crim (2nd Ed.) 204

Pennsylvania Suggested Standard Criminal Jury Instructions (Pennsylvania Bar Institute, PBI Press) 195

Ramon, Bronson & Sonnes-Pond, Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever, 21 CACJ Forum No.2 (1994) 332

South Carolina Criminal Jury Instructions (South Carolina Bar, 1995) . 194

South Dakota Pattern Jury Instructions (State Bar of South Dakota, 2000)

Stephen P. Garvey, As the Gentle Rain From Heaven: Mercy in Capital Proceedings, 81 Cornell L. Rev. 989 (1990) 343

Stephan A. Riesenfeld & Frederick M. Abbot, The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties, 67 Chi.-Kent L. Rev. 571 (1991) 502

Stephen Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L.Rev. 1283 (1997) 356, 499

Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (1993) 432

Uniform Criminal Jury Instructions (Oregon) 204

Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 Brook. L. Rev. 1011 (2001) 157

W. Scott Carpenter, & Paul J.McClung McClung's Texas Criminal Jury Charges (James Publishing, 2000) 195

TABLE OF AUTHORITIES (CONT.)

PAGE/S

TEXTS AND OTHER AUTHORITIES

Washington Pattern Jury Instructions - Criminal (West, 2nd ed. 1994) . 202

Wayne A. Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev. 143 (1999) 298

Wigmore on Evidence (3d. 1940) 101

William J. Bowers, et al., Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998) 157

William J. Bowers & Benjamin D. Steiner, Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Tex. L. Rev. 605 (1999) 333

Wisconsin Jury Instructions (University of Wisconsin Law School, 2000) 195

Witkin, Cal. Evid. (3rd ed. 1986) 131

Witkin & Epstein, California Criminal Law (3d ed. 2000) 229

Witkin & Epstein, California Criminal Law (2nd ed. 1989) 241

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S048337
Plaintiff and Respondent,	)	Los Angeles County Superior Court No. BA075063
v.	)	
REGIS DEON THOMAS,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEAL ABILITY

This is an automatic appeal from a final judgment imposing a verdict of death. CT 1172-79; RT 5045; Cal. Pen. Code §1239(b); Cal. Rules of Court, rules 13 & 34(a).

INTRODUCTION

Appellant's case is an example of the injustice that happens when a trial is not about evidence, but rather about fear and suspicion. Clearly Regis Deon Thomas was on trial for frightening crimes: the murder of two Compton police officers and the apparently unprovoked shooting death of a neighborhood man, Carlos Adkins.

The evidence against appellant relating to the killing of the officers was based on questionable the eyewitness testimony of three individuals.

These witnesses supposedly saw the shooting as they drove by at night-time in a car. But the witnesses testified they were not sure about what they saw, they initially did not assist the police, and they received financial compensation for assisting the prosecution. The police officer case was also based on the unreliable testimony of Calvin Cooksey. Cooksey, who had been an informer in the past, claimed to have had possession of the gun used to kill the officers. However, he made these claims only after being arrested on unrelated weapons charges. Calvin Cooksey also had a motive to lie about Regis Thomas because he had initiated a lawsuit against the city of Compton relating to the city's supposed failure to protect him and his family from the dangers flowing from his being involved in this case. He also received financial compensation for his assistance.

The evaluation of the evidence in this most serious and circumstantial of cases required a dispassionate jury, which would objectively evaluate the evidence. The case required a jury which could weigh Calvin Cooksey's convenient story for its implausibility, and which could look critically at the doubtful testimony of the eyewitnesses. The case required a jury which was exposed only to evidence directly relating to the charges, and which understood that its obligation was to weigh the evidence and only the evidence.

Essentially, given the serious crimes and the circumstantial nature of the prosecution's evidence, appellant had to have a fair trial. However, appellant did not get one. Rather, as appellant will show, many errors made it impossible for the jury to dispassionately weigh the evidence. First, the jurors were identified on the record only by a number, which led them to fear appellant and to suspect he was dangerous. *See* Argument I, *infra*. Second, the trial court refused to sever the counts involving the homicide of Carlos Atkins from those involving the police officers. It is likely that the

jury was influenced by the evidence of the Atkins homicide when deliberating about the police officers and vice versa. *See* Argument VI, *infra*. Three victims made it difficult enough for the jury to remain objective, but here there were more victims which the jury could have attributed to appellant. The jury heard evidence of other murder victims, the first of a witness (Andre Chappell), the second of the mother of witness Calvin Cooksey and the third of the wife of prosecution witness Mark Buster. *See* Arguments XI, XII & XX, *infra*. Essentially, appellant was on trial for six homicides, not just three.

Moreover, the prosecution made a point of putting on its case in a most emotional manner. It used autopsy photographs, mannequins, x-rays, bloody clothing and emotional testimony to prove the circumstances of the police officers homicides – all facts the defense did not dispute. *See* Argument IX, *infra*. The prosecution used artist's drawings to suggest that its witnesses were more certain about their testimony than was the case and pretended to be the downed officers in unnecessary and emotional reenactments of the homicides. *See* Arguments VIII & X, *infra*.

The jury was equally unable to weigh dispassionately the facts at appellant's penalty phase. The United States Supreme Court has emphasized that a jury's task when determining whether a man should live or die is to make "reasoned moral response" (*Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)) to the evidence. That was impossible here. The scene in the court room started out emotionally: victim family members and police officers were all present. In addition to the inflammatory pictures of the victims used at the guilt phase, the prosecution put on impassioned victim impact testimony from the families of the victims, but the jury was given no guidance as to how to evaluate that evidence. *See* Arguments VIII & XXIV, *infra*. Nor was the jury given the instructions it needed to evaluate

the pleas of appellant's family and friends for his life. *See* Arguments XXV to XXIX, *infra*.

The crimes for which appellant was on trial were serious. If found guilty, appellant was to receive the most serious penalty our society permits. Before appellant was found guilty and before he was sentenced to die, he was entitled to a fair trial. He did not get one. The result of the above errors was a trial that was fundamentally unfair at both guilt and penalty phases. Appellant should therefore get a new trial.

* * * * *

STATEMENT OF THE CASE

On January 27, 1994, a six-count information was filed in Los Angeles Superior Court charging Regis Deon Thomas (hereafter "appellant") with three counts of murder and with three weapons charges. In count one, it was alleged that appellant murdered Carlos Adkins on January 31, 1992. Cal. Pen. Code § 187(a). Counts two and three alleged that appellant murdered Kevin Burrell and James MacDonald on February 22, 1993. Cal. Pen. Code § 187(a). Counts one through three charged that appellant personally used a firearm in the commission of these offenses and that the charges were serious felonies. Cal. Pen. Code §§ 1203.06, 1927.7(c)(8) & 12022.5. Counts four and five alleged that appellant was an ex-felon in possession of a firearm and was carrying a concealed firearm on May 23, 1992. Cal. Pen. Code §§ 12021(a) & 12025(a)(1). Count six charged that appellant was an ex-felon in possession of a firearm on February 22, 1993. Cal. Pen. Code § 12021(a)(1). In connection with counts two and three, appellant was charged with the special circumstances that the homicides were of peace officers acting in the course of their duties when appellant knew or should have known that the victims were engaged in their duties. Cal. Pen. Code § 190.2(a)(7). In connection with the first three counts, appellant was charged with the special circumstance that he had been convicted of more than one murder in the first or second degree. Cal. Pen. Code § 190.2(a)(3); CT 597-602.[1]

Motions were ruled on prior to trial. A request by both prosecution and defense for individualized voir dire on penalty phase qualification of the jury pursuant to *Hovey v. Superior Court*, 28 Cal.3d 1, 80 (1980) was

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[1]"CT" refers to the Clerk's Transcript on Appeal, "SCT1" to the First Supplemental Clerk's Transcript, and "RT" to the Reporter's Transcript of the trial proceedings.

denied. CT 758; RT 141. Over defense objections, the prosecution's motion to use artist renderings of the crime scene was granted. CT 777; RT 115. The prosecution's motions to use autopsy photographs of the police officers, pictures of the officers alive in uniform and to introduce the officers' blood-splattered, bullet-damaged, uniforms as exhibits were also granted over defense objections. CT 795; RT 319, 3708. The prosecution was also permitted to do a number of reenactments of the crime with the witnesses. RT 1818-22, 2019-21, 2260-62. Two defense motions to sever the murder counts involving Kevin Burrell and James MacDonald from that involving Carlos Adkins were denied. CT 777; RT 93, 408. Over the objections of the defense, and stating that he was doing so "out of an abundance of caution," the trial court granted the prosecution's motion to have jurors referred to on the record by identification numbers, rather than by name. RT 136-39, 438.

Following the denial of his motion to sever the weapons charges in counts four and five from the rest of the case (CT 758; RT 106), appellant pled guilty to charges of carrying a concealed weapon and being an ex-felon in possession of a weapon in counts four and five of the amended information. CT 826; RT 459-60. Appellant was later sentenced to three years on both counts. Cal. Pen. Code § 13967(a).

Jury selection began on March 8, 1995. CT 790; RT 150. Over defense objection, a number of potential jurors were dismissed for cause because the trial court found their beliefs would substantially interfere with the ability to impose the death penalty pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985). RT 666, 675, 781, 819, 888. Observing that the prosecution had exercised its peremptory challenges against five female African-Americans and one male African-American, appellant's counsel objected that the prosecution was exercising peremptory challenges in

violation of *People v. Wheeler*, 22 Cal.3d 258, 276-77 (1978), and moved that the panel be struck. CT 828; RT 956. This motion was denied. CT 828; RT 957. Also during jury selection, the defense objected to misstatements the prosecution made regarding the presumption of innocence applying to the guilty and the innocent, which, the defense argued, eroded the presumption. RT 597-600; CT 1180.

On March 27, 1995, the prosecutor and counsel for appellant delivered their opening arguments to the jury in the guilt phase portion of the case. CT 836; RT 1119-51; RT 1154-76. The presentation of the prosecution's case began that same day. CT 836; RT 181. Appellant's counsel raised a number of evidentiary issues at trial. Defense objection to admission of evidence of the killing of witness Andre Chappell on the grounds that the jury would infer that appellant was guilty of Chappell's death was also overruled. RT 414. The defense request that the admissibility of incriminating statements appellant made to one witness in connection with the Adkins' homicide be limited was denied. RT 414. The defense also objected to graphic evidence of the officers' deaths, as well as to the items of clothing and photographs the coroner used. These objections were overruled. RT 3569-70. A defense request for instructions on voluntary and involuntary manslaughter in connection with the Carlos Adkins' killing was also denied. CT 918-19; RT 3937-38.

On May 1, 1995, the jury began its deliberations. CT 888; RT 4258. Jury deliberations were prolonged. The jury deliberated the entire first week of May (May 1 through 5). CT 888, 894, 896, 898-99; RT 4258-88. They deliberated every day of the following week (May 8 through 12). CT 903-908; RT 4363-76. The jury also deliberated part of a third week (May 15 through 17). CT 908-10, 985; RT 4377-80. During the deliberations, the jury made numerous requests to have testimony read back to them and

to view exhibits. CT 887, 892-3, 895, 897, 901, 906, 909. The jury also asked whether they could see appellant's truck, which had not been admitted into evidence. CT 906-7. Also during deliberations, one of the jurors sent out a note complaining that another of the other jurors had "a personal agenda," and was volatile. CT 900. In the course of questioning the jurors about the note, it was revealed that the jurors had also discussed the murder of the wife of a witness. RT 4308-09. A defense motion for a mistrial based on jury misconduct was overruled. CT 902; RT 4328, 4359. On May 16, the jury sent out a note asking whether it was necessary to have a unanimous decision as to whether a murder is second or first degree. CT 909. The next day, the jury was read an instruction on the unanimity requirement for the degree of murder, CALJIC 8.74. RT 4385.

Shortly thereafter, after fourteen days of deliberation, the jury reached a verdict. CT 985-86; RT 4388. Appellant was found guilty of the second degree murder of Carlos Adkins. CT 972; RT 4391. The jury found appellant guilty of the first degree murders of Kevin Burrell and James MacDonald. CT 982, 984; RT 4391-92. The weapons allegations in connection with the murder counts were found true. CT 972, 982, 984; RT 4391-92. The jury also found true the special circumstance allegations that Officers Burrell and MacDonald were killed in the course of their duties as police officers and that appellant was guilty of multiple murders. CT 980-83; RT 4392-93. Finally, appellant was found guilty of being an ex-felon in possession of a firearm. CT 979; RT 4393. A defense motion made immediately following the verdict for a new trial or for new jury deliberations on the grounds that the jury was not timely instructed with CALJIC 8.74 was denied. CT 1001; RT 4428.

The penalty phase began two weeks later. Immediately before the trial, the trial court observed that there had been emotional outbursts after

the guilt verdict, and noted that if these outbursts happened again, that the offending parties would be removed from the courtroom. RT 4449-50. The defense objected to the prosecution's proposal to introduce real evidence of victim impact at the penalty phase, including evidence of photographs of weddings, graduations showing the victims' families and one of the victim's feeding a child. RT 4445. All but two of the photos were admitted. RT 4448. The trial court noted during the discussion of the evidence that the family of one of the victims was present nearly every day and that the mother of one of the victims cried every day. RT 4424.

Opening statements in the penalty phase were on May 31, 1995. CT 1003; RT 4451-55. In his opening statement, the prosecution emphasized that justice required that the jury come to a unanimous verdict. RT 4452, 4454. The presentation of the prosecution's penalty phase case began that same day. CT 1003; RT 4455. The prosecution put on emotional testimony from the victims' parents and other family members. CT 1003. This evidence was illustrated with photographs from the victims' lives, which were displayed for the jury during the presentation of the prosecutor's case. People's Exhibit Nos. 118, 120 & 121; *see* RT 4558, 4578. The defense objected to evidence which it argued insinuated that appellant was a drug dealer (RT 4622-24), and to the prosecution's insinuation that appellant would have conjugal relations with his wife if not sentenced to death (RT 4629). The defense put on testimony relating to appellant's background, character and worth from appellant's mother, wife, other family and friends. CT 1005, 1019. At the end of the evidence, the jury was removed from the courtroom via the backstairs because one of the jury expressed concern to court personnel that the testimony had been very emotional from both appellant's and from the victims' families. RT 4779-80.

Closing arguments at the penalty phase were on June 5, 1995. CT 1019. During closing argument, the prosecution urged that the jury come to a unanimous verdict on the penalty because if they did not, a mistrial on penalty would be declared on "the penalty portion" and the "entire thing" would have to be tried. RT 4861. The judge admonished the jury to ignore this remark. RT 4862. The defense objected to a remark the prosecution made about appellant owning an expensive truck. The trial court overruled this objection. RT 4879. The defense also objected to a remark in the prosecutor's closing argument that sentencing appellant to life without the possibility of parole would be giving him a "freebie," because appellant could kill again. RT 4883.

The defense made numerous requests for penalty phase instructions, most of which were refused. CT 923-62. In particular, appellant requested that the jury be instructed that lingering doubt and mercy or sympathy could be a factor its deliberations. CT 926-27, 937, 937, 957. Appellant also asked that the jury be instructed on the proper use of victim impact evidence. CT 956. The defense also objected to the rereading of numerous guilt phase instructions without the trial judge also reading an instruction on the normative function of the penalty jury. RT 4849, 4853. This objection was overruled. RT 4854.

Penalty phase deliberations began on June 6, 1995. CT 1020; RT 4945. Deliberations were lengthy. The jury deliberated part of June 6, and all of June 7, 8 and 9. CT 1020-21, 1023-24, 1026; RT 4945-51, 4961-62. It deliberated the entire week of June 12 (CT 1028-31; 4967-71, 4979) and part another day (June 16). CT 1141; RT 4982. Two days into deliberations, the jury requested the definition of the word "extenuate," in the instruction defining factor (k) of the penalty phase instruction. CALJIC

8.85; Cal. Pen. Code § 190.3(k). CT 1022, RT 4952. Later, the trial court informed the jury that "extenuate" means "to lessen or mitigate." RT 4959.

After deliberations had continued for four days, appellant's counsel asked for an instruction informing the jury that it should ignore remarks made by the prosecution in its closing statement warning the jury if it hung the "entire thing" would have to be retried. RT 4963-64. The trial court refused the instruction. RT 4965. During deliberations, the jury also asked to be shown numerous exhibits, including x-rays and photographs showing the wounds of the police officer victims. CT 1205, RT 4966. On June 16, 1995, the jury announced its verdict. CT 1141. Just before coming in to announce the verdict, the jury sent out a note asking the court that their names could remain anonymous. CT 1141. The situation in the courtroom was so tense, the trial court warned the audience that anyone who cried out when the verdict was announced would be removed from the court. RT 4987. The jury determined that appellant should be sentenced to death. RT 4988.

Appellant filed a motion for new trial alleging numerous grounds for retrial on both guilt and penalty. CT 1180-1202. On August 15, 1995, this motion was denied. RT 5010. At this same hearing, the trial judge denied appellant's request for modification of the verdict. Cal. Pen. Code § 190.4; CT 1203-4; RT 5023. The trial judge also sentenced appellant on the ex-felon in possession of a firearm charge and on the weapons allegations, and formally imposed the death sentence. CT 1203-04; RT 5045-46.

* * * * *

STATEMENT OF FACTS

I THE HOMICIDES OF OFFICERS KEVIN BURRELL AND JAMES MACDONALD

The defense did not dispute that Compton Police Officers James MacDonald and Kevin Burrell had been murdered. Nevertheless, the prosecution introduced graphic evidence showing the manner of death. This evidence is summarized in detail in Arguments VII and IX, *infra*, and will not be repeated here.

A. The Evidence of the Passers-By

Though the defense did not dispute the evidence of the murders, they did vigorously dispute appellant's involvement in the crime. The prosecution put on the evidence of three eyewitnesses. These witnesses, Margaretta Gully, Alicia Jordan and De'Moryea Polidore got a quick glimpse of the crime scene as they were driving past on a dark night. None immediately spoke to the police after the crime. Moreover, Gully and Jordan received financial benefits from cooperating with law enforcement and therefore had an incentive to testify that their recollection was more certain that it really was.

On February 22, 1993, Gully was driving her Nissan Sentra; the other two were passengers. RT 1777-78. De'Moryea Polidore was Gully's 12-year old son. RT 1778. Alicia Jordan was the girlfriend of Gully's older son, Deshon. RT 1779. In addition to the other passengers, Gully's 11-year old daughter Ebony was asleep in the car. RT 1778. Gully recalled that Alicia was in the rear passenger seat and that Polidore was in the front passenger seat, although she told the police the opposite when she first talked to them. RT 1779, 1906.

At about 11:10 PM, the three were traveling west on Rosecrans Avenue in Compton on their way to pick up Gully's older son from his job

at Blockbuster Video. RT 1777. As they drove, Gully looked out her car windshield and noticed a Compton Police Department black and white squad car and a red truck. RT 1784. The truck was in front of the police car, facing the same direction as the car. RT 1785. The door to the truck was open. RT 1786. The police car had its headlights on, as well as its flashing lights and spotlight. RT 1832-33. Gully was traveling about 30 MPH when she saw the car and truck; as she drove by, she might have slowed down slightly to 25 MPH. RT 1802, 1871-72. She saw two police officers in uniform, one African-American, one Caucasian, struggling with a man, whom she thought they were trying to arrest. RT 1784, 1789. She identified photographs of Officers Burrell and MacDonald as photographs of the officers she saw that night. RT 1801; People's Exhibit No. 35.[2] However, she admitted that she had not previously known the officers and admitted that before she was shown the photograph at trial, she had seen many photos of the deceased officers in the news. RT 1873-74.

Gully assumed that she was witnessing a traffic stop. RT 1786. She thought the man was being arrested because she saw the officers trying to put the man's hands behind his back. RT 1787, 1926. The officers were on either side of the man. RT 1788. The African-American officer had a hold of the arm of the suspect. RT 1790. The Caucasian officer had a hold of the other arm. RT 1791. The officers and the man were near the truck. RT 1793. The officers did not have control of the man. The man was outside the car struggling to get away, and the officers were trying to restrain him. RT 1796. She did not see the man's hands. RT 1790. She did not actually see much of the struggle, but she thought the man was struggling because he was bent over and was trying to pull his arms forward. RT 1797-98.

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[2]The African American officer was Kevin Burrell. The white officer was James MacDonald. *See* People's Exhibit No. 35, RT 3081.

She did not hear anything that was said. The officers did not look angry. RT 1869. When she saw this scene, she told De'Moryea that she thought the police were bothering a clean-cut man. RT 1794. She did not see the officers get out of the car, nor did she see where the man had come from. She did not know how long the officers and the man had been there before she arrived. RT 1867-68.

The man was bent over, but as she passed he bent up and she got a "glimpse" of the man's face for about a second. RT 1798, 1800, 1803, 1872-73. She noticed he was African-American, well-built, muscular, clean-shaven and with closely shaved hair (a "quo vadis" style hair cut). He was between 20 and 25. RT 1794-95. She was about eight or nine feet away when she saw the face. RT 1800. He was wearing a dark green jacket and slacks. RT 1803.

As she passed the scene, she heard between six and nine shots from the right-hand side of her car. RT 1809-10, 1840. Almost everyone in the car went into a panic at the sound and were yelling and shouting. However, Ebony, the little daughter, stayed asleep. RT 1810. The passengers in the car were frightened in part because they thought they might be hit by stray gunfire. RT 1810. Gully was especially concerned about the safety of the children in the car, whom she thought might get shot. RT 1889.

From the sound of the gunfire, Gully initially thought that the police were shooting the man. RT 1899-1901. She did not realize that the officers were being shot until De'Moryea Polidore said so. RT 1811. Her son's words were: "They are shooting the officers in the head." RT 1898. In her testimony, Gully volunteered that she believed that even though Polidore used the pronoun "they," he meant that there was one person shooting the officer. Polidore often used the word "they" that way. RT 1896-97. She acknowledged that she too had used a plural pronoun in her previous

testimony when she said that she saw the officers try and apprehend "them," but stated that she saw no one at the scene other than the officers and the man. RT 1929, 1960-63.

She did not see the gun-fire through the windshield or passenger window. After Polidore said that "they" were shooting the officers, she looked through her rearview mirror to see what was happening, simply because others were doing the same thing. RT 1811, 1902. She saw the African-American officer down on the street and sidewalk and the man over him with a gun pointed near his head. RT 1811-12, 1820, 1882.[3] She did not see the officer go down. RT 1840. After she looked out the window, there was more commotion in the car and someone shouted that the man was coming in the truck. RT 1841. She looked in her rearview mirror and saw the truck speed away from the scene at about 55 MPH. RT 1841, 1844. Gully told the police she sped up to about 40 to 45 MPH as the truck approached, but denied this at trial. RT 1931.

Gully testified that the truck at the scene was a new red Chevrolet with tinted windows. RT 1805. Gully also identified a photograph of a red truck appellant had recently purchased from a man named Mark Buster, as

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[3]Over the objections of the defense (RT 323), the prosecution used artistic renderings of the scene to illustrate the testimony of witnesses Gully, Alicia Jordan and De'Moryea Polidore. Because this was more prejudicial than probative, this was error. *See* Argument VIII, *infra*.

Also over defense objections, the prosecutor also used his own body to demonstrate the manner in which the perpetrator was standing over the dying officer. RT 1818-19. Gully pretended she was the shooter and the district attorney lay on the ground and pretended he was the mortally wounded officer. The district attorney gave Gully an unloaded nine millimeter to complete the scene. The admission of this demonstration was error, as was a similar demonstration the district attorney performed with Alicia Jordan, who was so frightened that she started to cry, as well as a third demonstration with the boy De'Moryea Polidore. *See* Argument X, *infra*.

similar to the truck she saw that night. People's Exhibit No. 24, RT 1823-24; *see* RT 1650-51. However, when Gully had previously talked to the police, she was considerably less sure of her identification of the truck. For instance, she told the police that she did not see the word "Chevrolet" written on the tailgate of the truck. RT 1978. Also when she first talked to the police, she told them that she thought that the truck size was between a Chevrolet and a Nissan. RT 1913-14.

In court, Gully identified appellant as similar in many respects to the man she saw with the officers that night. Appellant "seemed to be" the "same man." RT 1833-35. The conditions for an accurate identification of the man, however, were far from ideal. Although her car had lights and the head lights from the police car were on, the windows of the truck she saw that night were tinted. RT 1832-33, 1805. It was dark and it had been raining earlier that evening, though Gully denied that there was moisture on the car. RT 1924. She was going between 25 and 35 when she passed the police officers. RT 1931-32. As noted, Gully only "caught a glimpse" of the man's face that night as he passed in the car. RT 1938. Moreover, although she testified that the driver of the truck was "similar" or "the same" in many respects to appellant (RT 1833-35), that conclusion was in part based on an in court view of appellant's back and profile after appellant was asked to stand and turn during her testimony. RT 1835-36. However, Gully never saw the suspect's profile, only his front and back. RT 1811, 1938-39. Moreover, when she previously discussed the suspect's skin color with the police, she told them that the color was similar to the skin color of an African-American officer working on the case, Officer Branscomb. However, she admitted in her testimony that Branscomb's skin color did not resemble appellant's. RT 1945.

Witness Gully did not report the crime after she witnessed it. She claimed she did not do so because she did not want to get involved, although later she had second thoughts about this after speaking with her sister. RT 1845-46. When she talked to the police, she made a composite drawing, even though she had first told the police she was not certain she could do so. RT 1849-50, 1909; People's Exhibit No. 41. She also attended a line-up and identified appellant as "looking like" the man she saw, but told the police that she could not identify anyone because although appellant had a similar body, clean shaving and skin coloring, she simply was not sure. RT 1851-52, 1955; People's Exhibit No. 42.

She denied that she was interested in a reward that the police offered in the case. RT 1857, 1860. However, the police put her up at a hotel for a time because of her involvement in the case. RT 1857. They did so she thought that her involvement in the case would put her in danger. When she wasn't home, the police "infiltrated her home and went to the neighbors, so she thought she might be in danger because of the gangs. RT 1858. Also because of her involvement in the case, she got over a thousand dollars to rent a new apartment. RT 1859.

Witness Alicia Jordan was also in the car that night. RT 2219-20. Jordan recalled that she was seated behind Gully on the driver's side, not on the passenger side as Gully recalled. RT 1779, 2369. According to Polidore, Jordan had been sleeping until immediately before the incident. RT 2098. Jordan denied this. RT 2458. Jordan testified she saw the truck and police car and believed, as Gully had, that they were witnessing a traffic stop. RT 2230. She remembered the lights of the police car, particularly the red spinning lights. RT 2228. The Nissan's headlights were also on. RT 2251. She saw a red truck, which she recalled having tinted windows. RT 2229-32. It had the word "Chevrolet" written on the back. RT 2326.

She identified a photograph of the truck appellant purchased from Mark Buster as similar to the one she saw that night. RT 2232-33.

As they drove by, Jordan saw two officers, whose uniforms she thought were Compton Police Officer uniforms, together with a third man, who was an African-American with very short hair. RT 2254. She had no recollection of what the officers were doing with the third man when she first saw them. RT 2234-35. She certainly did not remember any kind of struggle between the man and the officers. RT 2392, 2457. She did not notice what the man was wearing. She did not recall slowing down as they passed. RT 2235-36. She heard shots. The shots frightened her very much. RT 2353. However, when she heard shots, she did not duck; rather, she turned her head and look out the back window and saw the Caucasian officer fall. RT 2311, 2368. Jordan estimated that she was between 33 and 36 feet away when she saw the officer fall. RT 2241. Jordan did not see anyone around the officer as he fell. RT 2251. She saw a man with a hand gun in his hand who was moving around the two officers. RT 2253-57. She knew the man was shooting because she heard shots. RT 2252. She then saw the man shoot the black officer two times. RT 2251-55. As the man moved around the body of the officer, she saw his side and back. RT 2254-56, 2263. She did not see the man's face at this time. RT 2263-64.

She saw the man get into the truck. RT 2265-66. At this time her attention was not focused on the man, but rather on the fallen Caucasian officer in the street. RT 2268. This changed as the truck came up behind them. She said: "He's coming up behind us." RT 2330. The truck was traveling faster than Gully's Nissan. RT 2270. Although she could not see the face of the man as the truck approached because of the lights on the truck (RT 2391), she saw his face as the truck passed by her window. RT 2271. She was between 9 and 12 feet away as he drove by. RT 2272; 2474.

When asked by the prosecution to say whether she got a good look at the profile of the man she saw, at first Jordan asserted she did not know, and furtively glanced across the courtroom at appellant. RT 2273-74. She then stated that she was scared of appellant, started to cry, while having what the trial court described as an "attack" on the stand. RT 2274-75; *see* RT 2455. The next day, appellant stood-up and Jordan identified appellant's build, stature, head shape and hair as similar to the man she saw do the shooting. RT 2319-20. She stated she did not want to say whether appellant was the man she saw because she was scared. RT 2321. She then started again to cry, said that there was someone, like appellant, who might come and get her, and that this was why she was afraid. RT 2322. She then testified that she had a support person, Diane, whom she had the previous day told that appellant was the person who shot the officers. RT 2322-23. She had not told Diane this earlier. RT 2401-02. Later, she testified that appellant's profile matched that of the suspect. RT 2379.

She admitted that she had at first refused to speak with the police, although they tried to speak with her a number of times. RT 2332-33, 2360. She did not want to get involved because she was afraid of what might happen to her if she did. People from her area of Los Angeles sometimes got hurt when they testified. RT 2361. She also did not identify anyone as the perpetrator in the photographs she was shown. RT 2437-38. She was interviewed at least three times by law enforcement before her preliminary hearing testimony and did not identify appellant as the man she saw. RT 2405-06. In fact, she told the police she did not have a lot of time to look at the perpetrator and the windows of the truck were tinted. RT 2413-14; RT 3905. She also did not initially identify appellant at the preliminary hearing as the perpetrator. She admitted that she could have been afraid simply because she thought the person who shot the officers would be there in the

courtroom, rather than being afraid of appellant. RT 2409. However, she also stated in her preliminary examination that she would only be afraid of someone if she thought they had done the shootings. RT 2479-80.

Jordan went to the police for help with a place to live. She was afraid, and was having problems with her father who was also afraid because of her involvement and because the police came to her house. RT 2336-38. The city of Compton put her and her baby up for a year and a half at the Ramada Inn, where she was staying at the time of her preliminary hearing testimony. RT 2338-39, 2448. The city provided meals. RT 2338-39. She denied that she was motivated by the reward money the city offered in the case. RT 2340-41. When she moved out of the hotel, the city gave her three months rent assistance and money for furniture. RT 2345-46.

De'Moryea Polidore, Margaretta Gully's twelve year old son, was also in the car, sitting in the front seat. RT 1993. Like Jordan and Gully, he saw the police cars, the truck and a young, muscular, African-American man with short hair struggling with the officers. RT 1997-2003. The truck was medium truck with "real dark" windows. RT 2006-08. The driver's door of the truck was open. RT 2030. It had the numbers "4 something 4" on the back. RT 2041. He thought that the police were trying to arrest the man because they were behind him trying to grab his hands. RT 1996, 1999. He did not see the hands, but assumed that they were trying to grab his hands because the man's body was moving around. Polidore thought they were trying to put handcuffs on him. RT 2001.

He heard shots. He initially ducked and then he looked out the window. RT 2009-12, 2039. He saw the man standing over the Caucasian officer (who was on his stomach) shooting him in the head with a handgun. He saw sparks from the gun. RT 2014-17, 2031. He said "They're shooting him in the head." RT 2012. However, he did not mean by using

the word "they" that he saw more than one person. RT 2018. He saw the man get into the truck and then the truck speed by. RT 2036-39. At a line-up he was unable to identify anyone; however, he thought that of the six men in the line-up appellant looked most like the man he saw. RT 2053-54; People's Exhibit No. 48. In court, Polidore testified that appellant's skin, hairstyle, build and size were similar to the shooter's. RT 2057-58.

Two others in the area that night saw a truck similar to appellant's speed away from the scene. RT 2499, 2642. One of the witnesses, Ingrid Crear, testified that the tinting in the truck windows was so dark she could not see the driver. RT 2508.

B. The Informant's Testimony

The defense also vigorously disputed the evidence of Calvin Cooksey, an ex-felon with a history of informing for the police who came to the police with information about the crime only after being arrested himself on unrelated gun charges. RT 3117-18. Previously, Cooksey had been convicted of a robbery, gun possession and receiving stolen property. RT 3118-19. In prior years, Cooksey had worked with law enforcement, providing information about drug dealers. RT 2834-35, 3206. One law enforcement officer, Larry Brandenburg, testified that it was clear Cooksey wanted to be paid for informing, but this had never happened. RT 2867-68.

Calvin Cooksey had his reasons to testify against appellant. At the time of his testimony, Cooksey had an active wrongful death lawsuit against the City of Compton on grounds that the Compton police had failed to prevent the murder of his mother after he gave information implicating appellant. RT 3289. There was no evidence that appellant had anything to do with the murder of Cooksey's mother. *See* RT 3362. Nevertheless, Cooksey and his lawyer Brian Andelin staged a dramatic scene where

Cooksey came to the police station to surrender on a bench warrant with a hood over his head and wearing a bulletproof vest. RT 2301.

Cooksey had other selfish motives for testifying. He was in part motivated by the reward that was being offered by the police. RT 3134. In fact, he asked the police about the reward when he talked to them. RT 3388. He also came forward because he hoped the officers would help him get out of the gun charge he was facing. RT 3135. The gun case was subsequently dismissed against Cooksey very shortly after he testified in a hearing in appellant's case, but he denied knowing anything about why it was dismissed. RT 3187. Law enforcement denied promising Cooksey anything on the gun case. RT 3390. Although he was evasive about the amount of money received and about what he used the money for, Cooksey received money from the city in connection with his cooperation on the case. RT 3183-86, 3245. In fact, he received about $12,500 in advance of his testimony and, moreover, was permitted to stay at a Ramada Inn at the city's expense, until, that is, he was asked to leave because of a dispute with an employee. RT 3438-39. The money from the city was his only income. RT 3245. He also got promises for relocation, work, a car and possibly a new identity. RT 3272.

Calvin Cooksey claimed he knew appellant through a mutual friend named Phillip Cathcart. Cooksey and appellant hung out in the "hood" together and had a social relationship. RT 3047-52. In the latter part of February 1993, Cooksey and Cathcart were watching a news broadcast about the murders at Shamica Hargrave's apartment, when appellant joined them. Hargrave was Cathcart's girlfriend. The broadcast was about the police trying to find the truck. Appellant was jittery. RT 3061-68. After Cooksey and he exchanged "a look," appellant jumped up and said: "Yeah,

I did it. Fuck those mother fuckers. They slipped." They "slipped" meant the officers did not take precautions. RT 3071-73, 3077-79.

The account Cooksey claimed appellant related to him did not match the facts of the crime, as related by Gully, Polidore and Jordan. According to Cooksey, appellant said that the African-American officer came up to the car and he shot him in the chest; he then kicked the door open and shot the white officer three times, at least one time in the face, and finally shot the black officer again in the head. RT 3079-82; 3189. Cooksey also testified appellant said he shot one of the officers while he was still in the car. RT 3192. Appellant said nothing about the officers trying to arrest him. RT 3190. Since Cooksey felt that appellant could not have possibly killed two armed officers all by himself, he asked appellant who had been with him. Appellant said he was by himself. RT 3083-85.

There was no corroboration of this critical piece of evidence. Although Cooksey stated that Hargrave and Philipp Cathcart were present at the conversation (RT 3061), Hargrave did not recall that the three men had a conversation together in the days following the crime. RT 3347.

Cooksey testified appellant asked him to get rid of the gun, although he admitted that he and appellant had not done many "favors" like this for each other before. RT 3208-09. His testimony about how he got rid of the gun was confused. Cooksey testified he handled the gun and then said that he did not handle the gun; he said that he knew it was loaded and then that he did not think it was loaded. RT 3199-3201. In any case, Cooksey asserted that it was either later that day or the next day, that he saw appellant again and offered to get rid of the gun. RT 3087-90. Appellant agreed. RT 3091. With appellant and Philip Cathcart in one car, and Cooksey in a second, they all drove to a house somewhere in the Jordan Downs housing projects. RT 3097-98. Appellant gave the gun to a woman

Cooksey did not know and then told him to come to this same house and pick the gun up in an hour. He did so. RT 3100-05. Cooksey took the gun to a "Robert," who agreed to buy it from him. RT 3106-07. Cooksey got about $250 for the gun. RT 3110. Cooksey stated, but later denied, that he sold the gun so he could get some money. RT 3199.

Cooksey told no one about his conversation with appellant or about the gun sale until after he was arrested. He did not come to the police earlier because he did not want to get involved and because he was not living the kind of life style where he would just go and help someone out. RT 3117. However, things changed for Cooksey. He was arrested in the middle of March (about a month after the shooting) for being an ex-felon in possession of a gun. RT 3118. A few days after his arrest, he called Detective Larry Brandenberg, who had previously gotten him out of trouble when he was accused of stealing a car. RT 3123-24. He told Brandenberg that appellant had killed the officers and that he had sold the gun that was used to Robert. RT 3125. He did not tell Brandenberg one critical fact that could have implicated himself in the killings by connecting him to the murder weapon: he neglected to tell the police he knew the gun was the murder weapon at the time he sold it. RT 3127-28. Only later did he tell the police this. RT 3129-30, 3386.

The day he talked to the officers he was temporarily released from jail to try and buy the gun back from Robert, but was unable to find him. RT 3137. Later, after he had been released from jail, the police went with him again several times to try and purchase the gun back. RT 3138-39. Eventually they found Robert. Cooksey told him that the gun was his uncle's and he needed it back. RT 3140. Robert sold it back to him. RT 3145-46. Robert Rojas confirmed that someone who looked like Calvin Cooksey sold him a gun and then asked to buy it back. RT 3454-55.

An acquaintance of appellant, Keyon Pye, testified that she received a gun from appellant. However, he gave her the gun around Valentine's Day, a date which predates the shootings. RT 2691-92. She had previously told officers that she could not remember if she got the gun before or after the shooting. RT 2698-70. Later, a man came to pick up the gun. She could not identify the man who picked up the gun and did not recall ever having seen Calvin Cooksey before. RT 2714-16.

C. The Guns

The gun which Cooksey recovered for the police was a nine-millimeter Sig-Sauer. RT 3313; People's Exhibit No. 32. Los Angeles Deputy Sheriff Dwight Van Horn examined the Sig-Sauer and the bullets found at the scene and concluded that this Sig-Sauer could have fired the bullets which killed Officer Burrell and MacDonald. RT 3671-72.

The Sig-sauer was also indirectly connected to the case, though appellant's wife, Deshaunna Cody. Johnnie Mack Goodman, a gun dealer from Las Vegas, testified that on February 8 or 9 1993, his gun shop was burglarized. A number of guns were taken in that burglary. RT 1702. One of them was a nine-millimeter Sig-Sauer, with a number matching that recovered by Cooksey. RT 1707; People's Exhibit No. 32. A second gun taken in the burglary was a nine-millimeter Firestar. RT 1694; People's Exhibit No. 30. A Firestar with a number matching the Firestar taken in the burglary was recovered from Cody's purse when the police executed a search warrant at her house. RT 2899, 3035. Cody testified that appellant had previously given her the gun for protection. RT 2936. Another gun from the Las Vegas burglary was found in the house of Shamica Hargrave, with whom Phillip Cathcart stayed, and who was a friend of appellant. RT 1701, 3559; People's Exhibit No. 26.

Cody admitted that appellant had a gun with him the night before and the day after the officers were killed. RT 2930. She admitted that she told the police that appellant had not had a gun, but that this was not the truth. She had not been truthful because she was afraid. RT 2927.

The gun evidence also implicated Calvin Cooksey. The gun Cooksey was arrested with in March before he decided to come forward and help the police was taken in the same burglary as the gun used to kill the police officers and the gun found on Deshaunna Cody. RT 1706, 2769, 3119; People's Exhibit No. 28.

III THE HOMICIDE OF CARLOS ADKINS

Bernard Dickson was the main prosecution witness against appellant on the Carlos Adkins' homicide. Dickson had six felony convictions, although he testified that he had "four or five." RT 1378. He was convicted of four burglaries, a robbery and a theft from a person. RT 1376-78. Dickson had a long-standing problem with illegal drugs. He smoked phencyclidine ("PCP"), used cocaine and experimented with LSD. RT 1376-77, 1386. He denied that he had any problems with drugs at the time of his testimony, but admitted that he had previously committed a number of thefts and burglaries to support his drug habit. RT 1291.

Dickson had an incentive to give evidence that was favorable to the prosecution. When he initially reported to law enforcement that he had information about the homicide, Dickson repeatedly told his parole officer that he needed money (RT 1672) and received about twenty dollars from the parole officer. RT 1126, 1666. Although he was supposed to pay the money back (RT 1667), there was no evidence that he had done so. Dickson also admitted that one of the officers investigating the Adkins homicide appeared at his parole board hearing. RT 1380.

Dickson decided not to testify at the preliminary hearing in appellant's case because the district attorney would not give him money. He had asked for $2,000 in moving expenses, asserting that he was afraid to testify because of a conversation he previously had with appellant in which appellant threatened him. RT 1363-64, 1403. He admitted that he had previously not identified appellant in another court proceeding, but asserted that this was also because he was threatened. RT 1358. In return for his testimony against appellant at trial, he had been promised that if his current burglary case was prosecuted, he could serve out his sentence someplace other than Los Angles county. RT 1286.

Dickson testified that on the evening of January 31, 1992, he went over to Andre Chappell's apartment in the Nickerson Gardens Housing Project to play chess with friends. RT 1292-95. He had just been released from prison. RT 1290. Andre Chappell asked him to get a few cigarettes before they started the game. RT 1296. As he returned with the cigarettes, he heard someone call out "Lucky," which was his nickname. RT 1448. Dickson thought the person was "Romeo," so he called out the name. RT 1298-99. As he did so, a burgundy car drove by and the driver yelled out the window: "You don't know me. Don't try to sell me something." RT 1300. Dickson answered: "Your name Romeo? I'm not talking to you." The man repeated: "Don't try to sell me anything." RT 1301. Dickson replied: "It ain't like that, homeboy," and he started towards Andre's house. He looked back and there was a gun pointed at him out the window. Dickson went into Chappell's apartment and shut the door. RT 1302-03.

While he was out, Carlos Adkins had arrived at Chappell's house and the two men were playing chess. RT 1305, 1501. Someone banged on the door and Andre got up to open it, although Dickson had warned him that someone out there had a gun. RT 1306. The man, who Dickson

identified in court as appellant, came into the apartment and said: "[Y]ou don't know me. You don't be trying to sell me nothing." RT 1307, 1316. Dickson explained that he was calling to "Romeo." The man had a gun in his hand, although it was pointed down. RT 1308, 1313. At some point, Carlos Adkins stood up. RT 1315. After Adkins stood up, the man said "I know you's a Tillman," and hit him in the head with the gun. "Tillman" is someone's last name. RT 1316. Dickson corrected the man about Adkins' name. The man backed out of the apartment waving the gun and said, you don't know me. Dickson thought the man said his name was "Renzi." RT 1317. As the man backed out, he looked up and apologized to Andre Chappell's wife, Janice, saying: "Sorry to disturb your house, miss. These niggers don't know who I am." RT 1318. Adkins replied, "You don't know who I am either," and the man came back into the house. RT 1319. The man walked back into the house with the gun, put it between Adkins' eyes and said he would blow Adkins' brains out. RT 1320. He walked over to where Adkins was standing. Adkins grabbed the gun and the two men struggled. RT 1321-22.

Several shots were fired and Dickson ran out of the house. RT 1321-22. Dickson called "911." RT 1327. Shortly thereafter, he encountered the man who shot Adkins, who was now with a second man. The men threatened him with a gun. They hit him and told him that they would kill him or his daughter if he talked to the police. The man who shot Adkins wanted to kill Dickson right there, but the second man said that Dickson was a "G.," meaning that he was an original member of one of the neighborhood gangs. RT 1322-23. The man who shot Adkins told him to get into the trunk of the car and lay down. RT 1326, 1502. Dickson got into the trunk, but then ran away. However, he slipped and the men caught up with him and hit him with the gun. RT 1328.

Dickson testified that he did not go to the police because he was scared the man who killed Adkins would kill him. RT 1329. However, a few days later he told his parole officer about what happened because his conscience was bothering him, and he was getting pressure about what to do. RT 1330, 1451. He talked about needing money throughout this interview. RT 1672. His parole officer told him to talk to the police, which he claimed he reluctantly did. RT 1331, 1500. He told Officers Robert Peterson and Talbot Terrell that the person who shot Adkins was called "Renzi." RT 1333, 1502. The police later showed him a picture of someone named "Renzi" in a photographic line-up, but Dickson told them this was not the man. RT 1333-34, 1506-08; People's Exhibit No. 13. Within a week of the shooting, Dickson talked to a man from the neighborhood with a brother named "Renzi," who told him that the word on the street was that the name of the person who shot Adkins was "Reggie," not "Renzi." RT 1339, 1432-33. A man called "Renzi" was at the meeting with the brother. Dickson agreed with the two men that this "Renzi" did not look like the man who shot Adkins. RT 1338.

Dickson later told the police that he had given the wrong name. RT 1339-40, 1552. Terrell and Peterson showed him another photographic line-up and he picked out a photograph of appellant as the person who shot Adkins. RT 1342-43; People's Exhibit No. 11. Later, he was arrested on a burglary and returned to prison on a parole violation. In June 1992, he was transported to participate in a line-up where he identified appellant as the man who shot Adkins. RT 1347-53; People's Exhibit Nos. 15 & 16.

A few months later, he was brought to court in Los Angeles and put in a holding tank. RT 1353-54. He saw appellant there. According to Dickson, appellant admitted that he had shot Adkins, and explained that he did not mean to do it and wanted to know why Dickson was going to testify

against him. RT 1356. Appellant explained that he was upset about an argument he had with his girlfriend and that he was high. RT 1357-58. He followed Dickson into the apartment because he thought that Dickson was going to get a gun. When Dickson asked why he tried to hurt him, appellant said that he was trying to scare him. Appellant said that he would do what he could for Dickson and for Adkins' family if Dickson would agree not to testify against him. RT 1358. Appellant offered him $5,000. RT 1361. He said that if Dickson did testify against him, he could not go back home to the projects. Appellant also mentioned Dickson's daughter lived in the projects. RT 1358. Appellant told Dickson that he did not want to end up like Chappell, who Dickson believed was dead. RT 1359, 1444. Because he was afraid, Dickson told the district attorney that he had identified the wrong person. RT 1360, 1434. The district attorney asked whether he had talked with appellant and Dickson denied it. RT 1434, 1437, 1443.[4]

About a year later, after he had been released from prison, Dickson got a subpoena to appear to testify against appellant. Although he initially intended to appear, he told the district attorney that he would not appear unless he was given money to leave town. The district attorney refused to do so, so Dickson decided not to appear. RT 1363. He thought his life was in danger and it was not worth it. RT 1364. Dickson testified that since that time, he changed his mind and decided to testify against appellant because of his conscience and because of Adkins' family. RT 1365. He testified that he decided to cooperate even though he knew that he would be labeled as a "snitch" in his neighborhood. RT 1288, 1365, 1370. He noted

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[4]Appellant averred that the evidence of appellant's conversation with Dickson was hearsay, admissible only to show Dickson's reluctance to testify. The court admitted the evidence without limitation which was error. *See* Argument XI, *infra*.

that he saw people in the audience at appellant's trial who were from the projects. RT 1372.

Janice Chappell, Andre Chappell's wife, also testified. RT 1181-1282. Janice came downstairs when she heard men arguing in the living room. RT 1186. She saw a light skinned African-American man with close cropped hair, who she identified in court as appellant. RT 1201-14. She was 98 percent sure that he was the same man as the one she saw that night. RT 1259-60. This man seemed angry. RT 1201. She saw Adkins head toward the door as she went back upstairs. She turned when she heard shots, and saw sparks come from a gun. RT 1209, 1241. She saw the man in the door with a gun face to face with Adkins. RT 1210-11. Janice Chappell admitted on cross-examination that she had not known appellant prior to the incident (RT 1225) and that she had previously not definitively identified appellant as the man who she saw that night, but rather had simply said his photograph "looked like" the man. RT 1221, 1238, 1258.

The defense sought to raise a reasonable doubt about intent to kill and to show that Dickson's testimony was inconsistent with the hard evidence.[5] The police officers investigating the homicide stated they found only one bullet casing although Dickson had stated there were two shots. RT 1486, 1496-97, 1541. A casing linked to the shooting was found outside the house, not in the livingroom, where Dickson said the shooting had occurred. RT 1545. The coroner could not find evidence at an autopsy that Adkins had been struck on the head or face, as Dickson had stated. RT 1627. There had been no law enforcement report of Dickson telling anyone about being put in the trunk, nor was there physical evidence that he had been hit with a gun. RT 1503-04, 1562. Because the police had let Adkins'

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[5]The defense sought, but was erroneous refused, instructions on voluntary and involuntary manslaughter. *See* Argument XV, *infra*.

clothing be destroyed, there was no physical evidence about how close the gun was to Adkins. RT 1557. Finally, there was evidence that at the time of his death, Adkins had a blood alcohol level of .86 and a .130 microgram level of PCP. RT 3747. Psychiatrist William Vicary testified that the alcohol blood level was over the legal limit for driving and that the PCP level was high. RT 3748-49. This level of intoxication is associated with bizarre behavior, unpredictability, unusual strength, and visual and auditory hallucinations. RT 3749-50. A person intoxicated with this much PCP could be calm one minute and threatening the next. RT 3751.

Over the objection of the defense, evidence was admitted that Andre Chappell had been shot and killed in front of 1432 East 111th Street in Nickerson Gardens.[6] RT 1774.

III APPELLANT'S PENALTY PHASE

Appellant's penalty phase was largely an appeal to the jury's sense of compassion, sympathy and mercy. Appellant put on the testimony of numerous family members, including his wife, Deshaunna Cody, and mother, Iris Thomas, who testified about appellant's background of neglect, as well as about positive aspects of his character. These family members testified about how much they loved appellant what a loss appellant's execution would be to them and to the children in the family.[7]

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[6]The defense objected to the admission of evidence that Chappell had been shot. Because the court overruled the objection, the defense stipulated to the fact of Chappell's shooting death. RT 1632. Appellant argues that admission of this evidence was error. *See* Argument XII, *infra*.

[7]Appellant argues that there were numerous instructional errors at the penalty phase, the consequence of which was that the jury did not adequately consider appellant's plea for sympathy, compassion and mercy. Trial counsel offered, but the trial court refused to read, numerous instructions concerning the jury's normative role in deciding whether

(continued...)

Deshaunna Cody testified that she met appellant in 1983 at a football game. Appellant and Cody had six children together, Cherish, Regis, Jr., Tristan, Monaisha, Mya and Mea. RT 4604-05. Appellant was living when her when he was arrested. He was contributing money to buy clothes, food and toys. RT 4615-16. Even though he was away one or two nights a week, he was "there for her" if she needed him. RT 4630. Mya and Mea were twins, who were born after appellant was arrested on capital charges, which was also when appellant and Cody were married. RT 4614. Cody believed that appellant had been a good father. He disciplined the children and talked to them. He had always assisted with the children, and still did so. Regis, Jr. had problems at school, and appellant helped Cody with these problems. RT 4607-08. Cody had not told her children that appellant would never be coming home because they were too young. RT 4606. Cody and their children still needed appellant. RT 4613. The children, particularly Cherish, who was seven, wrote letters to appellant in jail. RT 4609-4610. Cody regularly visited her husband and talked with him by phone. RT 4613.

Kawasci Jackson had a three year old son with appellant, who was named Deon Steffon Thomas. RT 4635-36. Although appellant did not help out financially, appellant had a good relationship with Deon and helped her with his behavior problems. RT 4636-37, 4639, 4646. Appellant loved the boy and told him that. RT 4642. Appellant was happy, loving, and kind with her. RT 4637. Deon missed his father and talked about him all the time. Once Deon saw appellant on the television news

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[7](...continued)
appellant should live or die. The court also refused critical instructions offered by the defense on role of mercy, sympathy and morality in penalty phase deliberations. This was reversible error. *See* Arguments XXIV to XXIX, *infra*.

and asked if they could go get him. Deon did not usually remember, and when he did remember, he could not accept, that his father was not coming home. RT 4640. Kawasci Jackson visited appellant in jail with Deon. RT 4641. Jackson remembered that appellant was helpful in the neighborhood. He helped the older ladies in the neighborhood out with their groceries and helped take out trash, etc. RT 4641-42. Appellant was respectful to his elders. RT 4642. She did not know appellant to be a violent person. RT 4644. She too wanted appellant to live. Jackson thought she would go visit appellant in prison. Although she did not love him as a boyfriend, she would always love him as the father of her child. RT 4659.

Willie Riley was appellant's mother's ex-boyfriend. He met appellant when he and Iris Thomas, appellant's mother, were dating. Appellant was then 10 or 11. Riley moved in with Iris and her four children, including appellant, appellant's two brothers (Thurston and Cornelius) and his sister Ayanna. RT 4663-64. Appellant had never known his biological father or other father figure. RT 4664, 4771. So, Riley became the father in the family. Appellant and his brothers and sisters had been neglected. The furniture was old; there were vermin; there was a plumbing problem; and the refrigerator was ready to fail. Although it was difficult for appellant to accept Riley as a father, eventually they worked things out. Riley tried to put things together for the family. RT 4665-66. Riley and appellant played basketball, football and baseball together. Appellant helped with odd jobs and cleaning the yard. They went on outings. RT 4667-68.

Appellant was the oldest of the children and very responsible. Appellant had to make sure that the kids got out of the house for school. He helped take care of all the children. RT 4668-69. Appellant was eager to learn, but had problems at school. RT 4669, 4677-78. Appellant got along

well with Riley's own son and had friends in the neighborhood. RT 4670. Appellant could be counted on to calm family members down when there was an argument. RT 4671. Appellant stood up for his brothers and sisters, but was not naturally a fighter. RT 4679. Riley was with the family for two years, until appellant was about 12, but left when his relationship with Iris Thomas ended because of her narcotics problems. RT 4671-75. After Riley left, appellant was the father figure in the family. RT 4673-74. Riley wanted appellant to live. RT 4682.

Iris Thomas, appellant's mother, testified about her addiction and the effect it had on the family. She confessed that since 1976 she had a problem with cocaine. RT 4714-16. Although there were indications to the contrary, Iris Thomas denied that she was then addicted to cocaine at the time of her testimony.[8] RT 4719-21. Iris Thomas had tried to hide the problem from the family, but appellant found out about it. Mrs. Thomas ran away after appellant found out about her drug addiction issues. When she eventually returned, they took a walk and he told her not to leave him. RT 4715. He became frustrated with her when she could not stop using drugs. RT 4716. Mrs. Thomas thought that appellant was a good boy. He did not start getting into trouble until he was older. RT 4706. Appellant helped her. He helped with the house, washed the dishes and cleaned. He also watched his sister. Appellant was picked on when they moved to the projects because he was little. RT 4709.

Like Willie Riley and Deshaunna Cody, Iris Thomas asked the jury not to give her son the death penalty. Her son was also her little brother

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[8]At a bench conference, appellant's trial counsel observed that he believed Iris Thomas continued to have a substance abuse problem, which explained why she gave the judge "a look" and continually bobbed her head up and down. RT 3065.

because they also grew up together. He was her mama's boy. "I could just sit there and feel in my mind, and he would come and see about me." RT 4710. To her, he was still a baby. RT 4717. She understood how the parents of the victims in this case felt because she was learning what it was like to have a child gone. It hurt her to hear people talking about killing her son: "I don't want them to kill my child, please." RT 4703-04.

Other friends and relatives testified. Sheila Griggs, Iris Thomas' sister, had known appellant since he was born and lived with them for a while. RT 4727-29. Appellant was protective of his brothers and sister and mother. Griggs' children acted like appellant was their father. RT 4729. When Willie Riley moved in he took the family on trips, but when he left there were no more outings and there was nobody there for appellant after that. RT 4730-31. Appellant was very upset when he discovered his mother using drugs. One time the son and mother got into a verbal dispute over the drug use when Iris had a lot of people over using drugs. Appellant hit the television, broke it and left crying. Appellant cried more than once about his mother's cocaine abuse. RT 4732-33. Iris Thomas did not pay the bills because of her drug issues, so that there were times when the utilities were turned off, which upset appellant. RT 4733-34. Sheila Griggs thought that appellant was helpful in the neighborhood. He helped an older woman, Mrs. Curry, take care of her great grandchildren. RT 4735. He helped out another older woman, Beatrice Cage, with food. RT 4739. Appellant was good with the children in the family. RT 4737-38.

Kim Graham was appellant's neighbor and she frequently visited him. RT 4686. Appellant was very soft spoken, very nice. He interacted with his children and his wife's younger sisters and brothers. RT 4687. Appellant cared for his children. He worked with Cherish on her school work and helped to discipline his son Regis. RT 4688. Graham related that

when Cody told the children about the verdict one started screaming and another cried. RT 4691.

Patricia and Katherine Mosley were appellant's cousins. RT 4753, 4770. They were both close to appellant. RT 4755, 4770. Patricia recalled that appellant was very upset about his mother using drugs and he sometimes cried about it. RT 4756-57. Both Mosleys thought that appellant's children needed him. He talked and played with children all the time. They liked him and he liked them. He disciplined his children when they were out of line. Appellant could still provide support even and guidance for the children, even if he were in jail. RT 4758, 4775. Patricia Mosley still loved appellant. RT 4759. Katherine thought that appellant had never really been a child. He was friendly and giving. RT 4774.

Daniel Wells was a foster child to appellant's aunt, Eva Hunter. RT 4764. Wells was physically disabled: he drooled and found it difficult to talk. RT 4765. Appellant was one of his few friends and played with him. RT 4767-68. When people made fun of him, appellant helped him. RT 4767. Wells cried when he heard the news that appellant had been convicted. Daniel Wells wanted appellant to live. RT 4768, 4841.

Michelle Rigmaden testified that appellant helped and supported her when she had to go through cancer treatment and surgery. RT 4814-16. He gave money and helped pay for the cancer medications that the insurance would not pay for. RT 4839-40. Sabrina Thomas, appellant's cousin, also depended upon appellant for support. He protected her and helped her get through school. RT 4820-21. Appellant helped run a booth for children at a local carnival. RT 4837. Eva Hunter, appellant's aunt testified that she thought there was good in appellant. He helped her with her children and her foster children. He also helped the homeless people in the neighborhood. RT 4835-38. Hunter related to the sorrow of the victims'

families, but want to make sure that the jury knew that there was another side, a good side, to her nephew. RT 4842-43.

Appellant's convictions for carrying a concealed weapon and ex-felon in possession of a firearm from 1995 and his 1990 convictions for battery on a police officer and possession of a weapon were introduced as aggravation. RT 4498, 4559. Los Angles Housing Authority Officers George Holt and Steven Judd testified to an incident where they tried to stop appellant's car. RT 4456-78; 4479-96. After they turned on their flashing lights, appellant jumped out of the car and ran away. RT 4464-65. When ordered to stop, appellant swore at the officers and ran. RT 4467-69. He threw a loaded handgun as he ran. RT 4482-84, 4489-90. Appellant struggled as the officers took him into custody. RT 4472, 4485-88. The officers received minor injuries from the scuffle. RT 4472-73.

IV THE VICTIMS' FAMILIES

Aside from the convictions described immediately above, the bulk of the prosecution's case at the penalty phase was testimony showing the effect of the violent death of a family member on the people left behind. This testimony caused many in the courtroom to cry. *See* RT 4809. The prosecutor asked witnesses what they remembered about the last time they saw their family, about how they felt when they found out that their relative had been shot and about what they would say to the person if he could come back. The prosecution used photos to personalize the testimony.[9]

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[9]The victim impact evidence was so emotional and so misused that it was error for the court not to give a defense instruction which would have assured that the jury considered the evidence in a manner consistent with appellant's rights to a fair trial. *See* Argument XXIV, *infra*. Appellant argues the real evidence was designed solely to provoke an emotional response from the jury and was inadmissible. *See* Argument XXIII, *infra*.

Willie Mae Adkins, Carlos Adkins' mother, testified that when he was alive, she saw Adkins almost every day, and they laughed, talked and watched TV together. RT 4502. He was studying architecture. RT 4503. He helped her around the house. RT 4506. He had four children who loved him and with whom he did things. RT 4503. When she heard that Carlos had been shot, she felt empty. RT 4505. Her life changed dramatically since he has been gone. She does not go out. His death has effected her memory and she has been in the hospital for a nervous breakdown. She still thought about him every day, especially about holidays. RT 4506-07.

Carlos Adkins' daughter, Dalicia Adkins, testified that she was close to her father as a child. RT 4510. She did special things with him with the family. RT 4512-13. He watched out financially for her and her children. RT 4515. Adkins helped others out at Christmas; He made sure others had a tree and painted shop windows with holiday decorations. RT 4513-14. Lots of people came to his funeral. RT 4515-16. Dalicia Adkins fainted when she heard her father died. She had been nervous ever since. She watched her back and had nightmares. RT 4514. She dreamed about him and thought about him a lot. RT 4516. She felt scared without his protection. Her son knew that he did not have a grandfather. RT 4517.

Officer James MacDonald's father, also called James MacDonald, testified about the loss of his son. Mr. MacDonald had one other son, John MacDonald. The family was very close and did everything together. RT 4519-20. James MacDonald went away to go to Long Beach State College, but they frequently talked and he came home to visit. RT 4521. He was working to pay his college expenses. RT 4523, 4529. Young MacDonald always wanted to be a police officer. He volunteered at elementary schools to keep kids off drugs. RT 4522. He had just gotten a job with the police in San Jose. The night he was killed was his last shift as a reserve officer in

the Compton Police. RT 4524. He worked that job because he liked Compton and the people there. RT 4534. Mr. MacDonald recalled the last time he talked to his son and the last time he kissed him goodbye. They talked about how it would be nice to have him closer to home. RT 4532-33. When Mr. MacDonald recalled being told that his son was dead, he broke down on the stand. RT 4535. After he recovered, Mr. MacDonald described the funeral and how he went to the cemetery every day and talked to his son. The death of James MacDonald had changed his life; part of him died. RT 4538. He felt helpless and resented the happiness of others. Holidays are lonely. RT 4539. He is sick when he sees a police car. A memorial fund and softball tournament had been set up in the officer's honor. Compton had a memorial service for the officers. RT 4540-42. Mr. MacDonald thought about his son every day. If he could talk with him, he would trade places. RT 4543.

James MacDonald's mother, Tonia MacDonald, was close to her son. James was a loving "teaser." RT 4545-46. Holidays were important. RT 4546. She was proud and scared when MacDonald told her he wanted to be a policeman in Compton. RT 4548. They were looking forward to him being an officer in San Jose, in part because it was close by. RT 4549. James was close to his brother. He often visited when he was away. RT 4549-50. Mrs. MacDonald remembered hearing about her son's shooting; she prayed to God to keep him alive so she could say goodbye and was mad at God because her son died too soon. When she heard that he was dead, she screamed. RT 4550-52. She last hugged and kissed him and told him she loved him a few days before he died. RT 4553. She visited her son's grave twice a day and told him how much she missed him. RT 4554-55. She was in constant pain because he was gone, and thought she always

would be. RT 4555. If she could have one last conversation with her son, she would trade places. RT 4556.

Clark and Edna Burrell testified about their son Kevin Burrell. RT 4559-87. Kevin Burrell grew up in Compton and Clark was proud he wanted to go into police work to help straighten people out. RT 4563-65, 4568. Clark Burrell and his son were close. Kevin Burrell helped his father with odd jobs and they watched baseball and played dominoes together. RT 4564, 4576. They saw each other often. RT 4567. Mr. Burrell last saw his son the afternoon before he died. RT 4568. He remembered finding out that his son was dead. He asked God what a father had done to deserve this, but God did not answer. RT 4569-70. Clark thought about Kevin all the time, especially when he saw a uniform or a police car. RT 4571. The prosecution had his grandson, the officer's son, Kevin Burrell, Jr. stand up in the courtroom. RT 4574. There is a plaque in Compton in honor of the officers, which he visits. RT 4575-76. If Kevin Burrell would come back, Clark Burrell would tell him not to take chances. RT 4578.

Edna Burrell loved her son too. He took them out. RT 4580. He was an Explorer Scout when he was in High School. RT 4581. Edna was proud of him being a police officer in Compton, which he wanted to do because he wanted to help people. RT 4582-83. She last saw her son at her house for a meal. When he left, he hugged her. RT 4583-84. She knew about her son's shooting because she heard about it on the police scanner and had heard the shots. RT 4585-86. She thought about Kevin Burrell every day since his death. She had anxiety attacks and could not leave the house. RT 4586. If she could have talked with her son again, she would have told him how much she loved him. RT 4587.

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ERRORS PERTAINING PRIMARILY TO JURY SELECTION

I

THE USE OF JUROR NUMBERS DENIED APPELLANT'S RIGHT TO BE PRESUMED INNOCENT AND HIS RIGHT TO A PUBLIC TRIAL

A. Introduction

Over the objection of the defense, the trial judge ordered that the jurors be named on the record solely by a number. The trial judge did this without an adequate consideration of appellant's constitutional rights, which required that a numbered jury only be used in exceptional circumstances. Exceptional circumstances were not present in this case, so the use of a numbered jury was not justified. The use of jury numbers violated appellant's right to be presumed innocent; his right to a fair and public trial; his right to a reliable guilt and penalty verdict; and his right to be free from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Caldwell v. Mississippi*, 472 US 320 (1985); *Estelle v. Williams*, 425 U.S. 501, 503 (1976). To the extent the error in numbering the jury was solely one of state law, it violated appellant's right to due process by depriving him of a state-created liberty interest. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). The error requires the reversal of appellant's conviction and sentence of death.

B. Factual Background

Immediately before the selection of the jury, the prosecution told the trial court that his investigator had informed him that prosecution witness Margaretta Gully had been telephoned by someone she identified as a black male who offered her $14,000 not to testify. RT 131-32. The prosecution

did not provide additional details about the communication with witness Gully. RT 132. The prosecutor also informed the court that there had been two previous written "threats" to witnesses. He did not elaborate on what these threats had supposedly been or to whom they had been made. RT 131. The prosecution then asserted that if jurors in appellant's case entered the courtroom together with the spectators, there was a "significant possibility" that someone would try to bribe them "for a particular verdict." RT 132. The district attorney asked the trial court to order an "anonymous jury" and asked that the jury be permitted to use the back elevator. RT 132, 135. He believed that if approached with a bribe offer, the members of the jury would feel they were in danger. RT 133. Defense counsel countered that the incidents described by the prosecution had nothing to do with appellant. Counsel assured the court that the defense had not disclosed the names of witnesses to anyone and argued that the prosecution had not demonstrated that an anonymous jury was needed. RT 134.

The trial court declined to order that the prospective jurors be required to use the back elevator. RT 137-38, 469. The trial court ordered that hardship questioning of prospective jurors not be anonymous. RT 136. However, the trial court indicated that it was inclined to order that after hardship questioning the remaining prospective jurors would be assigned numbers and would be referred to on the record with that number. RT 136. The trial court added that although the jurors would be referred to on the record only by number, the attorneys for both parties would know the jurors' names. RT 137.

Later, the prosecution renewed its request for numbered jurors. RT 436. The prosecutor stated that he believed numbers for the jurors was critical because he did not want to have to try the case two times. RT 436. Defense counsel reiterated his argument that the record did not support an

anonymous jury, asserting that the phone call supposedly made to Margaretta Gully was only a bribe, which did not amount to a "threat." The offer of a bribe, counsel argued, was not good cause pursuant to Code of Civil Procedure sections 206 and 237 to conduct the trial with a numbered jury. RT 437; Cal. Civ. Proc. Code §§ 206 & 237. Moreover, numbers should not be used because the practice would simply increase the fearfulness of the jurors. He observed that some jurors had written in their questionnaires that they were afraid of the defendant and were afraid to sit because of the nature of the case. Counsel reasoned that numbering would add to juror alarm. RT 439, 468.

The trial court overruled the defense objection, concluded that he would use the numbers "out of an abundance of caution," finding justification for the procedure "based on the representations of [District Attorney] Arnold." RT 438. The trial court added that it would not tell the jurors that the numbers had anything to do with safety, merely that they were going to use a "numbering process." RT 438. He reminded the parties that they would have access to the names of the jurors because juror names would be on the questionnaires. RT 439. The trial court stated that the jury would be told that they were being given numbers for the sake of their privacy in that there was to be some media coverage of the trial. In connection with this remark, he noted that cameras would not be permitted to take pictures of the jurors. RT 440, 463. The trial court again declined to require the jurors use the back elevators, although the prosecution argued that jurors could be followed, which would defeat the use of numbers in the courtroom. RT 468-69.

Immediately before the prospective jurors were questioned, the trial court told them that the court was using juror numbers rather than names because there had been a request for media. The jurors were told that the

cameras would not be permitted to photograph jurors, and the court had given each juror a number, so that the media would not be familiar with jurors' names. RT 482. The jurors were not told that the defense and prosecution would have the jurors' names.

The trial court conducted voir dire for five days (March 9, 17, 20, 21 and 22, 1995). CT 795, 825-28. There was no media present during any of the voir dire. Just before trial the jurors were told that there would be a photographer and that the jury was not to be photographed. RT 1113-14. Shortly before and after opening statements, photographers were permitted to take photos of appellant. There were no jurors present. RT 1152. Following the penalty verdict, the jurors sent a note to the trial judge requesting that the trial court take steps to assure that their names be kept anonymous. CT 1140.

C. A Jury Identified Solely by Number May Be Empaneled Only in Extraordinary Circumstances

The Fifth and Fourteenth Amendments to the United States Constitution embody the notion that a "shield of innocence surrounds a defendant on trial." *United States v. Thomas*, 757 F.2d 1359, 1363 (2nd Cir. 1985), *citing Coffin v. United States*, 156 U.S. 432, 453-54 (1895). This presumption of innocence is "a basic component of a fair trial under our system of criminal justice." *Estelle*, 425 U.S. at 503; *Delo v. Lashley*, 507 U.S. 272, 278 (1993) (noting that presumption of innocence is fundamental to fair trial, although not specifically provided for in Constitution). In *Estelle*, the Supreme Court of the United States held that a state may not – consistent with the presumption of innocence – create trial conditions that affect the jurors' perceptions of the defendant unless there is a substantial government interest in doing so. *Estelle*, 425 U.S. at 505. The empanelment of a jury identified by number triggers due process scrutiny

because the practice is likely to taint a juror's opinion of the defendant, thereby burdening the presumption of innocence. *Thomas*, 757 F.2d 1359 (just as the practice of having witnesses testify anonymously, the practice of concealing the identities of the jurors burdens due process because it affects the jurors' opinion of the defendant). The use of an numbered jury burdens due process because nameless juries, at least in those cases when the jurors believe that their names are kept secret from the defense, will infer that the person on trial is dangerous. *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir.1994) ("An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence"); *see Illinois v. Allen*, 397 U.S. 337, 344 (1970) (shackling is likely to have a significant effect on the feelings the jurors have for a defendant).

Moreover, jurors' knowledge that their names are unknown to the defendant diminishes the jurors' sense of responsibility for their verdict, which, in turn, undermines the reliability of the guilt and penalty verdict in violation of the right to a fair jury trial and due process, and, in capital cases, the right to be free from cruel and unusual punishment. *See Caldwell v. Mississippi*, 472 US 320 (1985) (reliability of jury verdict undermined when juror's sense of personal responsibility is compromised). As one commentator has noted: "A public trial causes all participates to perform their duties more conscientiously." Marc O. Litt, *"Citizen-soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 Colum. J. L. & Soc. Probs. 371, 383 n.80 (1992).

Because the practice of not identifying the jurors publically burdens a defendant's due process right to the presumption of innocence and to a

fair trial, extraordinary circumstances are necessary to justify the practice. The situation here is analogous to that of the anonymous jury, where knowledge of the names of the jurors is denied to the defendant, although the names might be known to others. As many courts have acknowledged, the practice of anonymous juries burdens a defendant's due process rights, and, in order to protect these rights, practice is only permitted "in limited and carefully delineated circumstances." *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir.1995). In determining whether an anonymous jury is justified, these courts have applied a balancing test, weighing the peril to the defendant's rights in requiring an anonymous jury against the seriousness of the threat to the jurors. *Thomas*, 757 F.2d at 1365 (trial court must balance government's interest in safeguarding jurors against defendants' interest in avoiding erosion of the presumption of innocence); *United States v. Melendez*, 743 F.Supp. 134, 137 (E.D.N.Y. 1990) (the trial judge must "carefully consider the degree of prejudice to the defendant weighed against the magnitude of threat to the jurors."). In the case of a nameless jury, a balancing test which weighs the burden of a nameless jury on a defendant's right to the presumption of innocence against the need for jury safety is equally appropriate.

Respondent may cite *People v. Goodwin*, 59 Cal.App.4th 1084 (1998) for the proposition that the use of juror numbers where the parties know the names of the jurors does not violate state or federal law. In *Goodwin*, the Second District Court of Appeal held that a procedure in which jurors are identified in open court by number only (where, in addition, the names are known by the parties) does not deny a defendant the right to a public trial. This case upheld the use of such a procedure in *all* criminal cases, regardless of any need shown. *Id.* at 1092-93. It also found

that a jury identified only by number does not deny due process rights. *Id.* at 1091 n.3.

This holding was error. According to the court in *Goodwin*, the right to a public trial is satisfied if the trial was "open to the general public at all times." *Goodwin*, 59 Cal.App.4th at 1092-93. In the case of an anonymous jury, since the jurors' "faces" are there for all to see, there is no denial of a public trial right. *Id.* at 1092-93. A defendant's due process rights are not detrimentally affected, because anonymity only encourages the jurors to act without fear and to proceed on the courage of their convictions. *Id.* at 1091 n.3. These assertions, however, do not take into account the effect on due process of the jurors' belief that their names are secret from the defendant and the public. The procedure of jurors identified by number dehumanizes the trial process and undermines petitioner's presumption of innocence by giving jurors the impression that petitioner is someone to be feared and who cannot even be trusted with knowing their names. The fact that the parties are given a list of the jurors' names does not alleviate the problem because the jurors are unaware that anyone knows who they are. From the jurors' perspective, they are wholly anonymous, safe from retaliation and influence by the "dangerous defendant." *See* Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: in Exigent Circumstances Only*, 13 St. John's J. Legal Comment 457, 457-58 (1999) ("In a criminal case, the defendant accused of the criminal acts is usually the only party who would naturally be perceived as a threat."). As such, *Goodwin's* holding that use of a jury whose names are known to the parties does not implicate a defendant's rights to due process is erroneous and should not be followed by this Court.

D. The Use of Juror Numbers Was Not Justified in This Case

Appellant's case is not one of the exceptional cases in which the use of juror numbers was justified by a compelling need. First, there was

nothing about the appellant, either his history or his behavior during the trial, that justified the use of jury numbers. Appellant had no convictions for any crimes relating any kind of jury tampering or other conduct related to obstruction of justice. *See State v. Accetturo*, 261 N.J.Super. 487, 491, 619 A.2d 272, 274 (1992 N.J.) (Absent an obstruction of justice charge or a charge involving jury tampering an anonymous jury is not justified); *see also Thomas*, 757 F.2d at 1365 (justifying anonymous jury because of "strong evidence of defendants' past attempts to interfere with the judicial process"). Moreover, appellant has not been shown to be a part of any organized group that possessed the means to harm any of the jurors. *See Thomas*, 757 F.2d at 1365 (anonymous juror justified because defendants were alleged to be dangerous individuals engaged in large-scale organized crime). Vague allegations that appellant was associated with gangs in Los Angeles were not sufficient to justify an jury identified only by numbers. *See United States v. Vario*, 943 F.2d 236, 240 (2d Cir. 1991) (mere connection with organized crime is not sufficient to warrant an anonymous jury).

The prosecution and the trial court relied on the supposed bribe attempts made to a witness as a reason to justify the anonymous jury. RT 132. However, there was no evidence connecting this offer to the appellant. Moreover, there is little empirical evidence supporting the prosecution's claim that an anonymous jury was necessary to prevent bribery attempts. *See* Abramovsky, at 465-66 (detailing examples where jury anonymity proved ineffective in preventing the public from learning juror identities). Furthermore, as pointed out by defense counsel at the time, even assuming that such bribe attempts had been made, they did not amount to "threats" (RT 437) and certainly did not constitute a threat of harm to any of the jurors. Finally, the use of juror numbers did nothing to eliminate the

supposed threat identified by the prosecution that acquaintances or family members of appellant would approach the jurors with a bribe. Family members were present in the courtroom. *See* RT 138. The jurors were not sequestered and did not enter or exit the courtroom separate from the public.

As noted above, the trial judge based his decision that numbers be used in this case out of an "abundance of caution." RT 438. However, this was the wrong standard. Just as with an anonymous jury, a nameless jury can only be used in extraordinary circumstances. *Krout*, 66 F.3d at 1427. Here there was no showing that the jurors were in danger from appellant and no showing that appellant's associates presented a threat to the jurors. The offer of a bribe to Gully had nothing to do with the defendant.[10] Although the trial court used media coverage as justification for the use of numbers to the jury, there was, in fact, little media coverage of the trial. Indeed, members of the media were present only for a few proceedings. *See, e.g.*, RT 51, 55, 2150, 2200 (references to members of the media in the courtroom).

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[10]Witness Calvin Cooksey also allegedly received a threatening note in connection with his participation in this case. RT 3002. This letter was not mentioned by the trial judge in connection with his decision to require juror numbers. Moreover, the letter also does not justify the use of numbers in this case. There was nothing in the note suggesting that jurors were in danger. Also, the authenticity of the letter was highly suspect given that witness Cooksey's was suing the City of Compton in relation to the shooting death of his mother (RT 3289) and therefore had a motivation to exaggerate the danger to himself. *See* RT 3012 (prosecution questions the authenticity of the threatening letter). The trial court itself noted that when Cooksey returned to Los Angeles after a bench warrant was issued he turned himself into the police in a hood and bullet-proof vest in front of all the media to see. The trial court believed that Cooksey's lawyer had set up this as a media event and stated that in light of the media coverage, he doubted the authenticity of Cooksey's expressed fears. RT 3004.

E. Reversal Is Required

Since the circumstances in this case did not justify the empaneling of a nameless jury, reversal is required. Under *Chapman*, the burden is on the State to show there is no reasonable possibility that a constitutional error affected the jury's actual verdict. *Chapman v. California*, 386 U.S. 18, 23-24 (1967); *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995); *see Sullivan v. Louisiana*, 508 U.S. 275, 278-281 (1993) (*Chapman* requires assessing effect of error on jury's actual verdict, not on a hypothetical proceeding before an error-free jury). The prosecution cannot meet that burden, since there is no way it can show there was no harm from appellant's name was being withheld from the jurors.

In a capital case, where dangerousness is a central issue during the penalty phase, the jurors are especially likely to believe that the use of numbers is because the court believes that the defendant is dangerous. *See, Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995) ("Physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person."). Morever, the manner in which the prosecutor framed his case in closing argument around the portrayal of appellant as dangerous, cold-blooded killer who gave little thought to the execution-style killing of his victims exacerbated the negative impact of jury anonymity. *See, e.g.*, RT 4869, 4883.

By telling the jury that the use of numbers was solely to protect the jurors from the media (RT 482), the trial judge was clearly trying to suggest to the jury the use of numbers had nothing to do with the defendant. However, in this case the admonition was not effective in preventing an adverse impact on the presumption of innocence. The judge's statement that the use of numbers was because of the amount of media attention the trial had was not truthful, and the jurors surely knew that. *See United States*

v. Scarfo, 850 F.2d 1015, 1025-1026 (3d Cir. 1988) (Unwarranted claims by the trial judge as to possible media interference were deceptive to the jury and therefore represented a potential danger to the integrity of the criminal justice system.). While there was some publicity surrounding this case, it was not nearly as great as some cases, particularly in Los Angles County. *See Accetturo*, 619 A.2d at 274, 261 N.J.Super. at 491 ("Many trials are also widely covered by the news media. Jurors would not be so naive as to believe that news media coverage would be the reason for their anonymity."). The jurors certainly would have believed that the numbers were not solely used to prevent media attention since the numbers were used even when media personnel were not present. For instance, the numbers were used during voir dire and when the jurors were questioned at the bench by the parties when media was not present. *See, e.g.*, RT 224, 228. Moreover, photographs were made when the jurors were not present. *See* RT 1089, 1152. Additionally, any juror who had previously served on a jury would have known that it was unusual to have jurors identified by number. *See Accetturo*, 261 N.J.Super. at 491, 619 A.2d at 274 ("Experience tells us, however, that in any given jury panel there will be some and perhaps many persons who have previously served on criminal jury panels and who, therefore, will wonder and speculate about the matter of anonymity.").

The error in this case was compounded by other evidence which insinuated that appellant or appellant's associates were connected with gangs. For instance, Margaretta Gully testified that she moved out of her neighborhood because she was afraid of retaliation from gangs. RT 1857-58. Witness Alicia Jordan seemed very afraid of appellant when she testified. At one point in her testimony, Jordan testified that she had not previously told the truth about seeing appellant on the night of the crime

because she was scared that someone would come and get her. RT 2321-22. Later, when asked to identify appellant, she only reluctantly looked at appellant, covered her hands with her face and cried. RT 2274-75. The jury can only have believed that Jordan did not want appellant to see her, and was crying because she was afraid that he would do something to her because she was involved in the case. In fact, Jordan explicitly said that she was afraid of what might happen to her if she testified (RT 2354-56) and that something might "happen to" people from her neighborhood if she testified. RT 2361. The fact that witness Jordan testified with her support person "Diane" from the District Attorney's Office standing in the courtroom (RT 2322-23) also suggested that appellant was dangerous. The damage was compounded by the jury hearing the evidence that Jordan's father did not want her to get involved in the case because someone would get her (RT 2337) and by the evidence that eventually Jordan left her father's home and moved into a hotel room provided by the Compton police. RT 2344.

Further compounding the negative effect of the jury numbers was Bernard Dickson's testimony that he had been promised he could serve his jail time on an unrelated charge out of state because of fear of retaliation (RT 1287) and that he was reluctant to testify because things could happen to him and his family. RT 1289. Dickson also testified that he met up with appellant who allegedly told him that if he testified he might end up dead like another witness, Andre Chappell. RT 1359. Although there was a no evidence that appellant was connected to Chappell's death, the jury must have believed the numbers were used because they too were in danger from appellant or his cohorts.

A final piece of evidence compounded the error of using numbers for the jurors. Witness Calvin Cooksey testified that one of his concerns in

having gotten involved in this case was that his mother had been killed after he came forward as a witness. RT 3278-80. Although there was a stipulation that the death of Cooksey's mother had nothing to do with appellant (RT 3362), Cooksey testified that he thought it did, and was, therefore, afraid of appellant and held him responsible for his mother's murder. RT 3280. The jurors also must have thought that the use of numbers was to prevent something horrible from happening to them.

Moreover, the error of numbering the jurors was compounded by the jurors' own misconduct. As appellant shows below, the jury committed misconduct in discussing the shooting death of the wife of prosecution witness Mark Buster, which evidence was not admitted at trial, but which again suggested that appellant and his associates were violent and dangerous. *See* Argument XIX, *infra*. The consideration of the information that Buster's wife was killed further eroded the presumption of innocence – an erosion that began when the jurors were assigned numbers. Lastly, we know from the jurors themselves that they became afraid of the defendant. After the penalty phase deliberations and immediately prior to announcing the verdict, the jury sent out a note to the judge asking that their names and addresses be kept private. CT 1140.

All the facts point to a conclusion that the numbering system was not harmless in this case. Given the evidence in this case suggesting that witnesses were afraid of appellant and his supposed companions; given the fact that the media explanation the trial judge gave to the jury about the numbers was patently false; and given that the jurors connected appellant with an additional acts of violence and expressed fear of the appellant

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following their deliberations, the error in identifying the jurors solely by number cannot be said to have been harmless. Reversal is therefore required.

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II

THE FAILURE TO CONDUCT INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS

A. The Parties Requested Individualized Voir Dire

"Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." *Hovey v. Superior Court*, 28 Cal.3d 1, 81 (1980).

Early in appellant's trial, the trial judge observed that the law had recently changed with respect to voir dire and he did not "see a need any more to have the individual Hovey voir dire one at a time as they used to have it and now the questionnaires are used." RT 37. Later, the trial court addressed the question of voir dire again, stating that he proposed limiting the attorneys to two hours each in questioning the jurors and that he did not intend to permit individual sequestered voir dire. RT 72. Both parties objected to the procedure, arguing that individual voir dire was necessary because prospective jurors were unlikely to be open about their feelings about the death penalty. The prosecutor stated:

> From having done trial for a while it is my sincere belief that jurors are far less candid in a group than they are individually, and there is [sic.] some controversial issues in this case. (¶) Number one, it involves the death penalty. Number two, it involves two police officer victims . . . (¶) My only concern is that people are not going to be candid. It is so much easier for a juror to say that they agree with another juror to parrot what another juror says to as not to appear to be dumb or stupid or controversial or nonconformist.

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RT 72. The defense attorney shared the prosecutor's concerns:

> I think that the individual sequestered voir dire in terms of the qualifications of jurors on the death issue is important and I agree with Mr. Arnold [the prosecutor], that if these jurors are asked those questions in a group, then those jurors, once they, the other jurors, once they hear the right answers, and it might be the right answer in terms of how to get excused from the case, they're going to pick up the cues from other jurors, and I think we will get much better answers, we'll get more honest candid answers from jurors individually.

RT 73. Counsel followed his argument with a request to permit individual sequestered voir dire. RT 74. In response to the trial court contention that the attorneys had sufficient information about the death penalty from the questionnaires, the defense agreed that there were a number of questions about the death penalty in the questionnaire, but argued that prospective jurors were likely to have problems with the questions and to want to explain their answers. RT 76-77. Later, the trial court denied the defense request for individual sequestered voir dire. RT 141. The trial court then conducted non-sequestered voir dire. RT 151, *et seq.*

As described below, the trial court's failure to conduct individual sequestered death qualification voir dire violated appellant's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel and a reliable death verdict, and denied him his right under California law to individual juror voir dire where group voir dire is not practicable. U.S. Const. amends. V, VI, VIII, & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Morgan v. Illinois*, 504 U.S. 719, 726 (1992); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); Cal. Code Civ. Proc. § 223; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire on Death-Qualifying Issues Violates a Capital Defendant's Constitutional Rights to Due Process, Trial by an Impartial Jury, Effective Assistance of Counsel, and a Reliable Sentencing Determination

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. U.S. Const. amends. VI & XIV; *Morgan*, 504 U.S. at 726; Cal. Const. art. 1, §§ 7, 15 & 16. Whether prospective capital jurors are impartial within the meaning of these rights is determined in part by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or impair their ability to judge in accordance with the court's instructions are not impartial and cannot constitutionally remain on a capital jury. *See generally*, *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *see also Morgan*, 504 U.S. at 733-34; *People v. Cummings*, 4 Cal.4th 1233, 1279 (1994). Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. *Morgan*, 504 U.S. at 729. To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. *Id.* at 729. Anything less generates an unreasonable risk of juror partiality and violates due process. *Id.* at 735-36, 739; *Turner v. Murray*, 476 U.S. 28, 37 (1986). A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. *Hovey*, 28 Cal.3d at 74-75. When jurors state their unequivocal opposition to the death penalty and are subsequently

dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. *Id.* at 74. By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." *Covarrubias v. Superior Court*, 60 Cal.App.4th 1168, 1173 (1998). "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." *Hovey*, 28 Cal.3d at 74-75. Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court and to be less forthright and revealing in their responses. *Id.* at 80 n.134.

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223 (Cal. Code Civ. Proc. § 223) which allows death qualification in the presence of other prospective jurors and abrogates this Court's mandate that such voir dire be done individually and in sequestration (*Hovey*, 28 Cal.3d at 80; *People v. Waidla*, 22 Cal.4th 690, 713 (2000)) cannot meet the constitutional mandate of jury impartiality. *See, e.g., Morgan*, 504 U.S. at 736, *citing Turner*, 476 U.S. at 36 ("The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"). Nor can such restriction withstand Eighth Amendment principles mandating a need for the heightened reliability of death sentences. U.S. Const. amend. VIII; *see, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Zant*, 462 U.S. at 884-85; *Gardner*, 430 U.S. at 357-58; *Woodson*, 428 U.S. at 305.

Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan*, 504 U.S. at 729; *Rosales-Lopez v. United States*, 451 U.S. 181, 188 (1981), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. *See Morgan*, 504 U.S. at 739; *Turner v. Murray*, 476 U.S. at 37. Appellant acknowledges that this Court has upheld the practice (*see, e.g., Waidla*, 22 Cal.4th at 713, *People v. Box*, 23 Cal.4th 1153, 1180 (2000)), but urges it to reconsider its decision.

C. The Superior Court Erred in Denying Appellant's Request for Individual Sequestered Voir

Even assuming individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated appellant's constitutional rights to an impartial jury and due process of law. The court's conduct also violated appellant's constitutional right to equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. *Hicks v. Oklahoma*, 447 U.S. at 346; *Fetterly v. Paskett*, 997 F.2d at 1300.

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. *People v. Box*, 23 Cal.4th at 1180; *Waidla*, 22 Cal.4th at 713;

Covarrubias, 60 Cal.App.4th at 1184. Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." Cal. Civ. Proc. Code § 223. However, as this Court recognized, individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. *Hovey*, 28 Cal.3d at 80-81. The proper exercise of a trial court's discretion under section 223 therefore must balance competing practicalities. *See, e.g., People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 977 (1997) ("[E]xercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue.").

While the trial court appeared to recognize its discretion to conduct group rather than individual sequestered voir dire on death penalty issues, neither its comments, nor its actions, reflect an exercise of discretion about whether group voir dire was practicable in the particular circumstances of this case. The trial court stated that it thought that the questionnaire adequately covered questions about the death penalty (RT 76-77), but did not address the attorneys' concerns that jurors would not be candid about their opinions about the death penalty in a group. As such, the record fails to show that the court in making its decision "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." *Covarrubias*, 60 Cal.App.4th at 1183. The failure to address the trial attorneys' concerns shows that the court did not engage in the kind of "reasoned judgment" this Court ascribes to judicial discretion. *See Alvarez*, 14 Cal.4th at 977. Nor does it show "a careful consideration" (*Covarrubias*, 60 Cal.App.4th at 1183) of the practicability of small group voir over individualized sequestered voir dire, "[t]he most practical and effective procedure available to minimize the untoward effects of death-

qualification[.]" *Hovey*, 28 Cal.3d at 80. In this case, there were many jurors who were appalled by the crime, and, as appellant's counsel pointed out, many of them did not want to admit in front of others just how "bloodthirsty" they felt. RT 911. As appellant's counsel also observed, it was clear that some people were trying to make themselves look acceptable to the prosecution. For example, one prospective juror, Arthur David Bennett (*see* SCT1 001338), identified on the record as Juror No. 12, was honest about the fact that he would always impose death when he was by himself on the questionnaire (RT 886; SCT1 001350), but less honest about this issue when he was questioned in court. RT 900-01. Finally, in this case both parties requested individualized voir dire. In *Covarrubias*, the fact that both parties wanted the jurors to be questioned alone was a factor in this Court's determination that the trial court had abused its discretion in failing to so question the jurors. *Covarrubias*, 60 Cal.App.4th at 1183.

D. The Trial Court's Unreasonable Application of the Law Governing Juror Voir Dire Requires Reversal of Appellant's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in "a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." Cal. Civ. Proc. Code § 223. However, section 223 must be viewed as providing appellant an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is protected under the federal Due Process Clause. *See Hicks*, 447 U.S. at 346; *Fetterly v. Paskett*, 997 F.2d at 1300. Moreover, the prejudice standard for state law errors affecting the penalty phase of a capital trial is, as already noted, the "same in substance and effect" as the federal test for reversible error under *Chapman*. *People v. Ashmus*, 54

Cal.3d 932, 965 (1991). Accordingly, the trial court's unreasonable application of section 223 in appellant's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice" (*People v. Watson*, 45 Cal.2d 818, 836 (1956) or as an error that contributed to appellant's death verdict (*Chapman*, 386 U.S. at 24), the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of appellant's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that appellant was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey*, 28 Cal.3d at 80 n. 134), and who had become "desensitized to the intimidating duty" of determining whether appellant would live or die (*Covarrubias*, 60 Cal.App.4th at 1173) because of their "repeated exposure to the idea of taking a life." *Hovey*, 28 Cal.3d at 75. Accordingly, the trial court's failure to carefully consider the practicability of group voir dire as applied to appellant's case led to a voir dire procedure that denied appellant the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified. It also generated a danger that appellant was sentenced to die by jurors who were influenced to return a death sentence by their exposure to the death qualification process. *See id.* at 74-75. These hazards infringed upon appellant's rights to due process and an impartial jury (*see Morgan*, 504 U.S. at 729), and cast doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these are rights that are so important as to constitute an "essential part of justice" (*People v. O'Bryan*, 165 Cal. 55, 65 (1913)) for which the risks of deprivation must be regarded as a miscarriage of justice.

Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" *People v. Cahill*, 5 Cal.4th 478, 501 (1993); *see also People v. Diaz*, 105 Cal.App.2d 690, 699 (1951) ("The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice.").

Moreover, because the voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge appellant in accordance with the court's instructions. The trial court's use of this procedure cannot, therefore, be dismissed as harmless. *People v. Cash*, 28 Cal.4th 703, 723 (2002). Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that appellant was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles and that doubt requires reversal of appellant's death sentence.

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III

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY BY EXCUSING FOR CAUSE TWO PROSPECTIVE JURORS WHO WERE EQUIVOCAL ABOUT WHETHER THEIR ATTITUDES TOWARD THE DEATH PENALTY WOULD EFFECT PENALTY DELIBERATIONS

A. Introduction

Prospective jurors Randy Johnson, and Milton Trujillo told the court they were unsure if their views on capital punishment would impact their deliberations. The prosecution moved to discharge these jurors for cause and the trial court sustained the challenges. These actions violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *People v. Hayes*, 21 Cal.4th 1211, 1285 (1999). Neither of these jurors stated with the requisite degree of certitude that they would not consider death as an option under proper instructions from the trial court. The error is structural, and reversal of guilt and penalty is required. *People v. Heard*, 31 Cal.4th 946, 969 (2003); *People v. Ashmus*, 54 Cal.3d 932 (1991); *see Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

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

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). In capital cases, this right applies to the determinations of both guilt and

penalty. *Morgan*, 504 U.S. at 727; *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986). This right also is protected by the California State Constitution. Cal. Const. art. 1, § 16.

The United States Supreme Court has enacted a process of "death qualification" for capital cases. *See Witherspoon*, 391 U.S. at 522; *Witt*, 469 U.S. at 421. Appellant maintains that this process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. *Witt v. Wainwright*, 470 U.S. 1039 (1985) (Marshall, J., dissenting from denial of certiorari); *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *revd. sub nom, Lockhart v. McCree*, 476 U.S. 162, 176 (1986). The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in *Witt*, at 1040-42, and in *Lockhart*, at 184-206, which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

Even with a death qualification process, the Supreme Court has held that "[t]he state may not, in a capital trial, excuse all jurors who express conscientious objections to capital punishment. Doing so violates the defendant's Sixth Amendment-based right to an impartial jury and his right to due process, and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" *Witherspoon*, 391 U.S. at 521; *see also Hayes*, 21 Cal.4th at 1285. All the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams v. Texas*, 448 U.S. 38, 45 (1980). The same standard is applicable under the California Constitution. *See, e.g., People v. Guzman*, 45 Cal.3d, 915, 955 (1988); *People v. Ghent*, 43 Cal.3d 739, 767 (1987); *Heard*, 31 Cal.4th at 963.

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. *Ashmus*, 54 Cal.3d 932, 962 (1991); *see also*, *Witt*, 469 U.S. at 433 (ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole). As this Court has recently explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

Heard, 31 Cal.4th at 958, *quoting People v. Cunningham*, 25 Cal.4th 926, 975 (2001) (citations omitted). The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." *Witt*, 469 U.S. at 424.

Moreover, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court recently emphasized, when a prospective juror's views appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether his "views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror." *Heard*, 31 Cal.4th at 965. In short, the trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." *Id.* at 968.

Most recently in *People v. Stewart*, 33 Cal.4th 425, 440-55 (2004), this Court held that the trial court had committed reversible error by

excusing five prospective jurors for cause based solely an expression of general objections to the death penalty. This Court reiterated the United States Supreme Court's holding that personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case:

> Not all those 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 clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Stewart, 33 Cal.4th at 446, *quoting Lockhart*, 476 U.S. at 176. Relying also on its own opinion in *People v. Kaurish*, 52 Cal.3d 648, 699 (1990), this Court held that particularly in California, those who are opposed to the death penalty are legally qualified to serve as jurors:

> 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, supra,* 469 U.S. 412, . . . A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

Stewart, 33 Cal.4th at 446 (emphasis in original). And as this Court reaffirmed in *Heard*, 31 Cal.4th at 958, "'[t]he real question is whether the juror's views about capital punishment would prevent or [substantially]

impair the juror's ability to return a verdict of death *in the case before the juror.*'" (Citations and internal quotation marks omitted, emphasis added.)

Although, as shown, this Court has held that it is the *Adams/Witt* standard which reviewing courts must apply in evaluating a trial court's decisions, in applying *Adams* and *Witt* this Court has taken a wrong turn. It 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*, 2 Cal.4th 408, 456 (1992); *People v. Breaux*, 1 Cal.4th 281, 309-10 (1991); *People v. Frierson*, 53 Cal.3d 730, 742 (1991); *People v. Cox*, 53 Cal.3d 618 (1991). These cases all rely for this proposition on *Ghent*, 43 Cal.3d at 768, which, in turn, relies on *People v. Fields*, 35 Cal.3d 329, 355-56 (1984). *Fields* itself relied on the decision in *People v. Floyd*, 1 Cal.3d 694, 724-25 (1970). This history shows that the current rule which the Court is applying, *i.e.*, that the 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 language in *Adams*, as well as in cases the United States Supreme Court has decided since *Adams*, shows that the federal law embraces precisely the opposite rule.

As noted, *Adams* modified 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*, 448 U.S. at 45. An analysis 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, one of the *Adams'* prospective jurors, Francis Mahon, stated that she was unable to say that her feelings about the death penalty would not influence 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 3, 8.)[11] Prospective juror Nelda Coyle 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 23-24. She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." *Adams* App. at 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 27, 28. She "didn't think" she could vote for death. *Adams* App. at 27-28. Prospective juror George Ferguson admitted that opposition to capital punishment "might" effect his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would "probably" affect his deliberations. *Adams* App. at 12, 17.

In each case, the *Adams* trial court resolved the ambiguity in the State's favor, discharging them all for cause. Significantly, the United States Supreme Court did *not* defer to any of the trial court's conclusions; instead, the Court ruled that the record contained insufficient evidence to

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

justify striking any of these jurors for cause. 448 U.S. at 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." *Id.* at 49-50. In other words, when a juror gives conflicting or equivocal responses the trial court is not free simply to assume the worst and discharge the jurors for cause. The reason relates to the State's burden of proof: 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*, 448 U.S. at 45.

Seven years after *Adams*, the United States 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*, 481 U.S. 648 (1987). During voir dire in this case, 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*, 472 So.2d 409, 422 (Miss. 1985). 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 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 18. However,

when directly asked by the prosecution whether she could vote for death, she said "I don't think I could." *Id.* at 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." *Gray v. Mississippi*, No. 85-5454, Joint Appendix at 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 22. When the prosecutor again challenged Ms. Bounds, the trial court found that "she can't make up her mind." *Id.* at 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*, 481 U.S. at 661 n.10. In fact, the State explicitly made the very argument this Court has adopted, 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 22-23. In his reply, petitioner argued that where the prospective jurors' answers are equivocal, "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.

The State's position in *Gray* represents the precise view this Court adopted in 1970. *Floyd*, 1 Cal.3d at 725, *citing People v. Linden*, 52 Cal.2d 1, 22 (1959) ("Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court. [Citations.]"). As noted above, it is a view this Court has continued to follow since *Floyd*. It is also the same position the United States Supreme Court rejected, in *Adams* and in *Gray*. Just as it did in *Adams*, the Supreme Court in *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*, 481 U.S. at 661 n.10. The Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." *Id.* at 661 n.10.

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*, 408 U.S. 238 (1972) 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*, 428 U.S. 153, 181-88 (1976); *Woodson,* 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Beck v. Alabama*, 447 U.S. 625, 638 (1980). 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*, 447 U.S. at 638; *Gardner*, 430 U.S. at 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*, 476 U.S. 162, 182 (1986). 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 183. In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing." *Id.* at 183.

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*, 448 U.S. at 45. In fact, in *Gray*, the 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.

In light of *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 evolving Eighth Amendment jurisprudence on which they were based. United States Supreme Court precedent requires that where a juror is ambivalent about the imposition of the death penalty, he or she remain on the jury.

C. Application of the Adams/Witt Standard Requires Reversal Because Although the Jurors Gave Equivocal Responses, They Did Not Make Clear They Would Not Consider Death as an Option

1. The Voir Dire in This Case[12]

a. Randy Johnson

Randy Johnson (Prospective Juror No. 56) stated that he would have a great deal of difficulty believing police officers because he had personal difficulties with the Compton police. He was concerned that he could not be fair because he had these difficulties. RT 788-90. However, even given all his reservations, he thought he could put aside his reservations and follow the law about evaluating witnesses. He also said both in voir dire and in his questionnaire that he could not vote for death. RT 792. When questioned by the prosecution, Mr. Johnson said that the death penalty goes against what he stands for; he would follow the law, but he would have trouble living with himself after voting to put someone else to death. RT 796-97. He was not religious; it was just that he did not know if he could

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[12]The prospective jurors were usually referred to on the record by a number which was assigned by the trial court clerk. Sometimes however they were also referred to by name. Randy Johnson was assigned number 56 (RT 821; SCT1 000740), and Milton Trujillo was assigned number 102. RT 779; SCT1 002220. Unless the context is clear, appellant uses both name and number when referring to these prospective jurors.

"live with" the decision. RT 797. However, Mr. Johnson also said that he believed that he could follow the law. RT 793. He also indicated that he could impose the death penalty when the person murdered fifty people. RT 795. He asserted that he could follow the law if he felt it was appropriate. RT 795-96. Mr. Johnson also would not automatically disbelieve a police officer. RT 798.

b. Milton Trujillo

Milton Trujillo(Prospective Juror No. 102) was a single Hispanic 41 year old railroad worker. SCT1 002220. In his questionnaire, Mr. Trujillo stated that he was not opposed to the death penalty in all cases. When asked in the same questionnaire to give an instance where he thought that the death penalty should be imposed he wrote that the death penalty should always be used when a child was intentionally killed. SCT1 002234. He also agreed that he could review all the circumstances in the case – adding that he would have to study the case carefully because it was a "major decision." SCT1 002236. However, he was not altogether sure that he could impose the death penalty. He stated that in his questionnaire and during voir dire that he was "not sure" he could handle giving someone the death penalty, but he would "go beyond the way" he felt and make the decision, as required. SCT1 000235; RT 735. He added that he could weigh whatever was presented in making a decision following the law. RT 737. When questioned by the prosecutor, Trujillo again expressed ambivalence, stating that he was not sure he could come up with a death sentence. RT 765-66. In argument, the prosecutor stated that he thought Mr. Trujillo's questionnaire showed that he could not make a decision. The defense stated that the evidence showed was only that Mr. Trujillo was not sure. The trial court concluded from Mr. Trujillo's body language and demeanor that "his personal views would substantially impair him from

performing his duties" and granted the prosecution's motion to excuse Mr. Trujillo. RT 780.

2. Because Neither Prospective Juror Made Clear Their Views Would Preclude Them From Considering Death as an Option, They Should Not Have Been Discharged for Cause

The two prospective jurors each expressed some level of concern that their views on the death penalty would affect their 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 Johnson and Trujillo with those of the jurors held to have been improperly excluded in *Adams* removes any doubt that the exclusions in this case were improper.

In fact, Mr. Johnson expressed almost identical concerns to those expressed by prospective jurors Mahon and Coyle in *Adams*. Although Mr. Johnson had strong opinions regarding the death penalty, he agreed that there were cases, such as where someone killed fifty people, that he could impose the death penalty. RT 795. He was concerned, however, that he would have trouble living with a decision. The trial court excused Johnson, stating that he would have trouble doing "his job properly." RT 820. The trial court erred. Mr. Johnson's responses were no different from those of prospective jurors Mahon and Coyle in *Adams*. Just like those jurors, Johnson could impose death under certain circumstances. Just like those jurors, Johnson was concerned that his views on the death penalty might affect his deliberations, and his ability to live with himself. This was not sufficient reason to excuse prospective juror Johnson. As the United States

Supreme Court concluded in *Adams*, the Sixth Amendment does not permit for-cause exclusion of jurors simply because they are "unable positively to state whether or not their deliberations would in any way be affected." *Adams*, 448 U.S. at 50.

Similarly, Mr. Trujillo's responses during voir dire mirrored those of prospective juror White in the *Adams* case. Just like White, Mr. Truilljo did not think he could be personally involved in imposing the death penalty. Just like White, he was concerned that his feelings would affect his ability to deliberate. Like White, Mr. Trujillo 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*, 448 U.S. at 50. Although these jurors were not able to state that their views on the death penalty would not influence their deliberations, *Adams* establishes this will not support a challenge for cause. *Id.* at 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. *Heard*, 31 Cal.4th at 969; *Gray*, 481 U.S. at 660. Accordingly, appellant's death sentence must be reversed. Further, the unlawful exclusion of a prospective juror who is opposed to capital punishment constitutes structural error resulting in automatic reversal of the guilt phase as well, because the error infects the entire trial process. *Arizona v. Fulminante*, 499 U.S. 310 (1991).

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IV

THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN JURORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

Jeanine C. Sargeant Powell (Prospective Juror No. 86) was a 33 year old nurse with two children and was a unit secretary for a hospital in Los Angeles. SCT1 002022. Diana Tryon (Prospective Juror No. 103) was a 34 year old, married, mother of two, who had been employed for twenty years as a psychiatric nursing assistant. SCT1 001224. Alyn J. Cross (Prospective Juror No. 34) was a 36 year old divorced father of two, who had been employed for 16 years for the Department of Motor Vehicles. SCT1 000431. Leticeia Denise Henderson Hodges (Prospective Juror No. 50) was a 34 year old employee of the United States Postal Service with two children. SCT1 001669. Jacqueline Nannette Robinson (Prospective Juror No. 91) was a divorced 48 year old employee Los Angeles county also with two adult children. SCT1 002066. Patricia Ann Loflin Sheaffer (Prospective Juror No. 93) was a married 32 year old clerk at California State University with one small child. SCT1 002088. By any objective standard, these six people were respectable, solid citizens who would ordinarily be welcomed on any jury. However, all of these people were inexplicably unacceptable to the prosecution, who used peremptory challenges to exclude each and every one of them.

The prosecutor violated appellant's state and federal constitutional rights by exercising peremptory challenges to these African-American prospective jurors. Appellant objected to those challenges pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1979). The trial court overruled appellant's objection on the grounds that appellant had not made a prima

facie case that the challenges were exercised for discriminatory reasons. The finding that appellant did not make a prima facie showing that the African-American jurors named above were challenged on the basis of group association was erroneous, and reversal is required. When seen in the context of the entire record, the evidence of discriminatory intent presented here was stronger than in many cases where a prima facie case was found under *Wheeler*, *supra*, and under *Batson v. Kentucky*, 476 U.S. 79 (1986). As such, it was error not to require the prosecutor to show genuine, nondiscriminatory, reasons for the challenges. *See People v. Fuentes*, 54 Cal.3d 707, 714 (1991); *Wheeler*, 22 Cal.3d at 280-81.

The discrimination in the selection of appellant's jury violated appellant's right to equal protection under the Fourteenth Amendment of the United States Constitution and his right to a representative cross-section of the community under article 1, section 16 of the California Constitution. U.S. Const. amend. XIV; Cal. Const. art. 1, § 16; *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal.3d 258 (1979). In addition to being a violation of the Equal Protection Clause of the Fourteenth Amendment, the discrimination in jury selection violated appellant's right to a fundamentally fair and reliable trial under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. U.S. Const. amends. V, VIII & XIV. To the extent the error was one of state but not federal law, it violated appellant's right to due process by depriving him of a state-created liberty interest. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). As a consequence of the error, the death judgment must be set aside, and the case remanded for retrial, because "the exclusion of even a single juror based on race is unconstitutional and requires reversal." *People v. Jackson*, 13 Cal.4th

1164, 1254 (1996) (Mosk, J., concurring); *People v. Silva*, 25 Cal.4th 345, 386 (2001).

B. The Prosecution Challenged Six African-Americans

In the course of exercising his peremptory challenges, the prosecution, challenged five African-Americans: Prospective Juror No. 34, Alyn J. Cross (RT 909); Prospective Juror No. 50, Leticeia Denise Henderson Hodges (RT 952); Prospective Juror No. 103, Diana Tryon (RT 909); Prospective Juror No. 91, Jacqueline Nannette Robinson (RT 823); and Prospective Juror No. 93, Patricia Ann Loflin Sheaffer (RT 858).[13] Mid-way through voir dire, the prosecution used its thirteenth peremptory challenge to excuse a sixth African-American member of the venire, *i.e.*, Prospective Juror No. 86, Jeanine C. Sargeant Powell. RT 955; *see* SCT1 002088 (identifying Juror No. 86 as Jeanine C. Sargeant Powell). Following the challenge, appellant's trial counsel made a *Wheeler* motion, arguing that of the prosecution's thirteen peremptory challenges, five were exercised against female African-Americans, including Ms. Powell, and one against an African-American male. RT 956. Trial counsel noted that only one of these individuals, Leticeia Hodges, had expressed reservations about the death penalty. RT 956.

The trial court nonetheless denied the defense motion without any additional inquiry into the prosecution's motivations for his challenges. RT

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[13]The race of these jurors is identified in the juror questionnaires, made part of the record on appeal. The juror questionnaire of Alyn J. Cross (Prospective Juror No. 34) is at SCT1 000431; that of Leticeia Denise Henderson Hodges (Prospective Juror No. 50) at SCT1 001669; that of Jeanine C. Sargeant Powell (Prospective Juror No. 86) at SCT1 002022; that of Diana Tryon (Prospective Juror No. 103) at SCT1 001224; that of Jacqueline Nannette Robinson (Prospective Juror No. 91) at SCT1 002066; and that of Patricia Ann Loflin Sheaffer (Prospective Juror No. 93) at SCT1 002088.

957. In so doing, the court noted that when the prosecution had accepted the panel there had been two African-American men and two African-American women on it. He noted that the prosecution also accepted a panel with Prospective Jurors No. 49, No. 84 and No. 88 who, according to the trial court, appeared African-American. He noted that the prosecution also accepted the panel with Prospective Juror No. 13 who was "half half," according to her questionnaire. The court stated that it did not see evidence of systematic exclusion and found that appellant had not shown a prima facie case of systematic exclusion of African-Americans. RT 957-58.[14]

C. The Trial Court Erred in Finding Appellant Did Not Make Out a Prima Facie Case

1. Appellant Has Not Waived His Federal Claims

Appellant did not explicitly invoke *Batson v. Kentucky*, 476 U.S. 79 (1986) when he objected to the prosecution's preemptories. This does not waive appellant's equal protection claim under *Batson*. This Court recently held that a state challenge under *Wheeler* also preserves a federal claim under *Batson v. Kentucky*. In *People v. Yeoman*, 31 Cal.4th 93, 118 (2003), this Court stated that it would consider federal constitutional claims under *Batson*, although an objection made only under *Wheeler* because the two cases presented "identical factual issues" before the Court. Moreover, appellant has not waived his claim that the error violated his right to a fundamentally fair and reliable trial under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. This Court has routinely held that it will consider constitutional claims if a proper objection was made below, which, however, failed to include all possible

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[14]After the ruling on the *Wheeler* motion, the prosecution excused a seventh African-American Prospective Juror, Anthony Jay Ash. RT 988; *see* SCT1 000117 (identifying Anthony Jay Ash as African-American).

constitutional claims. So, in *Yeoman*, 31 Cal.4th at 117, this Court held that it would consider an claim that evidence violated the Eighth Amendment when trial counsel objected only to evidence on due process and equal protection grounds. As such, this Court must consider all of appellant's federal constitutional claims.

2. Standard of Review

In *Wheeler* this Court held that using "peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a representative cross-section of the community under article I, section 16 of the California Constitution." *Wheeler*, 22 Cal.3d at 276-77; *People v. Box*, 23 Cal.4th 1153, 1187 (2000); Cal. Const. art. 1, § 16. "Group bias" means "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *People v. Gonzalez*, 211 Cal.App.3d 1186, 1191 (1989), *citing People v. Johnson*, 47 Cal.3d 1194, 1215 (1989) and *Wheeler*, 22 Cal.3d at 276. The federal Constitution similarly proscribes discriminatory challenges on the basis of race. The State's purposeful or deliberate exclusion of individuals from participation as jurors on account of race violates the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *Swain v. Alabama*, 380 U.S. 202, 203 (1965); *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("racial discrimination in the jury selection process cannot be tolerated.").

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution. First, the defendant must make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. *Batson*, 476 U.S. at 96-97. That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has

excluded venire members from the petit jury on account of their race. *Id.* at 96. If a defendant makes this showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. *Id.* at 97. The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. *Id.* at 98.

This Court traditionally utilizes a deferential standard of review when a trial court denies a *Batson* motion without finding a prima facie case of group bias; the Court considers the entire record for evidence to support the trial court's ruling. *People v. Howard*, 1 Cal.4th 1132, 1155 (1992). The Ninth Circuit Court of Appeals, in a divided *en banc* opinion, has endorsed this deferential standard for evaluating a trial court's refusal to find a prima facie case under step one. *See Tolbert v. Page*, 182 F.3d 667, 685 (9th Cir. 1999). Several other courts have held, however, that the proper standard of review for a prima facie case ruling under *Batson* is de novo review. *See, e.g., Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992); *State v. Sledd*, 825 P.2d 114, 119, 250 Kan. 15, 21 (Kan. 1992); *State v. Butler*, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990); *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1993); *Valdez v. People*, 966 P.2d 587, 591 (Colo. 1998) (question of whether the defendant has established a prima facie case under *Batson* is a matter of law, and appellate court applies a de novo standard of review to a trial court's prima facie determination).

This Court should conduct a de novo review of the trial court's denial of appellant's motion. De novo review of the type of mixed question of fact and law presented at the step one inquiry is contemplated by *Batson*, is needed to insure uniformity of decisions, and is most appropriate to this Court's role in safeguarding the constitutional rights embodied in *Wheeler* and *Batson*. In contrast, the "considerable deference" standard appears

based on dicta regarding a trial judge's ability to make close judgments based on observations of the proceedings, understanding of trial techniques, and knowledge of local prosecutors. *Wheeler*, 22 Cal.3d at 281. The vantage point of the trial judge also caused the Ninth Circuit to favor deferential review. *Tolbert*, 182 F.3d at 684.

This reliance on the trial court's ability to observe the events at trial as supporting a deferential standard of review is misplaced at the step one stage of inquiry. The facts the reviewing courts have traditionally looked at in determining whether the defense has met its burden of production are not so individualized as to require deference to the trial court's determination. The facts that are relevant to the step one determination include the removal of most or all of an identifiable group from the venire, a disproportionate number of strikes against the group, the fact that the stricken jurors shared only their membership in the group but were otherwise as heterogenous as the community as a whole, and the failure to engage group members in more than desultory voir dire. *Wheeler*, 22 Cal.3d at 280-81; *Batson*, 476 U.S. at 96-97. Such facts are not the type of credibility or observation-based facts which the trial court is in the best position to decide, but instead are historical facts which are readily apparent and which lend themselves to preservation in the appellate record. Once documented in the record, the trial court is in no better position than an appellate court to decide the mixed question of law and fact as to whether the defense met its burden under step one.

By contrast, the step three analysis of whether the opponent of the strike has proved purposeful racially discriminatory use of a peremptory challenge is properly subject to deferential review if the trial court fulfills its duty to conduct a sensitive inquiry at stage three of the *Batson* process. *Batson*, 476 U.S. at 93; *United States v. Alanis* 335 F.3d 965, 969 n. 5

(2003); *Silva*, 25 Cal.4th at 385-86; *see also Hernandez v. New York*, 500 U.S. 352, 364 (1991) (trial court's third step *Batson* analysis entitled to deference); *People v. Arias*, 13 Cal.4th 92, 136 (1996) (trial court's third step analysis reviewed with "great restraint"). That determination, which relies on an evaluation of the race-neutral justifications offered by the prosecution, is more typically bound to observable facts unfolding at trial. The trial court is in the best position to assess the credibility and good faith of the prosecution as it exercises and attempts to justify its peremptory challenges. *See Arias*, 13 Cal.4th at 136 (de novo review would undermine the trial court's credibility determinations and would discount "the variety of [subjective] factors and considerations," which inform a trial lawyer's decision to exercise peremptory challenges). Since the step three determination is primarily a factual evaluation of the prosecution's credibility, a deferential standard of review is appropriate. *Hernandez*, 500 U.S. at 365.

However, the step one analysis warrants a different standard of review because of the different burdens of persuasion at work. Step one entails a shift in the burden of production effectuated by a reasonable inference of the discriminatory use of a peremptory challenge. The evidence of discrimination is difficult to ferret out and will seldom involve direct evidence of clear discriminatory intent. *See O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal.App.4th 563, 574-75 (1997) (in employment context, elaborate structure of burden shifting needed to ferret out employers true motives). The purpose of this series of burden-shifting mechanisms is to facilitate the fact-finder's inquiry "into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

These principles warrant a prima facie burden that is not onerous in order to ensure a full record and accurate determination on the "elusive" question of discrimination. Acknowledging that the moving party will usually be without any direct evidence of discrimination at the prima facie stage, the Supreme Court has repeatedly emphasized that a prima facie burden is low, describing it as "minimal." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (in section VII context petitioner must first make only a "minimal" showing of intentional discrimination), and "not onerous." *Burdine*, 450 U.S. at 253 (discussing burden of establishing a prima facie case of disparate treatment). The burden of production at step one does not entail an evaluation of the prosecution's credibility, but only a determination of whether the facts support a reasonable inference of the improper use of the strike. Indeed, at step one, the prosecution may remain silent and let the facts speak for themselves. *Batson*, 476 U.S. at 96-97. Thus, the step one burden of production "was intended to significantly reduce" the proof needed to raise a claim of discriminatory use of peremptory challenges, and is not the type of credibility and observation-based determination which should by necessity be yielded to the trial judge. *See Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000).

Appellate courts should reserve the ultimate resolution of this issue to themselves in order to create uniformity of decisions. This Court recently applied this standard to evaluate a mixed question of fact and law as to whether a defendant received effective assistance of counsel. *In re Resendiz*, 25 Cal.4th 230, 248 (2001). The United States Supreme Court settled on this standard for reviewing whether reasonable suspicion or probable cause support a warrantless search in cases on direct review. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996). Varied results based on similar facts is inconsistent with a unitary system of law and

"[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* at 697. These concerns have led other courts to apply a de novo standard of review to the prima facie case determination. *See Mahaffey*, 162 F.3d at 484; *Hartsfield*, 976 F.2d at 1355-56; *Sledd*, 825 P.2d at 119; *Butler*, 795 S.W.2d at 687; *Pharris*, 846 P.2d at 459; *Valdez*, 966 P.2d at 591.

Reserving the ultimate determination of whether a prima facie case has been established is also consistent with this Court's obligation to afford capital defendants meaningful appellate review. U.S. Const. amends. VIII & XIV; *Evitts v. Lucey*, 469 U.S. 387, 405 (1985); *Douglas v. California*, 372 U.S. 353, 358 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *see People v. Brown*, 46 Cal.3d 432, 446-47 (1988) ([W]e have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial). Transforming this threshold question (which merely shifts the burden of production) into an intense "factual inquiry" merges the first and third prongs of *Batson* and insulates from review a trial court's decision to reject a *Batson* challenge. *Tolbert*, 182 F.3d at 686 (McKeown, J., dissenting). Because the step one decision precedes the prosecution's duty to come forward with a neutral explanation for the challenge, it must be based on the historical facts which occur at trial, not on the credibility or perceived good faith of the prosecution. Facts which affect credibility and good faith come into play *after* the prosecution has tendered a race-neutral reason for a strike. *Id.* at p. 690; *Purkett v. Elem*, 514 U.S. 765, 768-769 (1995). The trial court's ability to perceive such facts and rule on those issues should not be accorded deference until the step three ruling.

3. *Batson* Requires Proof Sufficient to Raise an Inference of Discriminatory Purpose

a. The Federal Standard

In *Batson*, eight years after this Court's decision in *Wheeler*, the Supreme Court held that to establish a prima facie case of discrimination in jury selection the defendant must "*raise an inference* that the prosecutor used that practice [peremptory challenge] to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96 (emphasis added). In *Batson*, the Supreme Court held that a defendant may establish an equal protection violation in the selection of the petit jury based solely on the prosecution's exercise of peremptory challenges at the defendant's trial. *Id.* at 87. *Batson* adopted the now familiar three-step process, described above (*see* Argument C.2., *supra*) for determining whether the prosecution has exercised peremptory strikes with discriminatory motives.

With respect to a prima facie case in the context of jury selection, *Batson* adopted a flexible test, calling on the trial court to consider "all relevant circumstances" that might raise an inference of discrimination. *Batson*, 476 U.S. at 96-97. The Court offered a non-exclusive, illustrative list of circumstances which, considered alone or in combination with other relevant evidence, might give rise to an "inference" of discrimination. "For example, a 'pattern' of strikes against Black jurors ... might give rise to an inference of discrimination. Similarly, the prosecution's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.* at 97. Furthermore, the Court considered it relevant "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96.

The Supreme Court has explained that the purpose of this series of burden-shifting mechanisms is to facilitate the factfinder's inquiry "into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n. 8. Derived from the Court's Title VII cases, the procedural framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the ultimate question of discrimination." *Aikens v. U.S. Postal Service*, 460 U.S. 711, 715 (1983). The high Court has cautioned that reviewing courts should not obscure the crucial factual issue of discrimination with a rigid application of the tests. *St. Mary's*, 509 U.S. at 519 (the burden-shifting method was "never intended to be rigid, mechanized, or ritualistic"); *see also State v. Pharris*, 846 P.2d 454, 461 (Utah 1993) ("[The principles of *Batson*] dictate that trial courts utilize a method of factual evaluation which alleviates undue burdens of proof and which focuses on exposing any illegal discrimination"). Nor should they "make their inquiry even more difficult by applying legal rules which were devised to govern the 'basic allocation of burdens and order of presentation of proof.'" *Aikens*, 460 U.S. at 716, *quoting Burdine*, 450 U.S. at 252). The sole purpose of the proof scheme is to help courts and parties answer, "not unnecessarily evade[,] the ultimate question of discrimination *vel non*." *Aikens*, 460 U.S. at 714. These principles are equally applicable to the proof scheme administered in the *Batson* context. *See, e.g., Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) ("In detailing the particulars of the *Batson* proof scheme, we are mindful that its sole purpose is to help courts and parties answer, 'not unnecessarily evade[,] the ultimate question of discrimination *vel non*."); *Durant v. Strack*, 151 F.Supp.2d 226, 237 (E.D.N.Y. 2001) ("As the Supreme Court has acknowledged, the principle announced in *Aikens* applies with equal force in the *Batson* context.... The primary purpose of the *Batson* doctrine is to prevent invidious

discrimination in jury selection and resulting jury verdicts, and thus the crux of the issue in *Batson* claims, as in Title VII cases, is whether a discriminatory motive exists.")

These principles clearly counsel in favor of a prima facie burden that is not unduly onerous, so that there is a full record to make an accurate determination on the "elusive" question of discrimination. When a determination is made that a prima facie case has been established, the burden shifts to the opposing party to come forward with a race-neutral explanation for its challenged practice. The United States Supreme Court has said that "[p]lacing this burden of production on the defendant thus serves ... to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255-56. This enables "the factual inquiry [to] proceed[] to a new level of specificity" (*id.* at 255) such that it "now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced." *St. Mary's*, 509 U.S. at 516.

As one federal court explained, *Batson*'s requirement that the opponent show an "inference of discrimination" means just that and nothing more:

> It is sufficient to recognize that the clearly established governing legal rule pertaining to the prima facie burden announced in *Batson* is simply to be taken at face value: an inference of racial discrimination satisfies a prima facie case. Although inferences of racial discrimination defy standardization or quantification, as implicitly recognized by *Batson*, they are nonetheless self-evident and the subject of good common sense. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (commenting in the context of a Title VII action that inferences of racial discrimination are to be drawn in "light of common experience")

Overton v. Newton, 146 F.Supp.2d 267, 278 (E.D.N.Y. 2001).

b. The California Standard for Establishing a Prima Facie Case Cannot Be Squared With Batson

In its decision in *Wheeler*, this Court held that in order to establish a prima facie case of racial discrimination, the opponent of a peremptory strike must show "from all the circumstances of the case ... a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." *Wheeler*, 22 Cal.3d at 280 (emphasis added). In the next paragraph, however, the *Wheeler* court employed different words to frame the standard for review, asserting that "[u]pon presentation of this and similar evidence ... the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." *Id.* at 280 (emphasis added). The *Wheeler* opinion did not explain how the two phrases were to be understood as compatible or consistent. Thus, the inclusion of apparently inconsistent standards to describe the movant's prima facie burden gave rise to confusion among the lower courts of appeal about whether *Wheeler* required the defendant to establish a "strong likelihood" or simply a "reasonable inference" of discrimination at the prima facie stage.

Over time, the California courts – confronted by *Wheeler*'s use of apparently divergent formulations of the prima facie test – reached different conclusions about which standard correctly stated the movant's prima facie burden. *Cf., People v. Fuller*, 136 Cal.App.3d 403, 415 (1982) (*Wheeler* requires only a finding of "reasonable inference" of group bias); *People v. Bernard*, 27 Cal.App.4th 458, 465 (1994), *overruled by People v. Box*, 23 Cal.4th 1153, 5 P.3d 130, 99 Cal.Rptr.2d 69 (2000) ("reasonable inference" a lower standard than "strong likelihood").

In *Wade*, 202 F.3d at 1195-97, the Ninth Circuit observed that the California courts appeared to be employing a construction of the *Wheeler* prima facie standard that was incompatible with *Batson*, which requires that the defendant simply "raise an inference" of discrimination. In *People v. Box*, this Court responded that "in California, a 'strong likelihood' means a 'reasonable inference.'" *Box*, 23 Cal.4th at1188 n.7. Most recently, however, this Court went beyond *Box* and held that, in order to demonstrate a prima facie case of group bias, "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *People v. Johnson*, 30 Cal.4th 1302, 1318 (2003), *cert. granted Johnson v. California*, 2005 WL 32978 (U.S. Jan 07, 2005) (No. 04-6964); *see also Yeoman*, 31 Cal.4th at 115.

As will be shown, in *Johnson*, this Court continues to impose a burden of persuasion at step one more onerous than that contemplated by *Batson* in the jury selection context.[15] In *Wade*, 202 F.3d at 1192, the Ninth Circuit held that the "strong likelihood" standard, as interpreted by courts following *Bernard*, "does not satisfy the constitutional requirement laid down in *Batson*" and subjects "a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." *Id.* at 1192; *accord, Cooperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001); *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002) (California courts erroneously require a defendant to show a "strong likelihood" of discrimination to make a prima facie case). Since this higher standard was the one applicable at the time appellant's jury was selected in 1992,

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[15]The United States Supreme Court has recently granted a petition for certiorari on this very issue. *Johnson v. California*, 2005 WL 32978 (U.S. Jan 07, 2005) (No. 04-6964).

appellant's rights under *Batson* were necessarily violated by the trial court's erroneous application of that standard.

Moreover, the legal standard recently announced in *Johnson* cannot be squared with *Batson* and must be reconsidered. The principle flaw in the analysis of the *Johnson* majority is an unduly expansive reading of a footnoted referenced in *Batson* that the Court's disparate treatment decisions under Title VII "have explained the *operation* of prima facie burden of proof rules. [Citations.]" *Batson*, 476 U.S. at 94 n. 18 (emphasis added); *Johnson*, 30 Cal.4th at 1314-15. The majority presumes that the emphasized term requires adoption not only of the burden shifting procedures the high Court set forth in its Title VII cases, but also of the quantum of proof employed in those cases to shift the burden of production at trial to the defendant. This presumption does not withstand careful scrutiny. Appellant will not here reiterate the well-reasoned dissent of Justice Kennard on this point (*see* 30 Cal.4th at 1333-41), incorporated by reference herein. In *Johnson,* this Court set the bar too high; by severely restricting opportunities for the trial court to "undertake a factual inquiry" (*Batson*, 476 U.S. at 95), the burden of persuasion placed on the objector at step one will help conceal rather than reveal whether the proponent is of a mind to discriminate. To require this burden of persuasion on the merits at step one will inhibit the trial courts and the reviewing courts of this State in their efforts "to combat the pernicious effects of racial and other improper discrimination" in jury selection (*see Johnson*, 30 Cal.4th at 1328). Such requirement is contrary to *Batson* and its progeny.

4. The Trial Court Erred in Failing to Find That Appellant Established a Prima Facie Case

Under either federal standard, or the California standard, appellant carried his burden of establishing a prima facie case of race-based

peremptory challenges, and the trial court erred in failing to so find. The facts in the record clearly raised such an inference. Because the right to a jury representing a "cross-section" of the community is so important, courts reviewing whether a prima facie case has been made under *Wheeler/ Batson* should "err on the side of the defendant's right to a fair and impartial jury." *United States v. Chinchilla*, 874 F.2d 695, 697 (9th Cir. 1989).

First, African-Americans are a cognizable group for *Wheeler/ Batson* purposes. *Batson v. Kentucky*, 476 U.S. 79 (1986). Second, it is significant that this was an interracial offense – one of the victims in this case was African-American, one was white. Studies have shown that the risk of racial prejudice is particularly great in cases involving interracial crimes. *See* Nancy J. King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev.63, 81-82 (1993). Therefore, in assessing a prima facie showing under *Batson*, courts have taken into account the fact that the case involved an interracial offense or "racially-sensitive issues." *See, e.g., Mahaffey v. Page, supra*, 162 F.3d at 484 ("And lest we forget, the crimes at issue in this case were obviously racially-sensitive – Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a White couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to *Mahaffey's* defense at trial, as well as to his arguments in mitigation at the capital sentencing phase"); *Jones v. Ryan*, 987 F.2d 960, 971 (3rd Cir. 1993) (taking into account that defendant was charged with a violent offense against a white victim in finding a prima facie case); *Williams v. Chrans*, 945 F.2d 926, 944 (7th Cir. 1991) ("In a case where the defendant is Black and the victim is White, we recognize, at the prima facie stage of

establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many White jurors as possible in order to enlist any racial fears or hatred those White jurors might possess.").

Third, the prosecution exercised a peremptory challenge against several jurors, notwithstanding the fact that their answers strongly favored the prosecution. For example, Alyn Cross stated that he favored the death penalty for repeat offenders (SCT1 000443), which was a factor the prosecution would later use in support of the death penalty. *See* RT 4883 (prosecution's penalty phase closing argument). Jacqueline Nannette Robinson had a friend who was on the Compton Police Department (SCT1 002066) and could therefore be expected to be sympathetic to the prosecution. "[C]hallenging particular members of a protected group who might otherwise be expected to favor the proponent of the challenge because of their backgrounds might raise an inference of discrimination." Bennett L. Gershman, *Trial Error and Misconduct* at 266 n.163 (1997), *citing People v. Bolling* 591 N.E.2d 1141 (N.Y. 1992) (two of four black potential jurors removed by prosecution had favorable prosecution backgrounds).

Fourth, the excluded jurors had little more than their group membership in common. *See Wheeler*, 22 Cal.3d at 280; *People v. Turner*, 42 Cal.3d 711, 719 (1986). The jurors were from diverse backgrounds and from a variety of professions. Two were nurses with children. (Jeanine C. Sargeant Powell and Diana Tryon); some were married, some were not. Most were women, but one was a man. (*See*, IV.A., *supra.*) One had gone only to high school (*see* SCT1 002067; most some had some higher education (*see* SCT1 002023; SCT1 001670; SCT1 001225; SCT1 000432; SCT1 002089. All were gainfully employed, something which likely did

not serve as a reason for the prosecution to excuse them. They had different opinions about what the causes for crime were; they had different experience with the criminal justice system; they had different attitudes to law enforcement. *See* SCT1 002090-92, SCT1 002068-70, SCT1 002024-26, SCT1 001671-73, SCT1 001227-29, SCT1 000433-35. They were a diverse set of people, any of which would have made perfectly fine jurors.

A final factor on which a defendant is entitled to rely in establishing a prima facie case is the fact, "as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits. 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (citation omitted). Considered together, these factors established the "inference" of discrimination required by *Batson*. The factors also establish that it was more likely than not that the prosecution's use of peremptory challenges was based on impermissible group bias. *Johnson*, 30 Cal.4th at 1318. In light of the facts available to the trial court, the trial court had "a duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. Appellant raised an inference that the prosecution had excluded the six African-Americans on account of race and the burden should have shifted to the prosecution to articulate a race-neutral explanation of the peremptory challenges in question. The trial court's failure to find that appellant had established a prima facie case of discrimination with respect to the challenges violated *Batson* and *Wheeler*. The trial court's erroneous denial of appellant's *Wheeler* motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution (*Batson,* 476 U.S. at 98) as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. *Wheeler*, 22 Cal.3d at 258. Reversal of appellant's convictions and judgment of death is required.

V

THE DEATH SENTENCE MUST BE REVERSED BECAUSE OF PROSECUTORIAL MISCONDUCT DURING VOIR DIRE

A. The Prosecution Has a Unique Role

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction. . . ." *People v. Andrews*, 14 Cal.App.3d 40, 48 (1970). A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the State. *People v. Hill*, 17 Cal.4th 800, 819 (1997). As the United States Supreme Court has explained,

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Clearly, "[t]he prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993); *accord United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate

the right of people as expressed in the laws that give those accused of a crime a fair trial.").

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the Due Process Clause of the Fifth and Fourteenth Amendments. *Darden v. Wainwright*, 477 U.S. 168, 178-79 (1986); *Donnelly*, 416 U.S. at 643. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." *Hill*, 17 Cal.4th at 819 (internal quotations omitted). Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. *Darden*, 477 U.S. at 178-79. In addition, 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," even if such action does not render the trial fundamentally unfair. *Hill*, 17 Cal.4th at 819; *People v. Earp*, 20 Cal.4th 826, 858 (1999). A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. *Hill*, 17 Cal.4th at 822-23 n.1; *People v. Smithey*, 20 Cal.4th 936, 961 (1999). When a claim of misconduct focuses upon comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." *People v. Samayoa*, 15 Cal.4th 795, 841 (1997); *Smithey*, 20 Cal.4th at 960.

B. The Prosecution Made Statements During Voir Dire Undermining the Presumption of Innocence

During voir dire a number of jurors expressed confusion about the presumption of innocence. Both the prosecution and defense questioned

prospective jurors about the presumption. During the prosecution's questioning, the district attorney explained the presumption as follows:

> Totally unrelated to this case, suppose you drive home or you drive home today and you decide to stop off at Von's market or Ralph's market or one of the markets. You go inside. You want to get some milk and some bread. You're waiting in the line to buy your food. There is a person directly in front of you appearing to also want to buy food.
>
> Once that person gets up to the cash register, this person pulls out a gun and says to the cashier, "give me the money."
>
> The cashier does not respond fast enough and this person shoots and kills the cashier and leaves. . . . .
>
> That person, if that person could be caught, would be prosecuted for murder. But that person would be presumed innocent, even though you saw it happen right before your eyes. The law places this legal presumption that that person is presumed innocent until one of two things happens.
>
> One, the person comes into the courtroom and says, "I'm guilty," or, two, 12 jurors decide that he's guilty. And until and unless that occurs, that person is presumed innocent and it wouldn't matter if just you by yourself witnessed it or if there were 40 people in the line and 40 people observed it.

RT 598. Defense counsel immediately objected to these statements. RT 599. The trial court overruled the objection. Immediately following the ruling, the court explained that the presumption of innocence applies in the case prosecution described, but that the men and women here would not be jurors on a case like that because someone would not be a juror in a case they witnessed. RT 599. Later in a bench conference, defense counsel noted that the reason he objected during the prosecution's presumption of innocence discussion was the assumption not that if they witnessed a robbery they would not be sitting jurors. Rather, the prosecution's comments said to the jury that even guilty people have the presumption of innocence, which defense counsel argued was improper. RT 660. The trial judge disagreed and stated that he thought that guilty people did have a

presumption of innocence. In his view, everyone has the presumption of innocence and "[t]hen it's whether or not the proof is beyond a reasonable doubt in the mind of the jurors." RT 660.

In his motion for a new trial, defense counsel argued that misconduct of the prosecution diluted the presumption of innocence and required a new trial. CT 1180-1202. The defense motion for new trial was denied. RT 5010.

C. The Remarks Were Misconduct Requiring Reversal

The remarks the prosecution made to the jury were misconduct because they undermined the presumption of innocence. The presumption of innocence serves, first, "as a corollary to the standard of proof in a criminal case," serving "to remind the jury that the prosecution bears the burden of persuading the fact-finder of the defendant's guilt beyond a reasonable doubt and that in the absence of such proof that the jury must acquit." *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973); *In re Winship*, 397 U.S. 358, 364 (1970). However, the presumption of innocence has a second function apart from its reenforcement of the burden of proof: "'[The presumption of innocence] cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.'" *Id.* at 364, *citing* 9 Wigmore on Evidence § 2511, at 407 (3d ed. 1940).

The prosecution's comments that the presumption of innocence applies to guilty people diluted the presumption of innocence by suggesting to the jury that it did not need to put aside any bias they might have against appellant due to the fact that he stood in front of them indicted and accused by the prosecution of a crime because there was a significant possibility that he was actually guilty, just like the murderer of the cashier in the

prosecution's example. The harm of this example was compounded by the fact that in the same example the prosecution argued that the defendant could be found guilty if the jury indeed found him guilty, neglecting also mention that it is the prosecution that bears the burden of proving beyond a reasonable doubt that a defendant is guilty. The task of the jury was to set aside all bias associated with appellant appearing in front of them accused by the State, to presume he was innocent, and, starting from that clean slate, determine whether or not he was guilty, which it could only do if the prosecution proved such beyond a reasonable doubt.

The prosecution's misstatement of law on these critical matters was misconduct. *See United States v. Shwayder*, 312 F.3d 1109, 1121 (9th Cir. 2002) ("the [prosecution's] use of guilt-assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process."); *see also United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1990) (misconduct to suggest that a defendant is being prosecuted because he is guilty).

Because the prosecution's statements eroded the presumption of innocence and the prosecution's burden of proof, the effect of the misconduct was to violate appellant's rights to due process of law, proof beyond a reasonable doubt, the presumption of innocence, a fair jury trial and a reliable and nonarbitrary penalty determination, as guaranteed by the state and federal constitutions. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Donnelly*, 416 U.S. at 643; *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *People v. Bell*, 49 Cal.3d 502, 534 (1989); *Hill*, 17 Cal.4th at 819; *Winship*, 397 U.S. at 364.

Because the prosecution's remarks eroded the burden of proof to a standard less than beyond a reasonable doubt, the error is structural and

requires reversal per se. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). However, even assuming that the error was not structural, because the misconduct deprived appellant his rights guaranteed by the United States Constitution, review is required under the standard of *Chapman*, 386 U.S. at 24, and reversal is mandated unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. *People v Bolton*, 23 Cal.3d 208, 214-15 n.4 (1979); *Hill*, 17 Cal.4th at 819. The watering down of the presumption of innocence also violated appellant's Eighth Amendment right to a reliable, individualized, and non-arbitrary sentencing determination. *Sumner v. Shuman*, 483 U.S. 66, 85 (1987); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). If the prosecution had not engaged in the misconduct, it is likely either that appellant would have not been found guilty or that a life sentence would have been imposed. Therefore, the misconduct must be deemed prejudicial, and the judgment must be reversed.

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ERRORS RELATING PRIMARILY TO THE GUILT PHASE AND SPECIAL CIRCUMSTANCES

VI

THE TRIAL COURT'S REFUSAL TO SEVER FACTUALLY-UNRELATED MURDER CHARGES VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS

A. Introduction

Appellant was tried jointly on three counts of first-degree murder, one of which, the Carlos Adkins homicide, was completely unrelated to the other two, the homicides of the Compton police officers. The resulting trial was fundamentally unfair because appellant was forced to defend against the combined weight of the two sets of unrelated homicides at the same time. The inflammatory impact of the joint trial overwhelmed the jurors' ability to weigh the evidence on each charge, so that there is a significant likelihood that they returned first degree murder verdicts on charges although the evidence was weak. As such, appellant's trial violated the rule that joinder "must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." *Williams v. Superior Court*, 36 Cal.3d 441, 448 (1984); *Calderon v. Superior Court*, 87 Cal.App.4th 933, 939 (2001). The trial court twice denied motions to try the crimes separately. CT 777; RT 93. It was an abuse of discretion to deny severance on that basis, because the court did not "analyze realistically the prejudice which [would flow] from joinder in light of all the circumstances. . . ." *People v. Smallwood*, 42 Cal.3d 415, 425 (1986). Appellant's convictions and death judgments must be reversed because "joinder actually resulted in 'gross unfairness' amounting to a denial of due process." *People v. Mendoza*, 24 Cal.4th 130, 162 (2000), *quoting People v. Arias*, 13 Cal.4th 92, 127 (1996); U.S. Const. amends. V & XIV; Cal.

Const. art. 1, §§ 15 & 16. The results deprived appellant of a fair and impartial trial, due process and equal protection. U.S. Const. amends. V, VI & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998); *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991). Because the joint trial also influenced the penalty determination to appellant's detriment, appellant was also denied his federal and state constitutional rights to a fair, reliable and non-arbitrary penalty determination. U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, §§ 16 & 17; *see Woodson v. North Carolina*, 428 U.S. 280 (1976).

B. Trial Counsel Moved to Sever an Unrelated Homicide Count

Appellant was charged with three weapons counts and three homicides. Shortly after the beginning of trial, defense counsel moved to sever the trial on count one, the Carlos Adkins homicide, from that of counts two and three, the counts involving the homicides of Officers MacDonald and Burrell. CT 675-87. In his moving papers, defense counsel argued that the charges relating to the murder of the police officers were extremely inflammatory, so much so that the mere fact "that the defendant was charged with such a crime was likely to inflame the jury against the defendant." CT 680. He also contended that because a nine millimeter handgun was involved in all of the charges, the homicide of Carlos Adkins, that of the two officers and two separate weapons charges, there was a danger that if the jury concluded that appellant was guilty of killing the police officers, it would "automatically and necessarily infer that the defendant is guilty in the Adkins murder. . ." CT 680. Because the evidence relating to the Adkins' homicide was "relatively weak," (CT 681) defense counsel asserted that, the jury would conclude that appellant was culpable for this homicide due to the "spill-over" effect of the evidence

relating to the other counts. CT 682. Trial counsel also emphasized that severance should be granted because "the potential sanction faced by the defendant is the most serious the law proscribes." CT 683. At the hearing on the motion, counsel added that although there was the possibility that appellant could testify in the trial of Adkins' homicide in connection with a self-defense or an imperfect self-defense case, he would not do so in connection with the police officer counts, leaving the jury with the impression that "he has got something to hide with respect to the two counts involving the officers." RT 83. The trial court denied the motion to sever count one from counts two and three.[16] RT 93.

Defense counsel later renewed his motion to sever the murder counts, in which he added information relating to the prejudicial impact of trying the two cases together. CT 814-17. Counsel noted that since the date the trial court denied the first motion he had been informed by the prosecution that it would introduce evidence of a statement allegedly made by appellant, which arguably connected him to a fourth murder, that of Andre Chappell, a witness in the Carlos Adkins homicide. The prosecution told him that prosecution witness Bernard Dickson would testify that appellant had threatened him with the statement "you know what happened to Andre,"in relation to Dickson's pending testimony in a preliminary hearing on the matter. CT 815. The prosecution also intended to introduce evidence that Andre Chappell had indeed been shot to death. Trial counsel argued that the evidence supposedly connecting appellant to a fourth killing required severance of the Adkins' homicide from the other cases. At the

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[16]Defense counsel also moved to sever the counts four and five which arose from a gun incident on May 23, 1992, from the rest of the case. CT 688-92. The trial court also denied this motion. RT 111. Subsequently, appellant pled guilty to counts four and five. CT 826; RT 459-60.

hearing on the renewed motion, defense counsel argued that the trial court should reconsider its decision to deny severance because admission of evidence suggesting that Andre Chappell had been killed by appellant because Chappell was a potential witness in the case made it all the more likely that the jury would be prejudiced if the three other murders were tried together. In addition, trial counsel argued that the prejudicial impact of trying the two cases together was increased by possible evidence from prosecution witness Calvin Cooksey to the effect that Cooksey held appellant responsible for the murder of his mother. According to trial counsel, the upshot of having the two cases tried together was that appellant would really to be tried for the death of five people. RT 392. The trial court denied the renewed motion without comment. RT 408.[17]

C. Legal Standards for Severance

California Penal Code section 954, which governs joinder and severance of counts under California law, provides that while "an accusatory pleading may charge . . . two or more different offenses of the same class of crimes" jointly, trial courts have discretion to "order [that they will] be tried separately . . . ."[18] Cal. Pen. Code § 954. That provision

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[17]Appellant argues below that the admission of the Dickson's testimony about his conversation with appellant without limitation was reversible error. *See* Argument XI, *infra*. He also argues that the admission of testimony about Andre Chappell's shooting death was error. *See* Argument XII, *infra*.

[18]Proposition 115, which is applicable to cases, like this one, tried after January 27, 1990, "included several new constitutional and statutory provisions on the subject of joinder and severance." *People v. Arias*, 13 Cal.4th 92, 126 n.7 (1996). Among those were section 954.1, and article 1, section 30, subdivision (a) of the California Constitution. Cal. Pen. Code § 954.1; Cal. Const. art. 1, § 30(a). However, as this Court indicated in *Arias*, *supra*, those provisions did not "materially change[] the law" concerning

(continued...)

reflects a "recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." *People v. Bean*, 46 Cal.3d 919, 935 (1988).

Whether to sever counts is within the trial court's discretion (*People v. Bradford*, 15 Cal.4th 1229, 1315 (1997)), but where the charges include capital murder, and particularly where "joinder *itself* [] gives rise to the special circumstance allegation of multiple murder," the exercise of that discretion is reviewed with the highest degree of scrutiny. *Williams*, 36 Cal.3d at 454 (emphasis in original).[19] Indeed, severance "may be *constitutionally* required if joinder . . . would be so prejudicial that it would deny the defendant a fair trial." *People v. Musselwhite*, 17 Cal.4th 1216, 1243-44 (1998) (emphasis in original). Courts have recognized that a consolidated trial can potentially deprive the defendant of due process. *See, e.g., In re Anthony T.*, 112 Cal.App.3d 92, 101-02 (1980); *People v. Burns*, 270 Cal.App.2d 238, 252 (1969).

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[18](...continued)
severance. *Arias*, 13 Cal.4th at 126 n. 7. Thus, while section 954.1 states that "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together," that statement appears to do no more than codify the preexisting rule that "cross-admissibility is not the sine qua non of joint trials." *People v. Marquez*, 1 Cal.4th 553, 572 (1992).

[19]While "the law prefers" consolidation (*see, e.g., People v. Ochoa*, 19 Cal.4th 353, 408), the grounds which generally support consolidation do not apply. Consolidation "ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts [are] tried" in separate trials. *Ochoa*, 19 Cal.4th at 408. However, by moving to sever the cases, appellant implicitly waived any claim that separate trials would constitute harassment. CT 675-86; *see Williams*, 36 Cal.3d at 451. In addition, the same facts would not have been retried in separate trials, because the facts relevant to the various charges were almost completely distinct.

When the statutory requirements for joinder are met, the defendant can show ". . . error in denying severance only on a clear showing of potential prejudice." *People v. Osband*, 13 Cal.4th 622, 666 (1996). This Court has articulated four factors used to assess whether a trial court's refusal to sever counts constituted an abuse of discretion: (1) evidence of the jointly-tried crimes would not be cross-admissible at separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the spillover effect of aggregate evidence on several charges might alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. *People* v. *Sandoval*, 4 Cal.4th 155, 172-73 (1992); *see Williams*, 36 Cal.3d at 448. Moreover, even if a trial court does not abuse its discretion by joining separate counts, reversal is still required if that procedure resulted in "'gross unfairness,' amounting to a denial of due process." *Arias*, 13 Cal.4th at 127; *Mendoza*, 24 Cal.4th at 162.

For erroneous failure to sever counts to be reversible error under federal law, it must have "result[ed] in prejudice so great as to deny [the defendant's] Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1985) (Misjoinder rises to the level of a constitutional violation if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.); *Bean*, 163 F.3d at 1083. That is, it must have rendered the trial "fundamentally unfair," in violation of due process. *Featherstone*, 948 F.2d at 1503; *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

Federal courts have recognized that "'a high risk of undue prejudice [exists] whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would

otherwise be inadmissible.'" *Bean*, 163 F.3d at 1084, *quoting United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). This is because jurors at a joint trial cannot adequately "compartmentalize" damaging information about the defendant, and because such a trial often "prejudice[s] jurors' conceptions of the defendant and of the strength of the evidence on both sides of the case." *Lewis*, 787 F.2d at 1322; *Bean*, 163 F.3d at 1084.

The risk of prejudice is higher when charges are joined because they are similar, rather than "based on the same transaction," or "connected together or constituting parts of a common scheme or plan . . . ."[20] *United States v. Pierce*, 733 F.2d 1474, 1477 (11th Cir. 1984); *United States v. Halper*, 590 F.2d 422, 430 (2nd Cir. 1978). But the risk of prejudice is always high at a joint trial because jurors are prone to regard a defendant charged with multiple crimes "with a more jaundiced eye" (*United States v. Smith*, 112 F.2d 83, 85 (2nd Cir. 1940); *see also United States v. Lotsch*, 102 F.2d 35, 36 (2nd Cir. 1939)), and to conclude "that [he] must be bad to have been charged with so many things,"and may convict on one count based on evidence which only applies to another. *United States v. Ragghianti*, 527 F.2d 586, 587 (9th Cir. 1975).

D. The Trial Court Erroneously Failed to Sever the Charges

Because appellant conceded at trial that the statutory requirements for joinder had been met as to the homicides (*see* CT 678), he was required to make "a clear showing of potential prejudice" in support of his motion for separate trials on each of them. *Bradford*, 15 Cal.4th at 1315; Cal. Pen. Code § 954; *see People v. Catlin*, 26 Cal.4th 81, 110 (2001). To determine

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[20]Federal Rules of Criminal Procedure 8(a) provides that offenses may be joined only "if [they] . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. Rules Crim. Proc., rule 8(a).

whether appellant made that showing, this Court must "examine the record before the trial court at the time of its ruling." *Mendoza*, 24 Cal.4th at 161. It must apply a four-factor articulated above: was evidence on one or more of the charges cross-admissible as to any of the others; were any of the charges particularly inflammatory; did some of the charges involve the death penalty; and was a weak charge joined with a strong one, creating a spillover effect? *People v. Cunningham*, 25 Cal.4th 926, 985 (2001); *People v. Sully*, 53 Cal.3d 1195, 1222 (1991).

Whether the evidence of the charges was cross admissible is still a key consideration in deciding whether it was proper to join them for trial. *People v. Memro*, 11 Cal.4th 786, 850 (1995). If "[j]oinder is generally proper when the offenses would be cross-admissible in separate trials" (*Arias*, 13 Cal.4th at 126), it follows that joinder is less inappropriate where the evidence is not cross-admissible.[21] *See Lewis*, 787 F.2d at 1322. Moreover, a joint trial on charges that are not cross-admissible is not necessarily more efficient than separate trials would be, and it is only the supposed efficiency of joint trials which offsets the high risk of prejudice they pose. *Lewis*, 787 F.2d at 1322; *see also Bean*, 163 F.3d at 1084; *Lotsch*, 102 F.2d at 36.

Evidence of separate charges is cross-admissible and supports joinder, if there is an "evidentiary connection" between the charges, as when they have distinctive "common marks" supporting an inference about

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[21]While section 954.1 "prohibits the courts from rejecting joinder strictly on the basis of lack of cross-admissibility of evidence" (*Belton v. Superior Court*, 19 Cal.App.4th 1279, 1285 (1993)), nothing in section 954.1, or the cases construing it, suggests that the absence of cross-admissible evidence does not support an argument that the cases should not be joined. *See Osband*, 13 Cal.4th at 667 (section 954.1 "codifies" the rule that the lack of cross-admissible evidence is not sufficient to establish prejudice).

identity, motive, or another material fact (*Bean*, 46 Cal.3d at 936-38), or when evidence on one charge "logically support[s]" an inference of guilt on another. *Arias*, 13 Cal.4th at 128.

No such connection existed in appellant's case because the charges were unrelated. *See* RT 92. None of the substantive evidence of the two sets of homicides was cross-admissible in any significant way; the offenses were "unrelated" offenses, with different settings, victims, and alleged motivations. *See Calderon*, 87 Cal.App.4th at 939 (a "problem of prejudice" arises when jurors are exposed to evidence of crimes that are "entirely separate episode[s]"].) Thus, these shootings may have been "similar," in the most general sense, because in each case a man shot a man with 9 millimeter gun, in Los Angeles County, but this Court has never suggested that such quotidian similarities between crimes make their evidence cross-admissible. *Cf. Bean*, 46 Cal.3d at 935-37; *Catlin*, 26 Cal.4th at 110-12 (evidence is cross-admissible on identity and modus operandi if the crimes have "distinctive common marks").

Thus, while respondent may argue that the evidence of these shootings was cross-admissible because they were generally similar, this Court rejected a similar argument in *Bean*, *supra*, which involved crimes that were substantially more similar than these. The murders in *Bean* occurred only about 10 to 12 blocks, and three days, apart; both victims were older women who were assaulted at home and sustained head wounds, and the cars of both victims were stolen and abandoned in the same area. *Bean*, 46 Cal.3d at 937. This Court said that even such a relatively high degree of similarity was insufficient to show a "common modus operandi and thus [to] warrant[] an inference that the same person committed each" crime, and found that the evidence was not cross-admissible. *Bean*, 46

Cal.3d at 938. Here, there was nothing close to that degree of similarity between the charged crimes.

For the evidence of separate crimes to be cross-admissible on the issue of identity, the way they were committed has to be so similar as to "amount to a signature." *People v. Kipp*, 18 Cal.4th 349, 370 (1998); *Catlin*, 26 Cal.4th at 111. For evidence of separate crimes to be cross-admissible to show a common plan or design, they must have "such a concurrence of common features that [they] are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Catlin*, 26 Cal.4th at 111, *quoting People v. Ewoldt*, 7 Cal.4th 380, 402 (1994). The crimes in appellant's case clearly did not meet those standards, because they involved few, if any, "distinctive marks." *Bean*, 46 Cal.3d at 937. The few common features they had were not "distinctive," since a high percentage of all homicides involve similar features. *See* James Allen Fox & Marianne W. Zawitz, *Homicide Trends in the United States*, Bureau of Justice Statistics Web Site, http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm (accessed Nov. 29, 2004) (both the perpetrators and the victims of approximately 65% of homicides are male, and handguns are the most commonly-used weapons in homicides). Moreover, even if these crimes were generally similar, in those few, unremarkable ways, the evidence as to each one was completely distinct. There were no common lay or law enforcement witnesses to the two sets of crimes.

Especially because the evidence of the two sets of killings was not cross-admissible, this Court must weigh the prejudicial effect of joinder against the benefits of that procedure, a "highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." *Williams*, 36 Cal.3d at 451-52; *Smallwood*, 42 Cal.3d at 425-26. In that weighing, the Court must consider other factors used to determine

whether joinder poses a substantial risk of prejudice (*Mendoza*, 24 Cal.4th at 161), including whether "certain of the charges are unusually likely to inflame the jury against the defendant; [] a 'weak' case has been joined with a 'strong' case; and [] any one of the charges carries the death penalty." *Cunningham*, 25 Cal.4th at 985. Here, all of those factors indicated that joinder was likely to be prejudicial.

One of the crimes, that of the shooting of the police officers, involved far more inflammatory facts than were present in of the Adkins homicide. As the prosecution emphasized again and again, the officers in this case were supposedly shot execution style and were shot in a premeditated and deliberate manner solely because the perpetrator not only did not wish to be arrested, he did not want to leave any witnesses. *See, e.g.*, RT 4868-69, 5017. Moreover, it was clear from the beginning that the trial on the officers' deaths would evoke emotional responses from the community and the family. As the trial counsel observed, it was anticipated that appellant's trial would be attended by numerous Compton police officers, who would be there in uniform to support their fallen comrades. *See* RT 4868. By way of contrast, the Adkins' murder was much less inflammatory, possibly the result of a misunderstanding or a mis-communication. Thus, it was clear that Bernard Dickson, for instance, would testified that appellant had mistaken him for another person prior to the incident. RT 1298-1301. It was also clear that the defense intended to show that Carlos Adkins could have overreacted to the situation with appellant because of his PCP intoxication. This was part of a defense that appellant acted in self-defense or in imperfect self-defense. *See* RT 242-46 (discussion of admissibility of evidence that Adkins' had PCP in his system). As this Court has made clear, the issue is not necessarily whether the jury would have its passions aroused more by one crime than the others,

but rather whether the jury can be expected to try both, or in this case, all three crimes fairly. Because the police officer murders were so inflammatory, this factor weighed against joining these charges. *See People v. Mason*, 52 Cal.3d 909, 933 (1991) (it can be error to join an inflammatory charge with a less-egregious one "under circumstances where the jury cannot be expected to try both fairly").

The *Williams* decision also recognizes that it is prejudicial to join weak charges with strong ones, because the latter may bolster the former. Thus, this Court has said that only when the evidence of each count is "overwhelming" can a reviewing court be confident that joinder was not prejudicial. *See, e.g., People v. Odle*, 45 Cal.3d 386, 404 (1988) ("overhelming"); *People v. Lucky*, 45 Cal.3d 259, 278 (1988) ("extremely strong"). The evidence in this case did not meet that standard. In appellant's case, this Court can know for certain that the evidence from one case was being used to bolster the other because we know that the witnesses themselves were doing so. For instance, prior to the preliminary hearing, eyewitness Janice Chappell testified she was not able to positively identify appellant as the person who shot Carlos Adkins. CT 374-75; RT 1226. Moreover, she was not able to recall her previous identification of appellant. She only identified "Regis" as the perpetrator of the Carlos Adkins killing because she saw him on television when he turned himself in for the killings of the two police officers. CT 379; *see* CT 681-82. "The potential for spill-over" is this case was extreme as evidenced by Ms. Chappell's own testimony regarding her identification of appellant after she knew about his involvement in the police officer case.

Because these charges were capital offenses, this Court must "analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." *Williams*, 36 Cal.3d at 454; *see*

also Lucky, 45 Cal.3d at 277; *Smallwood*, 42 Cal.3d at 430-31. For the same reason, the trial court was required to assess the likely effect of joinder, and carefully weigh whether any likely conservation of judicial resources outweighed the prejudicial impact of that procedure. This factor also supported appellant's request for separate trials in another sense, because if the killings had been tried separately they likely would never have led to first degree murder verdicts, let alone to death sentences. Although two of the charges in this case (the police officer killings) carried the possibility of death penalty, all three involved issues that could have led to lesser verdicts if they were tried separately; *i.e.*, whether appellant was acting in self-defense as with the Adkins case, or was really the shooter (or possibly acted impulsively) in the case of the Compton officers.

After considering the four factors enumerated above, the trial court was required to weigh the potential prejudice against the benefits of joinder. *Bean*, 46 Cal.3d at 936; *Smallwood*, 42 Cal.3d at 430-31. If the court had properly performed that weighing, it would have realized that a joint trial would not yield any substantial benefits. These cases essentially had no common witnesses, and none whose testimony would have to be repeated at separate trials. Since the evidence of the charges was not cross-admissible, "there simply was no significant judicial economy to be gained from joinder." *Smallwood*, 42 Cal.3d at 430. Here, as in *Smallwood*, "'[t]he only real convenience served by permitting joint trial of [these] unrelated offenses against the wishes of [appellant] was the convenience of the prosecution in securing a conviction.'" *Id.* at 430, *quoting United States v. Foutz*, 540 F.2d 733, 738 (4th Cir. 1976). Moreover, even if separate trials would have involved additional time and expense, they would have been *more* efficient in the most important sense, because they would have produced more reliable verdicts, untainted by the prejudicial effect of

exposing the jury to evidence of other crimes. *See Smallwood*, 42 Cal.3d at 428. And, of course, "the pursuit of judicial economy must never be used to deny a defendant his right to a fair trial." *Williams*, 36 Cal.3d at 451-52.

E. Joining the Charges Made the Trial Fundamentally Unfair

Reversal of the convictions and death sentences is required because joinder "resulted in 'gross unfairness' amounting to a denial of due process." *Arias*, 13 Cal.4th at 127. These death verdicts were the product of a "spillover effect" of just the kind that supports severance of unrelated charges. *See Lewis*, 787 F.2d at 1322; *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964). Thus, even though the evidence of premeditation and deliberation, and identity, was doubtful on the charges, the combined weight of the evidence convinced the jurors to convict appellant of all murder counts. In fact, the prosecutor encouraged the jurors to cumulate the evidence of charges. In his guilt phase opening statement, he told the jury that all three killings were with a nine-millimeter gun. RT 1120. He noted that the witness Andre Chappell was also shot with a nine-millimeter. RT 1128. This was done to suggest that the same person killed the three victims. Even more important, because the cases were tried together, the jury heard evidence that appellant was potentially involved in not three, but five killings, *i.e.*, Adkins, the officers, Andre Chappell and Cooksey's mother. *See* Argument I, *supra*.

Additionally, the cases should have been severed because of the possibility, articulated by appellant's trial counsel in argument, that appellant might testify in one of the cases (the Adkins matter) but not in the other. RT 83. In *Cross v. United States*, 335 F.2d 987, 989 (DC Cir. 1964), Justice Bazelon held that it was reversible error to fail to sever charges when the defendant wished to testify in one of the cases, but not the other

and when it is clear that the two events are distinct in place and time. Justice Bazelon held that prejudice in erroneously joining offenses (and in failing to sever them) "has consistently been held to occur when . . . (joinder) embarrasses or confounds an accused in making his defense." *Id.* at 989. According to Justice Bazelon, any decision whether to testify:

> will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Id. at 989 (footnotes omitted).

This Court has rejected the proposition that the accused can testify on one or more joined counts, but remain silent on others without incurring the penalty of compelled self-incrimination or adverse comment on his failure to testify. *People v. Perez*, 65 Cal. 2d 615, 621-22 (1967). This would seriously damage the defendant in the jury's eyes. *See* Comment, *the Testifying Defendant--a Proposed Rule of Limited Waiver for the Trial of Joined Offenses*, 10. 118 U. Pa. L. Rev. 424, 425-28 (1970) (noting that in California a defendant can be compelled by joinder of offenses and the right of the prosecution to cross-examine "to choose between costly alternatives. He must either take the stand and risk cross-examination concerning counts on which he wished to remain silent, or he must sacrifice his right to testify where only facts within his knowledge could acquit him on some counts.").

As this Court has noted, if it developed at trial that a defendant was willing to testify as to one charge, but not in connection with the second it "could not help but leave an unfavorable impression" with the jury. *Smallwood*, 42 Cal.3d at 432, *citing* Comment, *Joint and Single Trials under Rules 8 and 14 of The Federal Rules of Criminal Procedure*, 74 Yale L.J. 553, 558 (1965) and ABA Project on Minimum Standards for Crim.Justice, Stds. Relating to Joinder and Severance, stds. 13-2.1 & 13-3.1(a) (Approved Draft 1978). In *Newman v. Superior Court*, 179 Cal.App.3d 377, 384 (1986), the Court of Appeal held that it was not error to sever counts where the defendant's contention that joinder would prevent him from testifying as to one incident without testifying as to both was mere speculation. In this case, the danger was real.

F. Reversal Is Required

For all the reasons stated above, refusing to sever these unrelated charges was a reversible abuse of discretion (*see Bradford*, 15 Cal.4th at 1315 [refusing to sever joinable charges is reversible error when it results in demonstrable prejudice]), which rendered the trial and the jury's verdicts "fundamentally unfair" in violation of the federal and state constitutions. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const. art 1, §§ 1, 7, 15, 16 & 17; *Arias*, 13 Cal.4th at 127; *Featherstone*, 948 F.2d at 1503.

Both this Court and the Ninth Circuit have found it to be reversible error to join separate murder charges where there was no cross-admissible evidence. *Smallwood*, 42 Cal.3d at 425-26 ; *Bean*, 163 F.3d at 1083-87. Moreover, this Court has said that reversal is appropriate where a joint trial caused "gross unfairness," and "deprived the defendant of a fair trial or due process of law" (*People v. Turner*, 37 Cal.3d 302, 313 (1984)), and the federal courts recognize that a joint state trial may be so prejudicial that it is fundamentally unfair and violates the Fourteenth Amendment.

Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. 1981); *see also Abbott v. Wainwright*, 616 F.2d 889, 890 (5th Cir. 1980) (prejudice from refusing to sever trials of co-defendants rendered trial fundamentally unfair). This case clearly involved such fundamental and gross unfairness.

Because the jury in this case surely used the evidence of the Adkins homicide as part of its deliberations on the police officer homicide and visa versa, appellant was tried by a jury which was biased against him. As such, trying these charges together also violated appellant's right to be tried by an unbiased jury, under article 1, section 16 of the California Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, which is a structural defect requiring reversal per se. U.S. Const. amends. V, VI & XIV; Cal. Const. art. 1, § 16; *People v. Wheeler*, 22 Cal.3d 258, 265-66 (1978); *Gray v. Mississippi*, 481 U.S. 648, 663-68 (1987). Further, appellant had a constitutionally-protected liberty interest in the correct application of state laws governing joinder and severance, and joining these offenses deprived him of the process due to him under state law, in violation of his federal due process rights. U.S. Const. amends. V & XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). Finally, given the prejudicial effect of joinder in this case, the jury's verdict cannot be considered reliable and therefore cannot stand in the face of the Eighth Amendment prohibition against cruel and unusual punishment. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

Appellant had no chance for a truly fair trial when the three homicides were tried jointly. Proceeding with a joint trial in the face of the obvious potential for prejudice was an abuse of discretion and grossly unfair, and violated appellant's right to due process. Thus, even if the Court is not required to reverse the convictions per se, reversal is still

required because it cannot be established that the federal constitutional errors involved in joining these charges were harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

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VII

CORONER'S EVIDENCE REGARDING ONE OF THE VICTIMS WAS ADMITTED IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES

A. Important Forensic Evidence Was Admitted in Violation of *Crawford v. Washington*

A defendant has a right under the Sixth Amendment to the United States Constitution to confront witnesses testifying against him. U.S. Const. amends. VI & XIV. In *Crawford v. Washington*, 514 U.S. __, 124 S.Ct. 1354 (2004), the United States Supreme Court changed the manner in which courts consider Confrontation Clause issues.[22] *Crawford* rejected the view that the Confrontation Clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial depended largely upon the state statutory rules of evidence. The Supreme Court concluded that "testimonial" statements or hearsay were a "core concern" of the Sixth Amendment, and that such testimonial statements were inadmissible against the defendant, whether or not the court had deemed such statements "reliable." *Crawford* thus overruled the rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), to the extent *Roberts* held that the Confrontation Clause did not bar admission of an unavailable witness' statement against a criminal defendant if the statement fell within a firmly established hearsay exception and bore adequate "indicia of reliability." *Crawford*, 124 S.Ct. at 1370. *Crawford* concluded that the "reliability" standard set forth in *Roberts* was too amorphous to prevent the improper admission of "core testimonial statements that the Confrontation Clause

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[22]Although not decided until after appellant was tried and sentenced, *Crawford* nevertheless applies to appellant's direct appeal. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ").

plainly meant to exclude." 124 S.Ct. at 1371. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 1370. *Crawford* held that out-of-court testimonial statements are constitutionally admissible only where the declarant is unavailable and there was a prior opportunity for cross-examination. *Id.* at 1370.

As appellant will show, much of the evidence concerning the death of Officer Burrell was based on the evidence of an autopsy report which was performed by a coroner whom the defense did not have an opportunity to examine. The evidence of the autopsy was testimonial hearsay within the meaning of *Crawford*, and was thus inadmissible; that portion of the coroner's testimony based on the autopsy was also inadmissible under *Crawford*. U.S. Const. amends. VI & XIV. The erroneous admission of the evidence requires reversal of appellant's conviction.

B. Evidence of the Autopsy and the Coroner's Conclusions

Dr. James Ribe, a forensic pathologist for the Los Angeles County Coroner's Office, testified at appellant's trial. RT 3571-654. Dr. Ribe was the coroner who performed the autopsy on Officer James MacDonald. RT 3614. However, Dr. Ribe did not perform the autopsy on Officer Kevin Burrell. Rather, Officer Burrell's autopsy was performed by Dr. James Wegner. RT 3575-76. According to Dr. Ribe, Dr. Wegner did a report of his autopsy of Officer Burrell, which report was admitted into evidence. RT 3576, 3743; People's Exhibit No. 83. Dr. Ribe reported that Dr. Wegner died several years before trial. RT 3575.

Dr. Ribe studied the report before his testimony. RT 3576. Much of his testimony was clearly based on what he read in the report, which contained conclusions about the cause of death and the descriptions of the

wounds. RT 3575; People's Exhibit No. 83. Dr. Ribe testified that Officer Burrell was shot four times. Officer Burrell was shot once in the upper right arm. RT 3580, 3650. He was shot once in the front of the chin, which shot exited the chin, re-entered above the left collarbone and passed downward into the upper torso. RT 3580, 3586-87, 3650. He was also shot in the foot. RT 3581, 3593. Finally, he was shot on the top of the head. RT 3593-95. Based on his knowledge of the consequences of such wounds, Ribe concluded that the officer lived at most for a few seconds or minutes after he was shot. RT 3607. There was no way one could tell from the autopsy which order the shots were fired in. RT 3652-53.[23]

In addition to the testimony, an exhibit of photographs from the autopsy was admitted into evidence during the coroner's testimony. The photos were not made under Dr. Ribe's supervision, but rather were made at or near the time of the autopsy. RT 3579. The photographs showed both the entrance and exit wounds for each of the shots. The prosecution introduced the actual bullets which made some of the wounds (People's Exhibit Nos. 87 & 90), and x-rays of some of the wounds (People's Exhibits Nos. 88 & 89). There was no indication that Dr. Ribe supervised the administration of these x-rays in the record. The prosecution introduced the bullets that had been removed from the body, but these were removed

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[23]The coroner offered similar testimony about Officer MacDonald's wounds. MacDonald died from gunshot wounds. He had four wounds: one to the left breast armpit, a second one was to the mid-back and entered through his protective vest, a third was to the base of the neck and a fourth a wound to the back of the right ear. RT 3615-16. Officer MacDonald died within an hour and a half of the shots. RT 3649. A placard of photographs taken during the autopsy was admitted showing the gunshots, illustrating both the entrance and exit wounds. People's Exhibit No. 97. A mannequin was used to illustrate the wounds. People's Exhibit No. 100; RT 3630. X-rays, one of which showed the hospital tube used to try and resuscitate MacDonald, were also introduced. People's Exhibit Nos. 102, 103.

by Dr. Wegner, not Dr. Ribe. RT 3589. The prosecution also used a mannequin with rods sticking through the simulations of the wounds. Black sticks illustrated where the bullets entered. Red sticks depicted where bullets exited. RT 3597. Photographs of the mannequins were also introduced. RT 3597; People's Exhibits Nos. 85 & 91.

C. Admission of the Autopsy Report and the Expert Evidence Based on the Report Violated the Confrontation Clause

The Court in *Crawford*, defined three kinds of statements that are clearly "testimonial."[24] Testimonial statements are, at a minimum, prior testimony at a preliminary hearing, a grand jury or at a former trial, police interrogations, and allocutions, guilty pleas and other formal statements admitting guilt. *Crawford*, 124 S.Ct. at 1372-74. Apart from these definitions, *Crawford* did not comprehensively distinguish "testimonial" statements from "nontestimonial," instead leaving the matter for another day. *Id.* at 1374. The Supreme Court did provide some guidance, however, by contrasting "formal statement[s] to government officers" (testimonial) from "casual remark[s] to an acquaintance," which are not testimonial. Also the Supreme Court noted that "*[i]nvolvement of government officers in the production of testimony with an eye towards trial* presents a unique potential for prosecutorial abuse." *Id.* at 1367 n.6 (italics added); *see also Lilly v. Virginia*, 527 U.S. 116, 137 (1999) ("[W]hen the government is

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[24]Appellant has not waived his right to argue the Confrontation Clause argument on appeal. Where trial counsel could not reasonably anticipate a dramatic change in the law, failure to object is excused. *People v. Welch*, 5 Cal.4th 228, 237 (1993). So in a recent case, the Court of Appeal held that the failure to object on confrontation grounds was excusable where the governing law, *Ohio v. Roberts*, 448 U.S. 56 (1980), provide scant ground for objection. *People v. Johnson*, 121 Cal.App.4th 1409, 1411 n.2.

involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice.").

Coroner's reports such as that relied upon by Dr. Ribe are testimonial hearsay within the meaning of *Crawford*. First of all, such reports are classic hearsay. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Cal. Evid. Code § 1200(a). In appellant's case, the report was a record offered for the truth of the matters in the record.

The report relied on by Dr. Ribe was testimonial hearsay because it was made by a law enforcement official (Dr. Wegner) who prepared it with the express purpose of the report being offered at a criminal prosecution. By statute a coroner is a "peace officer" (Cal. Pen. Code § 830.30; Cal. Govt. Code § 27419) and the statement was obviously made by the pathologist to help prepare a case against the person who was eventually apprehended in the killing of Officer Burrell. As a statement made by a law enforcement official in preparation for litigation, the statement implicates the core concern of *Crawford*, *i.e.*, the preparation of evidence against a defendant by the government without the opportunity for the defendant to cross examine the witness who prepared that evidence. The *Crawford* opinion is consistent with a holding that the coroner's report is testimonial. One of the cases cited by *Crawford* in support of the holding that testimonial hearsay is not admissible is the nineteenth century case *State v. Campbell*, 1 S.C. 124 (1844). In *Campbell*, the state court held that a

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statement obtained by a coroner was inadmissible because the witness had died and had not been cross examined.[25]

Appellant's proposed interpretation of *Crawford* is consistent with the recent interpretations of *Crawford* in the California Courts of Appeal. In *People v. Sisavath*, 118 Cal.App.4th 1396 (2004), the statement of a four year old (who could not qualify as a witness) was at issue. The boy's statement was made during a "Multi-disciplinary Team Interview" conducted by a forensic interview specialist and at which a prosecutor and District Attorney investigator were present; the statement was made after charges had been filed. Because an objective observer would reasonably foresee that this statement would be used in a prosecution, it was testimonial and its admission violated *Crawford*. The court of appeal held: "The pertinent question is whether an objective observer would reasonably expect the statement to be *available* for use in a prosecution." *Sisavath*, 118 Cal.App. at 1401 (emphasis added). As with *Sisavath*, an objective observer would reasonably expect that the autopsy report in this case would be used in a criminal prosecution. Just as in *Sisavath*, the autopsy was performed in the presence of a "peace officer," *i.e.*, the coroner. Here the autopsy was a significant piece of evidence created by an law enforcement official, Dr. James Wegner, who assisted the prosecution in

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[25]Justice Scalia in his majority opinion gives business records as an example of non-testimonial hearsay. *Crawford*, 514 U.S. at __, 124 U.S. at 1367. However, the Supreme Court surely does not mean that the admission of business records never violates the Confrontation Clause. Can the prosecution simply offer a police officer's report as a business record, have that report be the only evidence of guilt, and not violate the Confrontation Clause? This does not seem possible. An ordinary business record is one made in the ordinary course of business. Such records are clearly admissible as non-testimonial hearsay. Cal. Evid. Code § 1271. However, because a coroner's report is prepared with criminal litigation in mind, an autopsy report is not an ordinary business record.

putting a case together against appellant. Wegner should have been subjected to cross-examination by the defense. Since he was not, the report was inadmissible.

Moreover, to the extent that Dr. Ribes' testimony was based on the autopsy report, his testimony was also inadmissible. Experts have traditionally been permitted to rely on hearsay. *See* Cal. Evid. Code § 801(b). However, in this case the coroner testified based largely upon his review of the work of the deceased Dr. Wegner. Even the photographs and x-rays he reviewed were made at the time of the autopsy, presumably under the supervision of Dr. Wegner, whose work could not be examined by the defense. The mannequin also appears to have been constructed based on Dr. Ribes' review of the autopsy and other evidence made at the time of the autopsy. Dr. Ribes' testimony therefore presents the same confrontation issues that the autopsy report does, *i.e.*, it is evidence prepared by the government without a defense opportunity to test the information upon which the testimony was based. As such, the Confrontation Clause bars its admission.

D. Reversal Is Required

Appellant's conviction for the first degree murder of Officer Burrell must be reversed. Evidence admitted in violation of the Confrontation and Due Process Clauses requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Under the *Chapman* test, the question is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original). The prosecution cannot meet *Chapman* because it cannot assure that the verdict in this case was not attributed to the error in admitting the coroner's testimony and the autopsy report. Dr. Ribe

testified extensively about the manner in which the shots were inflicted. He concluded that it was possible that Officer Burrell was reaching unsuccessfully for a gun when the wound to the arm was inflicted (RT 3586), that he was bending or falling forward when the wounds to the chin and torso were inflicted (RT 3591) and that it was possible that he was on the ground defending himself when the foot wound was inflicted (RT 3593). This evidence and the evidence from the autopsy was a significant part of the prosecution's case that appellant premeditated the killing of Officer Burrell. In his closing argument, the prosecution based most of its argument on how the crime happened on the testimony of Dr. Ribe. RT 4090-92. The forensic evidence was also some of the basis of the prosecution's argument about why the crime happened. RT 4097-4101. Even in penalty, the prosecution used the coroner's evidence. For example, the prosecution used the testimony to emphasize its argument that the killings were premeditated because the last shots were fired to the head execution style. *See* RT 4868.

Because the evidence was so important to the prosecution's guilt case on the Burrell homicide, appellant's conviction must be reversed. As explained elsewhere (*see* Argument VIII), the prosecution's case was far from conclusive; both the eyewitness testimony and the informant testimony were problematic. With these problems with the evidence, the prosecution cannot show the erroneously admitted evidence did not contribute to the verdict. Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneously admitted evidence (*Sullivan*, 508 U. S. at 279), it was obtained in violation of his Eighth Amendment right to be free from cruel

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and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As such, appellant's sentence of death must also be reversed.

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VIII

ADMISSION OF ARTISTIC RENDERINGS VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL

A. Reproductions Were Admitted Over Appellant's Objections

The prosecutor argued the trial court should admit "artist's renderings," which he asserted would "illustrate" the testimony of eyewitnesses Margaretta Gully and Alicia Jordan. CT 663-73. The prosecution asserted in its moving papers that even if the representations were hearsay, it did not matter because they were only "demonstrative evidence" that were admissible if they were "reasonably accurate representation[s]" of the scene. CT 668. The representations did not need to be exact; moreover, inaccuracies "not related to the reasons the renderings were admitted" were not relevant at all to the court's decision to admit the artist's creations. CT 671, *citing People v. Rodrigues*, 8 Cal.4th 1060, 1114 (1994).

Appellant's trial counsel argued that the portrayals were not true representations of the crime scene because they did not accurately reflect the scene. CT 760. Appellant's counsel argued that "posed pictures," such as those the prosecution sought to admit, were admissible only where relevant and "where a proper foundation [had been] laid by testimony which shows that the reconstruction or re-enactment is accurate." CT 761, *citing* 2 Witkin, Cal. Evid. § 842, p. 808 (3rd ed. 1986). The defense warned of the danger of prejudice if the representations were admitted because even if accurate, picture evidence should be received with caution because of the "forceful impression the evidence makes." CT 761-62. Appellant argued that the renderings proposed were also inadmissible because they were hearsay. He disputed the prosecution's contention that the pictures were merely "demonstrative"; rather, they were the equivalent of the out of court

declarations of the artist offered for the truth of the matter, and as such were inadmissible as double hearsay. CT 762.

When initially considering the admissibility of the representations, the judge stated that he intended to admit the artist's works, provided there were "no misrepresentations" in them. RT 113. Appellant's counsel reiterated his argument that the renderings were not representative because they did not accurately depict the area. More importantly, he noted that there was a license plate number portrayed in several of the drawings that matched that of appellant's truck. This was prejudicial because there would be no testimony that the eyewitnesses could identify a license plate number on the truck they saw that night. The trial court dismissed this concern, maintaining that it was enough that the parties brought out the license plate issue in examination. RT 114. The court also noted that although the artist was not present in court, his or her representations could be admitted, so long as there was an understanding that the pictures were not "actual" drawings of what happened. RT 115. Later the court explicitly ruled that the prosecution could use the representations. RT 323. The trial court again overruled appellant's objection that the sketches did not accurately show the scene, as photographs might. RT 323.

This evidence was erroneously admitted. The evidence was hearsay not falling under any exception; as such, the reproductions were admitted in violation of state law. The admission of the reproductions also violated appellant's due process right to a fair trial under article 1, sections 1, 7, 15, 16 and 17 of the California Constitution and under the Fifth, and Fourteenth Amendments to the United States Constitution. It also denied his right to be free from the arbitrary deprivation of a state law entitlement under the Fourteenth Amendment. The error also denied appellant his right under the Sixth and Fourteenth Amendments to confront witnesses against him and

his Eighth Amendment right to a reliable verdict and sentence and to be free from cruel and unusual punishment. The error requires reversal of appellant's verdict and sentence of death. U.S. Const. amends. V, VI, VIII, & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Caldwell v. Mississippi*, 472 US 320 (1985); *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004); *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (recognizing "fundamental fairness" standard).

B. Use of the Reproductions At Trial

At trial, the prosecution used ten artistic renderings in connection with the examination of witnesses Margaretta Gully, Alicia Jordan and De'Moryea Polidore.[26] In each case, the prosecution asked the witness whether the exhibit represented what she or he had seen at the scene of the crime. So, witness Margaretta Gully testified that People's Exhibit No. 36 accurately showed the relationship of the officers to the suspect that night.

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[26]These exhibits were: People's Exhibit No. 36 (marked at RT 1804; admitted at RT 3743), People's Exhibit No. 37 (marked at RT 1822; admitted at RT 3743), People's Exhibit No. 39 (marked at RT 1843; admitted at RT 3743), People's Exhibit No. 40 (marked at RT 1844; admitted at 3743), People's Exhibit No. 47 (marked at RT 2038; admitted at RT 3743), People's Exhibit No. 51 (marked at RT 2243; not admitted, *see* RT 3743), People's Exhibit No. 52 (marked at RT 2243; admitted at RT 3743), People's Exhibit No. 53 (marked at RT 2249; admitted at RT 3743), People's Exhibit No. 54 (marked at RT 2311; admitted at RT 3743), People's Exhibit No. 55 (marked at RT 2324; admitted at RT 3743). People's Exhibit Nos. 36, 37, 39 and 40 were used during the examination of witness Gully; People's Exhibit No. 47 was used during the examination of Polidore; People's Exhibit Nos. 51, 52, 53, 54, and 55 were used during the examination of Alicia Jordan. The visual details in these exhibits are critical to appellant's argument. At the appropriate time, appellant will move to have the pictures transferred to this Court for its review.

In relation to People's Exhibit No. 36, Gully stated that the manner in which the suspect looked in the exhibit was similar to what she saw that night. RT 1804. She testified that People's Exhibit No. 37 showed the view that she had when she saw the man straddling the officer and shooting him. RT 1822-23. She identified People's Exhibit No. 39 as what she saw when the red truck at the scene passed her. RT 1843. People's Exhibit No. 40 was similar to what she saw as that truck turned right onto Central after it passed her. RT 1844.

However, in his cross-examination, appellant's trial attorney demonstrated that there was much in the pictures that misrepresented what Gully had seen. First, the attorney held up one of the renderings for about one second. Gully admitted that she saw the suspect's face for about as long as the attorney had held up the picture. She only got a glimpse of the man. RT 1873.[27] Gully also admitted that although the color of the jacket in the artist's rendering was light green, in fact, the person she saw that night had on a dark green jacket. People's Exhibit No. 36; RT 1876. Gully stated that she was with the artist when he did the rendering, but did not tell him it was lime green and did not notice that he had painted it lime green. She thought, in fact, the jacket was dark green. She acknowledged that she did not think the jacket the man wore had a hood and did not tell the artist this, although the jacket in the picture had one. RT 1878-80.

There were other things in People's Exhibit No. 40 that had nothing to do with Gully's recollection of the night of the crime. The rendering in People's Exhibit No. 40 showed a license plate number, but, Gully admitted, she did not recall one that night, and had not told the artist that

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[27]Which sketch was held up for Ms. Gully is not identified in the record, but presumably it was People's Exhibit No. 36 because this picture has a face on it.

she had. The picture had the numbers "454" painted in the left corner and left rear panel of the truck in the painting; however, Gully did not see that on the truck and never told anyone, including the artist, that she had. She never told the artist that she saw the word "Chevrolet" on the tailgate of the truck. RT 1880-81. Gully agreed with the trial attorney's statement that the rendering had more information in it than she had given the police. RT 1882. Gully also noticed that the picture in People's Exhibit No. 37 showed sparks coming out of the gun. She did not recall seeing sparks coming out of the gun, and was never asked about this by anyone. RT 1883-84.

Witness De'Moryea Polidore testified that he saw the white officer down on the ground, and then affirmed that People's Exhibit No. 47, a portrayal of an officer on the ground, "looked like" what he saw that night. RT 2038. People's Exhibit No. 47 portrays a man in a light green jacket. *See* People's Exhibit No. 47. However, on cross-examination, Polidore stated that he told the officers that the jacket was dark, either dark green or black. RT 2075. People's No. 47 also shows a truck with the number "454" on it. *See* People's Exhibit No. 47. However, Polidore did not see a "454" on the truck, rather he saw "4 something 4." RT 2081.

After she testified about what she saw on the night of the crime, prosecution witness Alicia Jordan was also examined using pictorial creations. The prosecution was permitted to display the sketches as he examined Jordan. RT 2244. The witness testified that People's Exhibits Nos. 51, 53, 54 and 55 accurately depicted various aspects of the

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crime scene. RT 2243-44, 2249-50, 2311-12, 2323-24, 2461-62.[28] One of the exhibits, People's Exhibit No. 55, clearly showed the profile of an African-American man framed in the driver's side car window. *See* People's Exhibit No. 55. Jordan stated that this picture accurately portrayed what she saw, and denied previously telling a police officer that she had been unable to see the person driving the car from the scene because the windows had been tinted. RT 2413, 2461-62.

Both the prosecution and the defense referred to the renderings in arguments to the jury. In his closing argument, appellant's trial attorney argued that the renderings were inaccurate – there was a shading of the truth when the artist added a license plate number to two of the exhibits. RT 4185; *see* People's Exhibit Nos. 39 & 40. He noted that People's Exhibit No. 55 misrepresented the lighting at the scene and the tinting of the windows of the truck. RT 4186-87. The prosecution did not disagree that the renderings were inaccurate in some respects, but argued that the purpose of the renderings was "to show what happened," and stated that there was no "hidden message." According to the prosecution, they were meant only to show "relevant" relationships. RT 4225-26.

C. Admission of the Renderings Violated Important Constitutional and Statutory Rights

1. The Admission of the Sketches Violated State Rules of Evidence

Contrary to the arguments by the prosecution, the evidence of the portrayals was improper hearsay not falling under any exception. "Hearsay evidence" is evidence of a "statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the

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[28]Jordan identified People's Exhibit 52 as a portrayal of the white officer at the scene, but stated that People's Exhibit No. 51 was more accurate. RT 3714.

matter stated." Cal. Evid. Code § 1200(a). Where a picture possesses evidential characteristics tending to establish particular facts, it is hearsay. More specifically, if a rendering is not merely an aid to understanding or an illustration of the testimony of the eyewitnesses, it is a hearsay statement of the artist. *See Crocker v. Lee*, 261 Ala. 429, 435, 74 So. 2d 439, 445 (1954). In such cases, the image itself is a "silent" witness to facts – facts about the scene of the crime -- so that the artist too is a witness, who has independent evidence, and who should have be present to testify for the jury before the image can be admitted. *See* 23 A.L.R. 5th 672 § 2(a), *Admissibility in Evidence of Composite Picture or Sketch Produced by Police to Identify Offender* ("[Sometimes] such an item is admitted merely to aid a witness in explaining his or her testimony, and it is nothing more than the illustrated testimony of that witness, but such an item may also be used, in a proper case, as probative evidence of what it depicts, and when utilized in this manner, it takes on the status of an independent 'silent' witness.").

As a sister court has pointed out in discussing the use of artist drawings at trial, a "drawing is selective and interpretative, and an artist, even when attempting to copy or to work from another's direction, is not merely a stenographer with a peculiar system of shorthand. His work contains and reveals his impression from information given to him." *People v. Turner*, 91 Ill.App.2d 436, 444, 235 N.E.2d 317, 320-21 (1968), citing *United States v. Zurita*, 369 F.2d 474, 177 (1966 7th Cir.). A police sketch "merely reflects the police artist's interpretation of someone else's description, based on the artist's synthesis of an infinite variety of facial figures and configurations." *People v. Maldonado*, 97 N.Y.2d 522, 527, 769 N.E.2d 1281, 1284 (2002). Artists' sketches are often highly suggestive hearsay, which improperly bolster witness's identification

testimony, and are, therefore, prejudicial. *Id.* at 527, 769 N.E.2d at 1284, 743 N.Y.S.2d at 392. As another court has put it, "just because the sketch is in picture form does not change the fact that it is being offered as a statement made out of court to prove what the suspect looked like." *State v. Motta*, 66 Hawaii 254, 260, 659 P.2d 745, 750 (1983).

In this case, the various sketches the prosecution offered were more than merely illustrations of the witnesses testimony of the scene. Rather, they were the artist's interpretations of what the scene looked like at various points the night of the crime. As such, they were hearsay and the artist should have been available for cross examination. Moreover, there were a number of details in the portrayals which were clearly the artist's interpretation about what the scene looked like. For instance, as appellant's counsel pointed out at trial, two of the pictures showed a particular license plate number, which just happened to match that of the truck appellant was alleged to have owned. RT 114, 1880; People's Exhibit Nos. 39, 40. Also, the trucks portrayed in several of the pictures showed the number "454" (People's Exhibit Nos. 40, 47) on the rear, something which was also an opinion of the artist, rather than an illustration of the memory of any of the eyewitnesses. This number just happened to match the number on appellant's truck. In addition, all of the portrayals show a particular lighting of the scene, which is very bright – like daylight. *See* RT 4186-87. This clearly could not have been an illustration of the recollection of the witnesses, since all of them testified that the scene happened at night. There are other details in the photos which are in effect statements of the artist. For instance, one portrayal of the white officer on the street after the shooting which was used in the examination of witness Jordan shows expended bullet rounds on the ground near the officer. *See* People's Exhibit No. 51. These bullets are not something that Jordan recalled. The location

of the bullets near the white officer's body was the opinion of the artist – who did not testify.

Nor does the picture evidence fall under any hearsay exception. The evidence in this case is unlike that of a composite sketch created by an artist and used by a witness to identify a suspect. This Court has held that a composite sketch of a suspect is indeed hearsay, but that it falls under an exception to the hearsay rule and is admissible as independent evidence of identity. *People v. Imbler*, 57 Cal.2d 711, 716 (1967), *citing People v. Gould*, 54 Cal.2d 621, 626 (1960); *People v. Cooks*, 141 Cal.App.3d 224, 308-09 (1983).[29] Under the rational of *Imbler*, a composite sketch is admissible under a hearsay exception if the witness affirms that the composite is an accurate version of the characteristics of the person the witness remembered as independent evidence of the identity of a perpetrator. *Imbler*, 57 Cal.2d at 716; *see* Cal. Evid. Code § 1238. If the witness denies that the composite accurately reflects what he or she saw, then the composite is admissible as a prior inconsistent statement. *Imbler*, 57 Cal.2d at 716; *see* Cal. Evid. Code § 1235. The portrayals in this case do not fall under the rationale of *Imbler*. They are not prior identifications of a perpetrator, nor are they prior inconsistent statements. As such, the portrayals were hearsay under no exception and were inadmissible statements of an out-of-court declarant.

Moreover, even if the artists' drawings were not hearsay, they should not have been admitted because they did not properly represent the scene. Evidence of demonstrations are only admissible where conditions of the

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[29]So, in this case the composite picture of the person witness Gully saw as she passed by the crime scene created by the police artist (People's Exhibit No. 41) was properly admitted at the time of trial as a prior identification of the suspect made by the eyewitness.

demonstration and those existing at the time of the alleged occurrence are shown to be substantially similar or where the evidence will not confuse or mislead the jury. *People v. Bonin*, 47 Cal.3d 808, 847 (1989). The trial court's ruling on admissibility will be reversed where the trial court abused its discretion. *People v. Boyd*, 222 Cal.App.3d 541, 565-66 (1990); *Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d 510, 522 (1973). Here the artist drawings were not accurate in many important ways. The lighting in the drawings suggested that there was plenty of light at the scene. There was not. The drawings suggested that there was no conflict in the testimony about whether the windows were tinted, when there was plenty of conflict about this point. The drawings also improperly suggested that the eyewitnesses got a good look at the perpetrator, when in fact, they got only a glance of the person, when they were in a moving car and were very frightened by the gun fire. As such, the drawings could have misled the jury on the critical issue of the reliability of the eyewitness testimony. Hence, it was an abuse of discretion to admit the drawings.

2. The Admission of the Renderings Violated Appellant's Rights to Confrontation and Due Process

a. Appellant Has Not Waived His Right to Raise Constitutional Issues

As noted, appellant objected to the reproductions on the grounds that they were hearsay without a proper foundation. CT 762. Trial counsel did not object on federal due process grounds, nor on grounds that admission of the evidence violated the Sixth Amendment Confrontation Clause. Appellant has not waived his right to argue these errors on appeal. As to the Confrontation Clause argument, appellant's claim is based on the recent United States Supreme Court case, *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004), in which the Supreme Court significantly altered the

way in which Confrontation Clause issues would be analyzed, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980). Where counsel could not reasonably anticipate a dramatic change in the law, failure to object is excused. So in several recent cases which are exactly on point, the court of appeal held that the failure to object on confrontation grounds was excusable where the governing law, *Ohio v. Roberts*, 448 U.S. 56 (1980), provided scant ground for objection. *People v. Kilday*, 123 Cal.App.4th 406, 417 (2004); *People v. Johnson*, 121 Cal.App.4th 1405, 1411 n.2 (2004). As such, appellant's failure to object on Confrontation Clause grounds is excused.

As to the claim that the evidence violates due process, this Court should also consider the due process claim since under California law the Confrontation Clause claim was not waived. As previously noted (*see* Argument IV), this Court has routinely held that it will consider constitutional claims if a proper objection was made below, which, however, failed to include all possible constitutional claims. So, for example in *People v. Yeoman*, 31 Cal.4th 93, 117 (2003), this Court held that it would consider a claim that evidence violated the Eighth Amendment when trial counsel objected only to evidence on due process and equal protection grounds. As such, this Court should consider all of appellant's federal constitutional claims.

b. Admission of the Portrayals Violated Due Process and the Right to Confrontation

As appellant has previously discussed (*see* Argument VII, *supra*) in *Crawford v. Washington*, 541 U.S. __, 124 S.Ct. 1354, the United States Supreme Court held that admission of testimonial out-of-court statements is barred by the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 124 S.Ct. at 1374. As appellant has

shown, the portrayals of the crime scene in this case were hearsay falling under no exception and were thus inadmissible under state law. The portrayals in this matter were also *testimonial* hearsay within the meaning of *Crawford*. As appellant has previously explained, *Crawford* did not precisely define what kind of evidence is testimonial. *Crawford*, 124 S.Ct. at 1372-74; Argument VII, *supra*. *Crawford*, however, warned of the dangers of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 1372-74. As the Court of Appeal has recently held, a statement is testimonial "if obtained by an officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution." *Kilday*, 123 Cal.App.4th at 418. Here, the portrayals were clearly intended for use at trial, and thus their use implicates the Confrontation Clause.

Moreover, the portrayals were produced in a manner which implicates the confrontation concerns of *Crawford*. Under *Crawford*, statements taken by the police in an interrogation are clearly testimonial. 124 S.Ct. at 1374. In particular "production of evidence [by a government agent] for use in a potential prosecution through purposeful questioning" implicates the concerns of Crawford, *i.e.*, that the resulting statement will be inaccurate due to suggestive police questioning.[30] *Kilday*, 123 Cal.App.4th at 418. In this case, it appears that the portrayals were constructed by the artist together with the witnesses. For example,

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[30]This Court recently granted review in two cases that address whether statements obtained through police officer questioning in the field are testimonial. *See People v. Cage*, previously published at 120 Cal.App.4th 770, review granted and opinion superseded October 13, 2004, S127344; *People v. Adams*, previously published at 120 Cal.App.4th 1065, review granted and opinion superseded October 13, 2004, S127373.

Margaretta Gully testified that she told the artist what she saw before the rendering was done, and talked with him as he painted. RT 1876-77. It is also clear that the artist had other knowledge about the scene, such as details about where the bullets were found and what appellant's truck looked like, which he added to the pictures. The concern in *Crawford* that evidence created by the police would be inaccurate due to suggestive police questioning is therefore implicated in the construction of the portrayals in this case. For one thing, the witnesses' descriptions could easily have been influenced by the police officer's view of the evidence. *See Campbell v. People*, 814 P.2d 1, 6 (Colo. 1991), *opinion on remand*, 847 P.2d 228, 230 (Colo. App. 1992) (finding that the eyewitness equivocated on characteristics of defendant's skin and had been influenced by composite drawing done by police artist); *Commonwealth v. Blaney*, 387 Mass. 628, 642, 442 N.E.2d 389, 398 (1982) (O'Connor, J., dissenting) (composite process, unlike corporeal identifications, is "inherently susceptible to subtle and even unconscious suggestiveness by the police artist).[31] Additionally, it is possible that the artist added other inaccurate details to the scene, which inaccuracies could only be adequately explored if the artist were available for cross-examination. Because confrontation concerns are implicated, sketches produced by the government as the result of questioning of a witness with the sole purpose of constructing a case against a criminal defendant are testimonial hearsay. Because the artist was not shown to be unavailable and was not cross-examined, admission of the pictures violated the Sixth Amendment Confrontation Clause.

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[31]The problem of suggestion is particularly acute when, as in this case, the police have already identified a particular suspect when the artist works with the witness. *See Commonwealth v. Weichell*, 390 Mass. 62, 84-84, 453 N.E.2d 1038, 1051 (1983) (Liacos, J., dissenting).

The respondent may object that any concerns about the details of the drawings which did not reflect the memories of the eyewitnesses could have been dealt with by way of cross-examination of that eyewitness. However, *Crawford* is clear that "reliability" is not a substitute for the confrontation required by the constitution. As Justice Scalia make clear in his opinion, a court's judgment that the evidence is reliable is not a substitute for cross examination. *Crawford*, 124 S.Ct. at 1370; *see Gall v. Parker*, 231 F.3d 265, 317 (6th Cir. 2000) (The prosecutor's presentation of a videotaped deposition of a mental health expert without any showing that the witness was unavailable violated Confrontation Clause).

Should this Court find that the hearsay in this case was "non-testimonial" hearsay, appellant's confrontation rights were nevertheless violated. A nontestimonial hearsay statement continues to be governed by *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, 124 S.Ct. at 1369, 1374. As noted above, there were many aspects of the renderings that made them unreliable. They did not accurately portray the lighting at the scene, a fact which was critical to the usefulness of the pictures as illustrations of what the witnesses saw that night. Also as noted, there were a number of details in the renderings, including the bullets laying about the scene, the clothing the suspect was wearing, the sparks from the gun, the license plate, and the numbers on the back of the truck, which had nothing to do with what the witnesses remembered. As such, the evidence was also inadmissible under *Ohio v. Roberts*, 448 U.S. 56 (1980).

Admission of the portrayals also denied appellant's rights to a fair trial as guaranteed by the Due Process Clause of the federal Constitution. This is true because admission of hearsay evidence which was not shown accurately to portray the events it supposedly represented rendered the trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62 (1991).

Moreover, appellant's due process rights were violated because his Sixth Amendment right to confront witnesses was violated. *See Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995) (State court procedural or evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process.").

D. The Errors Require Reversal

Evidence admitted in violation of the confrontation and Due Process Clauses requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Evidence admitted under state laws of evidence is reversible if upon a review of the entire record there is a reasonable probability that an acquittal would have been returned absent the error. *People v. Watson*, 46 Cal.2d 818, 836 (1956). As appellant has previously explained (*see* Argument VI), under the *Chapman* test, the question is "'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error'" (*Sullivan v. Louisiana*, 508 U. S. 275, 279 (1993) (emphasis in original)), so that if a significant constitutional error has occurred at trial, reversal is compelled because the government cannot show that the guilty verdict "was surely unattributable to the error." *Id.* at 279; *accord*, *People v. Quartermain*, 16 Cal.4th 600, 621 (1997).

The prosecution cannot meet this test. The prosecution had no case if appellant's jury disbelieved eyewitnesses Gully, Polidore and Jordan. The believability of these three eyewitness identifications of appellant as the man they saw that night was a crucial part of the case. Yet, these identifications were made in extremely poor conditions: the scene was at

night; the witnesses did not know the man they saw; there were gunshots and the witnesses were frightened and anxious to get away from the area; each person had at most a few seconds to view the scene. Yet the prosecution was permitted to artificially enhance the believability of these three witnesses with pictures which made what the witnesses said about what they saw much more certain than it really was.

The pictures were not realistic representations of the scene in critical respects. Most importantly, they did not show the scene as dark and misty, as it was. Instead, they suggest that the witnesses could see what happened very well in well-lit circumstances. Moreover, the pictures suggest that it was easy to see through the windows of the truck as it sped from the seen. Yet, although Jordan testified that she could see through the windows and that the tinting in the drawing was accurate (RT 2462), previously she said that she could not see through the windows because they were tinted (RT 2413). Other witnesses testified that the windows of the truck were tinted. RT 1805, 2008. At least one witness, Ingrid Crear, who saw a red truck speeding from the scene said that the windows were "very tinted" and she could not see who was driving the truck. RT 2508. Had the pictures not been introduced, there is a reasonable likelihood that appellant's jury would have viewed the eyewitness identifications in this case with the skepticism they deserved and not found appellant guilty of the homicides. The main other piece of evidence in this case, the testimony of informant Calvin Cooksey, can not make up for the eyewitness testimony, as it too was doubtful, given Cooksey motivation to fabricate evidence. *See* Statement of Facts, *supra*. As such, appellant's two first degree murder convictions must be reversed. Finally, it is clear that the improperly admitted evidence made appellant's guilt verdict unreliable. Since appellant's death sentence relies on an unreliable guilt verdict, it was obtained in violation of his Eighth

Amendment right to be free from cruel and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As such, appellant's sentence of death must also be reversed.

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IX

THE TRIAL COURT ERRONEOUSLY ADMITTED HIGHLY PREJUDICIAL PHOTOGRAPHS, PHYSICAL EVIDENCE AND TESTIMONY CONCERNING THE DEATHS OF THE POLICE OFFICERS

A. Introduction

As appellant noted in his introduction (*see* Introduction, *supra*), the facts of the crimes in this case were disturbing. Because the facts were so upsetting, it was critical that they be presented to the jury as dispassionately as possible to assure that appellant got a fair trial, *i.e.*, a trial where the jury made its life or death decision on the evidence, rather than on its feelings about the evidence. Yet that did not happen in this case. It did not happen in part because of the prosecution's determination to put on its case in the most graphic manner possible. Over appellant's repeated objections, the trial court erroneously permitted the prosecution to introduce numerous difficult to look at photographs, much witness testimony that must have been difficult to listen to, and other physical evidence, including bloody, brain-spattered clothing, all offered to prove the circumstances of the deaths of Officers MacDonald and Burrell – facts which the defense did not dispute. This evidence could only have had the effect of inflaming the jury against appellant. Some of the evidence was irrelevant; most of it was cumulative. To the extent that it did have relevance, it was more prejudicial than probative.

The presentation of this evidence, in addition to evidence of pictures of the officers in uniform while they were alive and evidence of a police officer's friendship with Kevin Burrell, inflamed the jury, appealed to the jurors' sympathy and emotions at the guilt phase, and was clearly improper. The error prevented an impartial assessment of guilt, distracted the jury from its responsibility to decide the appropriate penalty, and violated

appellant's rights under state law and federal constitutional law. The admission of this evidence was an abuse of the trial court's discretion under California evidentiary law and the admission of the evidence violated appellant's constitutional rights to due process, a fundamentally fair trial, and a reliable adjudication at all stages of a capital case. U.S. Const. amends. V, VIII & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17; *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Ford* v. *Wainwright*, 477 U.S. 399 (1986); *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (recognizing "fundamental fairness" standard).

B. Defense Counsel Objected Repeatedly to the Prosecution's Use of Evidence of the Crime to Anger the Jury

From the beginning of the trial, appellant's trial counsel objected to the prosecution's use of the evidence of the crimes to inflame the passions of the jury. First, trial counsel objected to the prosecution's use of placards of photos of the officer's wounds. CT 765-68. The proposed exhibits showed pictures of the officers at autopsy, displaying various wounds from various angles. The placard with the photos of Officer Burrell consisted of six photos with pictures of head, chest, arm and foot wounds. One of the pictures depicted a steel probe through the arm wound. People's Exhibit No. 84A. Several of the pictures showed a breathing tube, obviously used in an attempt to resuscitate the officer. People's Exhibit No. 84B & 84C; *see* RT 3637 (referring to endotracheal and nasogastric tubes). The placard with the photos of Officer MacDonald consisted of six photos of the deceased officer on the autopsy table, including photos of the officer's chest, back, neck and head. People's Exhibit No. 97, items A - F. The Court allowed the prosecution to use all the photographs without limitation. RT 319-20. The prosecution made extensive use of the photographs in his

opening statement. RT 1136-40. The photographs were later admitted into evidence. People's Exhibit Nos. 84 & 97; RT 3743.

The defense also objected to the prosecution's life size mannequins to illustrate the wounds to the officers and objected to them going into the jury room. RT 3569, 3708. These mannequins had dowels sticking out of holes drilled into the mannequins illustrating the wounds and the trajectories of the bullet making the wounds. Photographs of various angles of the mannequins were also admitted. People's Exhibit Nos. 85, 91, 100 & 104; RT 3581, 3596, 3630, 3640.

Over defense objection, the prosecution also successfully obtained the admission of various articles of blood-stained clothing taken from the bodies of the officers. The clothing the prosecution was permitted to use from Officer Burrell was his bloody jacket, his bloody uniform shirt with human bone and tissue on it, a blood-stained, tissue spattered t-shirt, and a bloody boot and sock. People's Exhibit Nos. 92-95; RT 3589-607. The clothing the district attorney was permitted to use in connection with Officer MacDonald's death was a protective vest with dried blood and human tissue, a bloody uniform shirt, and a very bloody t-shirt. People's Exhibit Nos. 105-07; RT 3641-47. All these items, together with photographs of the items, were admitted into evidence. People's Exhibit No. 60 (Photographs of Burrell's Clothing); People's Exhibit No. 59 (Photograph of MacDonald's Clothing). During his examination of the coroner, the prosecution was permitted to tack the clothing on a board (RT 3598) or to have it held up for the jury (RT 3645).

The defense also objected to two additional pairs of photographs, one pair showing the two officers in their uniforms when they were alive, another showing the two officers on the autopsy table. People's Exhibit No. 50 (autopsy photos); People's Exhibit No. 35 (officers in uniform); RT

3708. These were both admitted into evidence and the prosecution used the photos in the examination of two lay witnesses. RT 2192, 2580.

In addition to objecting to the physical and photographic evidence, the defense objected to inflammatory testimony. For instance, the defense objected to the testimony of Officer Frederick Douglas Reynolds, one of the officers who was first to the scene and who attended the autopsy. Officer Reynolds testified that he had been a friend of Officer Burrell. RT 2581. The defense objection to the prosecution eliciting the evidence of the friendship between the officers was overruled. RT 2581. Officer Reynolds also described the blood and vomit at the scene when he found the officers. RT 2589. The defense objected to the mention of the blood and vomit, and the objection was sustained; however, Officer Reynolds returned to the topic, and later testified that he saw blood and vomit around the head of one of the officers and saw brain matter on the officer's jacket. RT 2590. Defense counsel acknowledged that the prosecution had the prerogative to elicit testimony about the crime scene and about how the officers were found; however, he strenuously objected to the manner in which the prosecutor was doing this, particularly because he turned to the parents before beginning his questioning. RT 2591. In addition to the above, Compton Police Officer Mark Metcalf, who found Officers MacDonald and Burrell, testified to the condition of the officers as they were dying: Officer MacDonald had a gunshot wound to the face, and his eyes were rolling up and down. RT 2546.

Emphasizing that the identity of the officers was not in dispute and noting that the parents were in the audience and were obviously upset, trial counsel offered to stipulate to the testimony of vocational nurse Bobbie Harris (RT 2168), who was also at the scene, and who was to describe the officers as she found them. The trial court ruled that because the

prosecution wished to put on the evidence, he would not oblige it to accept the offered stipulation. RT 2171. Harris was shown a picture of the officers from the autopsy. People's Exhibit No. 50; RT 2192. She testified about the blood she found at the scene, including in her testimony the fact that one of the officers gurgled when she felt for a pulse. RT 2195-96.

Finally, the defense objected to much of the testimony of the coroner, especially the prosecution's use of the articles of clothing from the officers to illustrate the coroner's testimony. The testimony of the coroner is summarized in detail in Argument VII, *supra*. During the examination of the coroner, the prosecution first had the coroner testify about the wounds (RT 3577-78, 3615-16) and, although the coroner surely could have described the wounds without the photographs, the prosecution then made extensive use of the photographs of officers MacDonald and Burrell to illustrate the testimony. RT 3579-81, 3616-20; People's Exhibit Nos. 84 & 97. Not satisfied with the pictures and the coroner's descriptions, the prosecutor also used x-rays of the wounds (RT 3589-91, 3594-95; 3636-38; People's Exhibits Nos. 88, 89, 102 & 103), mannequins (RT 3581-82, 3587-88, 3592-93), photographs of the mannequins (RT 3596, 3640; People's Exhibit Nos. 91 &104) and an autopsy report, which had illustrations of the wounds (RT 3576, 3614; People's Exhibit Nos. 83 & 97). On top of all this, the prosecution also used the officer's clothing with the coroner. RT 3597-607; 3641-49.

In particular, the defense objected to the coroner's use of a t-shirt which was heavily blood-stained. RT 3608-09. The prosecution noted that it was using the clothing to establish that the wounds could have been inflicted in a struggle with someone; however, even given that, the defense argued, the prosecution had gone too far with a bloody t-shirt, which had no independent relevant significance. RT 3609. The trial court declined to

accept the defense's offered stipulation as to the cause of death and the manner in which the wounds were inflicted. RT 3569, 3609.

C. The Admission of the Vast Amount of Cumulative, Inflammatory Evidence Was Prejudicial Error

As a general rule, evidence should be excluded when "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code, § 352. In several cases, courts have found abuse of discretion in allowing photographs of the bodies of murder victims. Thus, "[w]hen allegedly gruesome photographs are presented, the trial court must decide whether their probative value outweighs their probable prejudicial effect." *People v. Love*, 53 Cal.2d 843, 852 (1960). Such evidence can have such a powerful effect that "[u]nnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment." *People v. Marsh*, 175 Cal.App.3d 987, 997 (1985). "[P]hotographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime..." *People v. Chavez*, 50 Cal.2d 778, 792 (1958). Moreover:

> Where the inevitable effect of introducing a photograph is to arouse the sympathy or prejudice of the jury, and the fact in proof of which it is offered is not denied, or where its introduction serves no purpose other than to inflame the jurors' emotions, it is not admissible.

People v. Redston, 139 Cal.App.2d 485, 490 (1956).

Although photographic evidence may properly be admitted even if largely cumulative, the necessity of admitting such evidence is a relevant factor in assessing its probative value. *See People v. Allen*, 42 Cal.3d 1222, 1257 (1986). "'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the

defendant.'" *People v. Cardenas*, 31 Cal.3d 897, 905 (1982), *quoting People v. De La Plane*, 88 Cal.App.3d 223, 242 (1979). "If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." *People v. Anderson*, 43 Cal.3d 1104, 1137 (1987), *quoting People v. Thompson*, 27 Cal.3d 303, 318 (1981); *see also People v. Coleman*, 89 Cal.App.3d 312, 321 (1979) ("Evidence presented on a nondisputed issue is irrelevant and, hence, inadmissible, as only relevant evidence is admissible in a trial."); *People v. Reyes*, 62 Cal.App.3d 53, 64 (1976) ("Evidence is *not* relevant in a case unless offered on a contested issue of fact.").

The numerous grizzly photographs of the deceased officers were exactly the kind which could bias or otherwise "inflame the passions" of the jury. *See People v. Burns*, 109 Cal.App.2d 524, 535-38 (1952) (reversal based on gruesome autopsy photos); *accord, People v. Scheid*, 16 Cal.4th 1, 20 (1997) (recognizing that pictures displaying contorted facial expressions of crime victims could conceivably inflame a jury). In addition, the photographs were completely unnecessary given the availability of the mannequins and the coroner's testimony. The blood and tissue covered clothing was also the kind of evidence that a jury would find repulsive and was unnecessary, especially given the availability of other more neutral evidence. *See People v. Smith*, 33 Cal.App.3d 51, 69 (1973) (error to admit emotionally laden photographs, when other evidence demonstrating facts of killing needed no amplification).

Under Evidence Code section 352, the trial court's abuses its discretion in admitting photographs and other evidence tending to provoke the emotions may be set aside where the probative value of the pictures clearly is outweighed by their prejudicial effect. *Sheid*, 16 Cal.4th at 18. The prejudice referred to in Evidence Code section 352 applies to evidence

which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. *People v. Karis*, 46 Cal.3d 612, 638 (1988). Photographs of deceased officers and bloody clothing is the kind that tends to evoke an emotional bias against a defendant, without adding any additional information to the case. *Smith*, 33 Cal.App.3d at 69. That is the real reason why the prosecutor wanted these photographs and items to be in front of the jury, and is the reason this Court should find the trial court's admission of them erroneous.

The prosecution argued that it wished to demonstrate that the gunshots were received by the officers during a struggle. RT 3609. This was not disputed, as defense counsel's many offers to stipulate show; however, even if the prosecution was going to prove the shots were received in a struggle, the facts clearly could have been put on with the coroner's testimony, or the mannequins, or the x-rays. It was not necessary, even given the prosecution's articulated reasons for this evidence, to put on the extraordinary amount of evidence of the deaths of the officers.

This case is a clear instance of prosecutorial overreaching, especially where the evidence admitted to show the identity of the officers goes. Even if the prosecution should have been permitted to put on some of this evidence to prove its case, it cannot be that it was permitted to put it all on. It was error to permit the prosecution to use photos and the testimony of an officer, who in addition to identifying the officers, testified about gruesome details of what he found, and, then on top of all this, to permit the testimony of a nurse, who added more of her own gruesome details about the scene. There was no dispute about who these men were, and the evidence added very little information to the issue – all this extra testimony was designed solely to shock the jury.

Appellant could have gotten a fair trial while at the same time the prosecution put on necessary evidence about the cause of death of the officers and of the manner in which the wounds were inflicted. But here the prosecution just went too far. The prosecution used photographs and x-rays, and clothing and mannequins and photographs of the mannequins and autopsy reports and testimony from the coroner. This was all to show facts which the defendant did not dispute. The trial court simply did not consider the impact of all this evidence on the passions of the jury in his ruling that the prosecution did not have to accept the defense's offered stipulations. Rather, he just assumed that the prosecutor had a right to put on the evidence as he saw fit because he had the "burden of proof" for the circumstances of the crime. RT 2578. The trial court was incorrect that there are no limits to the prosecution's right to put on a case. It cannot be that a prosecutor can simply aver that he bears the burden of proof and can then put on any evidence, irrespective of how unbearable it is. A rule permitting the admission of any evidence to show the crime, involves an abandonment by the trial court of its responsibility to assure that a defendant gets a fair trial, and by this Court to review a trial court's decisions.

In addition to violating state law, the court's admission of the evidence violated the Eighth and Fourteenth Amendment requirement of objective criteria to guide the jurors' penalty determination (*Maynard* v. *Cartwright,* 486 U.S. 356 (1988); *McClesky* v. *Kemp,* 481 U.S. 279 (1987)); their prohibition against unduly prejudicial evidence (*South Carolina* v. *Gathers*, 490 U.S. 805 (1989); *Gregg* v. *Georgia*, 428 U.S. 153 (1976)); and the requirement of heightened reliability in capital sentencing procedures (*Beck v. Alabama*, 447 U.S. 625, 627-46 (1980), *Murray* v. *Giarratano*, 492 U.S. 1, 109 (1989); *Johnson* v. *Mississippi*, 486 U.S. 578 (1988)). Gory,

emotional evidence such as that in this case rendered the trial fundamentally unfair. *See Ferrier v. Duckworth*, 902 F.2d 545, 549-49 (7th Cir. 1990) (irrelevant photographs of blood-spattered crime scene could render trial fundamentally unfair). To the extent the error was solely one of state law, it violated appellant's right to due process by depriving him of a state-created liberty interest. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

Moreover, by allowing the evidence, the court allowed the prosecutor improperly to generate sympathy for the victims and bias against appellant, thereby increasing the likelihood that the jury would vote to convict. *See People v Poggi*, 45 Cal.3d 306, 322-323 (1988) (trial court improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph showing incisions that the surgeons made performing a tracheotomy). It is well known that excess evidence regarding the brutality of a crime causes jurors both to ignore evidence of mitigation and prematurely to decide that the punishment should be death at the guilt phase of a trial. *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L. Rev. 1011 (2001) (evidence that jurors discount or ignore evidence of mitigation in the face of an aggravated killing); *see also* William J. Bowers, et al., *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998) (jurors' accounts that grotesque details of the crime, especially as conveyed by photographs of the victim's body, tend to prompt a decision that the punishment should be death at the guilt stage of the trial). "[T]he Constitution will not permit ..." evidence "...

aimed at inflaming the jury's passions" and designed to "goad ... it into an emotional state more receptive to a call for imposition of death ...." *Tucker v. Zant*, 724 F.2d 882, 888 (11th Cir.1984); *see People v. Love,* 53 Cal.2d 843, 856 (1960) ("[e]vidence that serves primarily to inflame the passions of the jurors must ... be excluded...."). In particular, the evidence of Officer Burrell's friendship with Officer Reynolds and the evidence of the officers in their uniforms before death was improper evidence of victim impact introduced at the guilt phase. *See Poggi*, 45 Cal.3d at 322-23.

As the jurors were improperly inflamed and impassioned by the erroneous admission of these photographs, clothing, mannequins, and testimony, appellant's right to a reliable adjudication at all stages of a capital case was denied. *Ford,* 477 U.S. at 411; *Beck*, 447 U.S. at 638. The trial court's abuse of discretion in admitting these items and testimony also violated appellant's right to due process and made his trial fundamentally unfair. *People v. Marsh*, 175 Cal.App.3d 987 (1985), citing *People v. Cavanaugh*, 44 Cal.2d 252, 268-69 (1955) (unnecessary admission of gruesome photographs deprives a defendant of a fair trial); *Lesko v. Owens*, 881 F.2d 44, 52 (3rd Cir. 1989) (where the inflammatory nature of evidence admitted against a defendant "so plainly exceeds its evidentiary worth . . . a constitutional error has been made.").

As the error caused by the admission of these items cannot be shown to be harmless beyond a reasonable doubt, appellant's sentence must be reversed. *Chapman*, 386 U.S. at 24. Even under California's lesser state law error standard, it is reasonably probable that the jury would have reached a different result had the evidence been excluded; therefore, appellant's guilty verdict must be reversed. *Scheid*, 16 Cal.4th at 21, *citing Watson*, 46 Cal.2d at 836 (suggesting impropriety of "unduly belaboring" issue by using inflammatory photographs extensively during witness

examination). As discussed above (*see* Argument VIII, *supra*) the prosecution's case in the matter was far from conclusive. It was based on doubtful eyewitness testimony, and the testimony of an informant, Calvin Cooksey, who had many reasons to exaggerate and falsify his evidence. While this Court has held that any error in admitting gruesome photographs was harmless due to the strength of the prosecution's case (*People v. Hines*, 15 Cal.4th 997, 1046 (1997)), the same rationale may not be employed here. The guilt case was a close one, and evidence provoking an emotional response from the jury could easily have made the difference between conviction and acquittal. As such appellant's conviction for the murder of the two police officers must be reversed.

The erroneous admission of the evidence also requires reversal of the penalty. The jury's decision to impose death must be the result of a "reasoned moral response." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). Thus, when evaluating whether evidence denied appellant his right to a fair penalty phase this Court must consider the extent to which the macabre evidence admitted in this case overwhelmed the jury's capacity to reason about whether appellant deserved to die. *See Cargle v. State*, 909 P.2d 806, 830 (Ok.Cr.App. 1995) ("The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."); *see also People v. Raley*, 2 Cal.4th 870, 916 (1992) (in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion."). In this case, the evidence must have overwhelmed the reason of the jury, as it did the witnesses and the audience.

Moreover in evaluating the error and the prejudice in this case, one cannot overlook the impact of this evidence on the audience and witnesses in this case. The Court noted that the evidence of the death of Officer MacDonald was obviously having a disturbing effect on Mrs. MacDonald, the officer's mother. She appeared extremely agitated during the testimony of the coroner. RT 3610. This could not have gone unnoticed by the jury. This was aggravated by the prosecution's gesture to Mrs. MacDonald and the other parents before the prosecution began to put on his testimony. RT 2591. It is also likely that Officer Reynolds got upset during his testimony. RT 2593 (references to whether Officer Reynolds was "okay").

Since appellant's death sentence relies on an unreliable guilt verdict, it was obtained in violation of his Eighth Amendment right to be free from cruel and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Moreover the evidence was an emotional appeal to the passions of the jury, which surely overwhelmed the ability of the jury to make a reasoned moral response to the evidence, as they were required to do. *Penry*, 492 U.S. at 328. As such, appellant's sentence of death must also be reversed.

* * * * *

X

THE THREE REENACTMENTS OF THE CRIME WERE MORE PREJUDICIAL THAN PROBATIVE

A. Appellant's Rights to a Fair Trial and Due Process Were Violated by The Prosecutor's Reenactments of the Crime Scene

Although three eyewitnesses testified in detail about what they saw the night of the crime, the prosecution was also permitted to put on reenactments of the crime scene using these witnesses. During these dramatizations, the prosecutor pretended to be the wounded police officer and the witnesses pointed a gun at his back and head. This evidence was admitted in violation of California Evidence Code section 352 because it was more prejudicial than probative. The admission of the demonstrations also violated appellant's due process right to a fair trial and his right to a trial free from cruel and unusual punishment under article 1, sections, 15, 16 and 17 of the California Constitution and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, VI, VIII, & XIV; Cal. Const. art. 1, §§ 15, 16 & 17; *Caldwell v. Mississippi*, 472 US 320 (1985); *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Ford* v. *Wainwright*, 477 U.S. 399 (1986); *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (recognizing "fundamental fairness" standard). The error requires reversal of appellant's verdict and sentence of death.

B. The Demonstrations

Prosecution witness Margaretta Gully testified about what she saw the night Officers Burrell and MacDonald were shot. She testified that she was driving along Rosecrans and she approached a scene where two officers were struggling with a young African American man. Then she heard gunshots. RT 1809. She looked through her rearview mirror and saw

the suspect over the fallen officer. RT 1811. The suspect straddled the officer and bent at the knees. RT 1816.

However, not satisfied with Gully's words, the prosecution also sought to elicit a demonstration, essentially a reenactment, of what Ms. Gully claimed to have seen that night. Before the prosecutor could begin the demonstration, trial counsel objected:

> Your honor, I believe that Mr. Arnold [the district attorney] is going to physically demonstrate the manner in which the officer – or the suspect was allegedly straddling the officer and shooting the officer.
>
> I want to object to the demonstration. I don't feel the – I think the demonstration is more prejudicial than probative.
>
> The witness has testified. I don't think there's any question about the manner in which she has testified about the suspect straddling the officer.
>
> And I think that a further demonstration would only seem to inflame the passions of the jury, especially in view of the fact that there are a number of Compton police officers who happen to be here in court today.
>
> I don't think it is necessary. I think that the record is clear, and the demonstration does not enhance this witness' testimony in any way.

RT 1817. The prosecution argued that because he had the burden of proving specific intent to kill, and of "proving willfulness, deliberation, and premeditation in order to prove the special circumstance" the demonstration should be permitted. According to the prosecution, "[a] description by words is nowhere near as clear and as accurate as a visual representation." RT 1817. He added: "I think it is highly relevant. The jury can then see the proportional relationship that the suspect was in relationship to the officer. They can see the distance between the end of the gun and the officer's head." Trial counsel interjected: "The other problem, what you see here in the court does not tend to depict what this witness saw at the scene. It is a darkened scene. It's a street. It's night in Compton."

RT 1818. The trial court overruled the defense objection, ruling that the demonstration should be permitted because the prosecution had the burden of proof. RT 1818.

The prosecution proceeded to reenact the crime with witness Gully. First, the prosecutor had Gully get down off the witness stand and handed her an unloaded gun. This was apparently a Sig-Sauer 9 millimeter pistol. *See* RT 2018 (pistol used in a subsequent demonstration explicitly referred to as a Sig-Sauer). Whether the pistol used was identical to the gun used in the crime is not noted for the record. However, since the crime weapon was likely a nine-millimeter Sig-Sauer pistol, the gun must have borne a strong resemblance to the gun supposedly used in the crime. *See* People's Exhibit No. 32 (Sig-Sauer pistol); RT 3670-72 (testimony of Dwight Van Horn, identifying the Sig-Sauer as the possibly the gun firing the bullets found at the scene). After handing witness Gully the gun, the prosecutor lay down on the floor face-down on his stomach pretending to be the wounded officer, saying:

> Now, Mrs. Gully, I am going to lay down on the floor, and I am the officer that is down. All right?
>
> I want you to be the suspect, and I want you to stand whereever the suspect stood and do whatever the suspect did. You know, configure your arms how you saw the suspect configuring his arms.

RT 1821. Trial counsel then described what happened for the record:

> Yes, it appears the witness is straddling both of Mr. Arnold's legs. The witness' legs are on each side of Mr. Arnold's legs.
>
> Mrs. Gully's right leg is on the outside of Mr. Arnold's right leg. Mrs. Gully's left leg is on the outside of Mr. Arnold's leg at the knee.
>
> Mrs. Gully, the witness has two hands on the weapon and appears to be aiming at a location of Mr. Arnold's head.

> And the barrel of the gun appears to be at a distance of about three feet, maybe four feet.

RT 1821-22.[32]

Later, the prosecution put on similar reenactments with the other witnesses in the car with witness Gully that night. After Gully's son, fourteen year old De'Moryea Polidore, testified about what he saw that night, the prosecutor asked him to reenact the scene. Again, Mr. Arnold pretended to be a downed officer, the white officer, Officer MacDonald:

> I want you to come off the stand, and the first thing I want you to do is, I'm going to tell you that I'm going to be the white police officer, okay? ... The first thing I'm going to want you to do is, I'm going to want you to position me how that white police officer was laying on the ground.

RT 2019. The prosecutor, who was already on his belly, then re-angled himself on the floor, as witness Polidore instructed him to close up his legs and put his hands farther up to look like the fallen officer. RT 2020. Then the prosecutor told Polidore to get the Sig-Sauer off the table and to position himself as he remembered the shooter. RT 2021. Trial counsel and the trial court described the demonstration for the record, as witness Polidore reenacted the shots that killed Officer MacDonald:

> Mr. Jaffe: It appears as though De'Moryea Polidore is standing over Mr. Arnold. Mr. Polidore's right leg is to the right south side of Mr. Arnold's right knee. Mr. Polidore's left leg is to the left of Mr. Arnold's left knee. Mr. Polidore is holding the handgun in both hands. The right hand appears to be on the trigger. The arms are out stretched. The end of the barrel of the gun appears to be approximately three feet away from -- well, actually four feet away from Mr. Arnold's head.

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[32]The prosecution also elicited evidence that an artist rendering showed the same scene of the suspect standing over the fallen officer. Appellant showed above that this rendering was also inadmissible. *See* Argument VIII, *supra*.

The Court: And it's pointed in the direction of the upper back or head area.

Mr. Jaffe: Yes. The gun is pointed at approximately a 45 degree angle.

RT 2021.

The prosecution staged the killings a third time with witness Alicia Jordan, who was in the car with witnesses Gully and Polidore. Again the demonstration was after witness Jordan testified about what she saw. RT 2240, *et. seq*. This time the prosecutor pretended to be the wounded black officer, Officer Burrell. The prosecutor gave witness Jordan the Sig-Sauer and then told her:

All right. I am going to lie down on the ground, and I want you to position me.

I am the officer. I want you to put my feet in the right spot, you know, my head in the right spot. You don't have to physically move me. Just tell me what to do. All right?

Once I am in the right spot, I am going to want you to pretend you are the suspect, and I want you to move around and do what the suspect did. Hold the gun like the suspect held the gun. Move around me like the suspect moved around the officer.

RT 2258-59.

There was then a pause in the staging because witness Jordan refused to do the demonstration. RT 2259. The trial court tried to elicit why she balked and Jordan responded: "I don't – well, yes, there's not a reason, but I don't want to." RT 2259. Over the objection of trial counsel, the prosecution asked witness Jordan whether there was "something over on this side of the room that you don't want to be near," in a clear reference to appellant, sitting on the other side of the room. RT 2259. Witness Jordan only consented to do the demonstration if the prosecutor agreed to move closer to where she was standing. RT 2260.

The prosecutor then got on his stomach and the trial court questioned Ms. Jordan, who asserted that she did not remember how the downed officer lay. RT 2260. The trial court instructed Jordan to "tell us what you remember seeing happening. Just show if you could, please." RT 2260-61. Witness Jordan balked a second time, but finally agreed to the demonstration if, instead of a gun, she was allowed to point at Mr. Arnold with her finger. RT 2261. She then walked to the left side of the officer, to the area between the waist and shoulder area and demonstrated for the jury how she saw the man "shoot him down." Her right hand was out and pointing towards the back at first and then the head area of the officer. RT 2262.[33]

In guilt phase closing argument, the prosecution made explicit reference, not only to the testimony of witnesses Gully, Polidore and Jordan, but also to their demonstrations. In discussing the evidence witness Gully gave, the prosecutor reminded the jury of the demonstration he did with Gully with the suspect straddling that "poor officer" as he was already wounded. RT 4086.

C. Appellant Has Not Waived His Objections to the Evidence

1. Objections to the Polidore and Jordan Demonstrations Would Have Been Futile

Although trial counsel made a timely objection to the demonstration with Margaretta Gully on the grounds that the evidence was more prejudicial than probative (RT 1817), trial counsel did not object to the

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[33]Later on redirect examination, the prosecution had Jordan participate in a second demonstration. The prosecutor sat in one chair and witness Jordan in a second. The prosecutor asked Ms. Jordan to pretend that he was the "suspect," in the truck as it drove past, told her that he would adjust his position, and asked her to tell him when he was as far away from Jordan as the "suspect" had been from her. RT 2472-74.

reenactments of the crime scene done with De'Moryea Polidore and Alicia Jordan. Trial counsel has nonetheless not waived his right to appeal this issue because it would have been futile for him to have raised the objections in that the trial court had already overruled his objection to substantially similar demonstrations.

To preserve an evidentiary issue for appeal, the complaining party generally is required to make a timely and meaningful objection in the trial court. Cal. Evid. Code § 353(a). The purpose of the rule requiring a timely objection is to give the trial court the opportunity to correct the error. *People v. Green*, 27 Cal.3d 1, 27 (1980). However, neither argument nor objection is required to preserve a point for appeal when it would have been futile because the trial court has already overruled an objection to similar evidence. *People v. Roberto V.*, 93 Cal.App.4th 1350, 1365 n.8 (2001), *citing People v. Sandoval*, 87 Cal.App.4th 1425, 1433 n.1 (1992). So, in *Green v. Southern Pac. Co.,* 122 Cal. 563, 565 (1898), an objection to the testimony of one witness was overruled, and a later witness testified to substantially the same matter without objection. The court found that the party was not barred from raising on appeal his complaint about the un-objected to evidence because he had already taken objection to evidence of the same character. *Id.* at 565.

The Gully demonstration was similar to the Jordan and Polidore demonstrations. The trial court ruled that the Gully demonstration was admissible because the prosecution had the "burden of proof." RT 1818. The trial court would surely have ruled the same on any objections made on section 352 grounds to the Jordan and Polidore demonstrations. As such, it would have been futile for trial counsel to object to the Jordan and Polidore demonstrations, which presented precisely the same issue of prejudice versus probative value. *See People v. Livaditus*, 2 Cal.4th 759, 775 n.3

(1992) (Although the defendant did not specifically object to the evidence, his general objections on the grounds argued on appeal to the evidence, which were overruled, were sufficient to satisfy the contemporaneous objection rule); *see also People v. Zambrano*, No. E034724, 2004 WL 2634292, at *4 (Cal. Ct. App. Nov. 19, 2004).

Moreover, since this is a capital case this Court should disregard any arguable waiver of this issue and, instead, examine the whole record to determine whether a miscarriage of justice was done. This Court held in a footnote in *People v. Frank*, 38 Cal.3d 711, 729 n.3 (1985), that "[o]n an appeal from a judgment imposing the penalty of death, a technical insufficiency in the form of an objection will be disregarded and the entire record will be examined to determine if a miscarriage of justice resulted." Since *Frank*, this Court has criticized the holding in *Frank* because the lead opinion in the case was not the majority opinion, and because the Court had only cited the *Frank's* footnote "in order to distinguish it," finding that in each case where the footnote was cited, rather than making a technically insufficient objection, the appellant had made none whatsoever. *People v. Jones*, 29 Cal.4th 1229, 1255-56 (2003), *citing People v. Williams*, 16 Cal.4th 153, 208 (1997) and *People v. Diaz*, 3 Cal.4th 495, 527 (1992). In this matter, appellant's failure to object was technical, in that all that trial counsel can be faulted for is failure to make a standing objection to all of the prosecution's demonstrations. *See* C.E.B., 3 California Evidence 4th, § 381 (suggesting standing objections), C.E.B., California Trial Objections 6th, § 4.11 (same). As such, *Frank* applies and this Court should not find that appellant has waived his right to object to the demonstrations.

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2. Trial Counsel's Failure to Make Federal Constitutional Objections Does Not Waive Appellant's Constitutional Claims

Trial counsel did not explicitly move to exclude the evidence of the three demonstrations from Gully, Polidore and Jordan on the grounds that the evidence violated the Due Process Clauses of the federal and state Constitutions; nor did he object to the evidence on the grounds that it violated his right to a reliable guilt and penalty verdict under the ban against cruel and unusual punishment in the Eighth Amendment of the federal Constitution. Appellant, nonetheless, has not waived his right to raise a claim that admission of the demonstration evidence violated these rights.

It is well-established that "constitutional issues may be reviewed on appeal even where defendant did not raise them below." *People v. Barber,* 102 Cal.App.4th 145, 150 (2002). This Court has repeatedly stated that it is more inclined to review constitutional issues where an appellant's fundamental rights are involved. Most recently this Court held:

> We believe that to consider defendant's federal claims on the merits is 'more consistent with fairness and good appellate practice than to deny the claim as waived. As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.'

People v. Coles, 33 Cal.4th 1158, 1195 n.6 (2004), *citing People v. Yeoman*, 31 Cal.4th 93, 117, 133 (2003). In *Hale v. Morgan*, 22 Cal.3d 388, 394 (1978), the Court noted that it was more likely to consider issues where there was a failure to object where the defendant's fundamental rights were at issue: "our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement

of a penal statute is involved (e.g., *People v. Allen* (1974) 41 Cal.App.3d 196, 201, [and] the asserted error fundamentally affects the validity of the judgment (e.g., *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153) ...."

Moreover, an appellate court can consider issues not objected to at the trial court if the question raises a pure question of law on undisputed facts. This Court held so in 1959: "[t]he general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" *Ward v. Taggart,* 51 Cal.2d 736, 742 (1959), *see Hale*, 22 Cal.3d at 394. This Court has particularly done so where the issue raised the defendant's constitutional rights. For example, in *Yeoman*, 31 Cal.4th at 117, this Court considered a claim that evidence violated the Eighth Amendment when trial counsel objected only to evidence on due process and equal protection grounds. *See also People v. Coddington*, 23 Cal.4th 529, 632 (2000) ("We deem the objections made were broad enough to encompass his constitutional claims and therefore need not address his claim that if the objections were inadequate counsel rendered ineffective assistance.").

Finally, trial counsel's objection to the evidence on due process grounds would likely have been futile. Having overruled trial counsel's section 352 objection, it is unlikely that the trial court would have ruled in appellant's favor on a claim of due process. *See People v. Whitt*, 51 Cal.3d 620, 637 n.7 (1990) (addressing merits of appellate claim because objection would likely have been futile); *see also Stutson v. United States,* 516 U.S. 193, 196 (1996) (inappropriate to "allow technicalities which caused no

prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims); and *People v. Hill,* 17 Cal.4th 800, 820 (1998) (reviewing claims on appeal that would have been denied if made to the trial judge). As such, appellant's failure to raise a claim of violation of due process and violation of the Eighth Amendment does not act as an implied waiver of the issues.

D. The Demonstrations Were More Prejudicial Than Probative, Denied Appellant His Right to His Federal Constitutional Rights and Require Reversal

Evidence of demonstrations is admissible where (1) the demonstration is relevant, (2) its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar and (3) the evidence will not consume undue time or confuse or mislead the jury. *People v. Bonin*, 47 Cal.3d 808, 847 (1989). The party offering the evidence bears the burden of showing that the foundational requirements have been satisfied. *Id.* at 847. The determination whether to admit demonstration evidence requires the trial court to decide whether the evidence is "of any value in aiding the jury." *People v. Terry*, 38 Cal.App.3d 432, 445 (1974). The trial court's ruling on admissibility will be reversed where the trial court abused its discretion. *People v. Boyd*, 222 Cal.App.3d 541, 565-66 (1990); *Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d 510, 522 (1973).

The admission of the reenactments in this case was an abuse of discretion because the prosecution failed to establish that the conditions existing at the time of the occurrence were substantially similar to the reenactments. As noted, the reenactments occurred under much different lighting conditions than the actual crime. *See People v. Gilbert*, 5 Cal.App.4th 1372, 1388 (trial court's refusal to admit demonstration where models would reenact scene was proper because defendant failed to

establish that the conditions of the experiment would be substantially similar to the alleged occurrence at issue). Moreover, the reenactments were likely to mislead the jury. Witnesses Gully, Polidore and Jordan saw what happened the night the police officers were killed for at most a few seconds. The reenactments probably took several minutes. Because they suggested that the eyewitness testimony in this case was much more certain than it really was, the reenactments were highly misleading to appellant's detriment.

A trial judge also abuses his discretion when he admits evidence that is more prejudicial than probative. In this case, the demonstrations were highly prejudicial because they served to highlight the emotional aspects of this case by dramatically illustrating the scene where the officers were slain – laying down on their stomachs and shot in the head. They also had little probative value. They did not show anything over and above the testimony from Jordan, Polidore and Gully. The demonstrations added no more information the jury needed to make its decision about the case. All the demonstrations did was evoke fear and revulsion. The emotional impact of the demonstrations was heightened by the unnecessary use of an actual gun, a nine-millimeter Sig-Sauer no less; the dramatic effect was further heightened by having the prosecutor himself lie on the floor three times and pretend to be the slain officers. The emotional impact the demonstrations must have had on the jury was also enhanced by the fear Alicia Jordan showed of appellant during the reenactment. The prosecutor's referral to the demonstration in his closing argument, especially the prosecutor's evocation of the "poor officer" (RT 4086) was designed solely to arouse the feelings of the jury and just exacerbated the prejudice. To the extent that the demonstrations showed physical relationships, as the prosecution claimed they would (RT 1818), such facts could easily have been verbally

elicited from the witnesses in the prosecution's examination of them. Moreover, the demonstrative evidence had the effect of suggesting to the jury that the eyewitnesses saw the scene for a longer period and under better conditions than they did. As appellant has previously pointed out (*see* Argument VIII, *supra*), the scene was at night and no witness saw anything of it for more than a few seconds.

The admission of the demonstrations also violated appellant's Fourteenth Amendment due process right to a fair trial. Any conviction that is based on unreliable and/or untrustworthy evidence violates the constitutional guarantee of due process. *See White v. Illinois*, 502 U.S. 346, 363-364 (1992) ("Reliability is ... a due process concern"). These demonstrations were extremely unreliable both because they provoked the jurors' passions and because they misrepresented the scene.

The Eighth and Fourteenth Amendments prohibit unduly prejudicial evidence. *South Carolina* v. *Gathers*, 490 U.S. 805 (1989); *Gregg* v. *Georgia*, 428 U.S. 153 (1976). So that in a capital case, "[e]vidence that serves primarily to inflame the passions of the jurors must ... be excluded...." *People v. Love*, 53 Cal.2d 843, 856 (1960); *see* Argument IX, *supra*. As the jurors were improperly impassioned by the demonstrations, the reenactments denied appellant's right to a reliable adjudication at all stages of a capital case. *Ford*, 477 U.S. at 411; *Beck*, 447 U.S. at 638; *Murray* v. *Giarratano*, 492 U.S. 1, 109 (1989); *Johnson* v. *Mississippi*, 486 U.S. 578 (1988). Finally, the admission of such evidence "so infect[ed] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

Evidence admitted in violation of the Due Process Clause requires reversal unless the government can "prove beyond a reasonable doubt that

the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Evidence admitted under state laws of evidence requires reversal if upon a review of the entire record there is a reasonable probability that an acquittal would have been returned absent the error. *Watson*, 46 Cal.2d at 836. Under the *Chapman* test, the question is "'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Sullivan v. Louisiana*, 508 U. S. 275, 279 (1993). The prosecution cannot meet *Chapman* or *Watson*. It cannot assure that the verdict in this case was not attributed to the error in admitting the demonstrations. As appellant has argued above, (*see* Argument VIII, *supra*), the prosecution in this case had a weak case if appellant's jury disbelieved eyewitnesses Gully, Polidore and Jordan. Yet the prosecution was permitted to artificially enhance the believability of these three witnesses with demonstrations which made what the witnesses saw that night seem more certain than they really were. Moreover, the prosecution cannot show that the evidence did not effect the jury's decision to sentence appellant to death. The evidence was an emotional portrayal of the facts in this case designed to appeal solely to the passions of the jury. The jury's decision to impose death must be the result of a "reasoned moral response." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). These demonstrations, particularly taken in the context of the other macabre evidence the prosecution introduced in relation to the crime (*see* Argument IX, *supra*), surely overwhelmed the capacity of the jury to reason about what sentence appellant deserved. As such appellant's conviction and sentence must be reversed.

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XI

THE TRIAL COURT ERRONEOUSLY ADMITTED WITHOUT LIMITATION APPELLANT'S STATEMENT CONNECTING HIM TO ONE OF THE HOMICIDES

A. Introduction

In pretrial proceedings, the prosecution sought to admit evidence of a statement appellant made to witness Bernard Dickson in which appellant supposedly threatened Dickson if he were to testify. The defense conceded that the evidence was admissible to show Dickson's state of mind; however, the defense asserted that the evidence could not be used to show appellant's knowledge of the crime because it was more prejudicial than probative. The trial court ruled that the evidence could come in without limitation. This was error violating appellant's state and federal constitutional rights.

The erroneous application of California's evidentiary rules deprived appellant of an important procedural protection and liberty interest that is protected under the federal Due Process Clause, as well as his state right to a trial judge who safeguards the rights of the accused. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). Moreover, the erroneous admission of the evidence also resulted in a jury verdict based on unreliable evidence in violation of due process and the ban on cruel and unusual punishment in the Eighth and Fourteenth Amendments. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plur. opn.); *see also Beck v. Alabama* 447 U.S. 625, 637-38 (1980); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The admission of the evidence rendered appellant's trial fundamentally unfair and violated his rights to due process

of law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (recognizing "fundamental fairness" standard). The errors, when seen in the context of the evidence of other killings considered by the jury, require reversal.

B. The Prosecution Sought Admission of a Statement Made in Jail lock-Up

In pre-trial proceedings, the prosecution sought the admission of statements by appellant to witness Bernard Dickson, which the prosecution argued were relevant both as evidence of appellant's consciousness of guilt and to explain Dickson's reluctance to testify. The prosecutor explained his reasoning: Bernard Dickson had been a witness to the killing of Carlos Adkins in late January 1992. A second man, Andre Chappell, was also at the shooting, as was Andre Chappell's wife, Janice Chappell. After the shooting, Dickson approached law enforcement and at some point identified appellant as the person who shot Adkins. In March 1992, Andre Chappell was found shot to death. After his identification of appellant, Dickson was arrested and put in prison on a burglary charge. RT 343.

In May 1992, appellant was arrested on an unrelated charge and law enforcement discovered the outstanding warrant relating to the Adkins' case. After appellant's arrest, Dickson identified appellant as Adkins' shooter at a live line-up. Dickson was later brought from prison to testify in the case against appellant. For unknown reasons, while awaiting a court appearance on the Adkins' case on September 21, 1992, Dickson and appellant were put in the same lock-up in the local jail. According to the prosecution, the two men talked while waiting for the court appearance and appellant told Dickson: "You know what happened to Andre. Homeboys that give information. Bad things happen to them." According to the prosecution, following this conversation Dickson told the district attorney handling the Adkins' case that he was mistaken about his identification of

appellant as the perpetrator. The case against appellant was subsequently dismissed. Later, Dickson told detectives and the district attorney that his claimed mistake in the earlier proceeding was a lie, claiming that he had lied because he thought his life was in danger from appellant. RT 344.

The prosecution then related that Dickson would testify at appellant's trial that he had retracted his initial identification of appellant because he was scared. The district attorney also related that Dickson would testify that he did not appear for the preliminary examination in this case, as he was supposed to, because he had asked for relocation money, which the district attorney refused to provide. He wanted the relocation money because he was afraid to testify. RT 345. For all these reasons, the prosecution argued that appellant's statement to Dickson was admissible because it was relevant to show Dickson's state of mind. RT 345.

The prosecution argued that the statement was also relevant to show appellant's consciousness of guilt: the statement to Dickson showed that appellant was connected to the Adkins' killing because it showed that appellant knew that Chappell was present when Adkins was killed. Moreover, the prosecution argued, what appellant said in the lock-up, *i.e.*, "You don't want what happened to Andre to happen to you," was an admission that demonstrated consciousness of guilt. RT 404.

In his response to the prosecution's arguments, appellant's counsel agreed that the evidence of Andre Chappell's death could come in to show witness Dickson's state of mind, *i.e.*, to show why the witness was afraid to come forward. RT 405. However, the defense argued that the evidence should not be admitted as evidence of an admission by appellant. Counsel argued that this would be prejudicial to the defense. Defense counsel argued that the statement should not be used by the prosecution to show consciousness of guilt because the jury would inevitably speculate that

appellant had something to do with the killing of Andre Chappell when all parties knew that there was no evidence that appellant had anything to do with it. RT 405. The defense also argued that appellant was already on trial for "three bodies" and argued that the jury would have information about another body, if information about the statement was admitted.[34]

Stating that he thought that the evidence of the statement was relevant to the believability of Dickson and also admissible under Evidence Code section 1220 as an admission of a party, the trial court ruled that the evidence could come in without limitation. RT 414; Cal. Evid. Code § 1220. In a motion for new trial, counsel renewed his objection to the evidence. CT 1180-201. This motion was also denied. RT 5010.

At trial Dickson testified about his conversation with appellant in the jail lock-up. According to Dickson, appellant told Dickson that if Dickson got on the stand then he could not go back to the projects. He testified that appellant also mentioned that Dickson's daughter was still in the projects and Dickson did not want anything to happen to his family. Dickson knew that what appellant said about him not being able to go back to the projects was true, so he made up a fictitious person to the district attorney. RT 1358. Appellant also told Dickson that he did not want to end up like Andre Chappell, who Dickson knew was dead. Dickson thought appellant was just trying to get Dickson to compromise. Appellant said: "... I didn't want to end up like Andre. You know how homeboys is if I start to live

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[34]At points during this discussion, defense counsel combined his objection to the evidence of the admission relating to Andre Chappell with an objection to other proposed prosecution evidence that witness Calvin Cooksey was reluctant to come forward because his mother had been killed. It is clear, however, that one of the grounds appellant objected to the admission of the evidence was that evidence of additional "bodies" would prejudice appellant.

over there, and, you know, it ain't cool. You know I didn't mean to do it like that." RT 1359. Dickson also testified that was in prison, but that he would be doing his time "elsewhere" because "because of the consequences following my testimony." He continued to be afraid because he would be labeled a "snitch," *i.e.*, someone who tells on others. In Dickson's community, this is a bad thing and snitches get killed or their families get harassed. RT 1288.

C. The Evidence Was Erroneously Admitted

As a general rule, evidence should be excluded when "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352. The admission without limitation of the evidence of appellant's conversation with Bernard Dickson about witness Andre Chappell constituted error because the admission of the evidence was more prejudicial than probative.

The judge permitted the jury to use the evidence of the conversation with Dickson as evidence that appellant knew that Andre Chappell had been present at the Adkins killing, thus suggesting that appellant had also been at the killing. *See* RT 4082-83 (prosecution's argument). The probative value of this evidence was slight, given that Adkins, Chappell and Dickson were all from the same neighborhood, where word seemed to get around (*see* RT 1339 [references to the "word" on the street]), so that it was likely that most people from the neighborhood knew about the Adkins killing. As such, there was no special significance to the fact that appellant also knew about the killing.

Moreover, the prejudicial impact of the conversation was great. Without limitation of the evidence to the effect of the conversation on Dickson's state of mind, the evidence could also be used for another

impermissible purpose: *i.e.*, to show that appellant was more likely to have killed Carlos Adkins because he either killed Andre Chappell himself or arranged to have Chappell killed because of Chappell's involvement in the case against appellant. This was an impermissible use of the evidence of the conversation with Dickson. The general rule is that evidence of crimes other than those charged is inadmissible when offered solely to prove the criminal disposition or propensity of the accused. Cal. Evid. Code § 1101(a). This is because the probative value of such evidence is outweighed by its prejudicial effect. *People v. Haston*, 69 Cal.2d 233, 244 (1968).

Here the jury was likely to have considered the evidence of the conversation about Chappell to show that appellant had the disposition to kill Adkins because it knew that Andre Chappell had identified appellant as the perpetrator of the Adkins' killing. During its examination of one of the law enforcement officials who investigated the Adkins' case, the prosecution elicited information that Chappell had identified appellant before he died. The defense objected to this as hearsay and the answer was struck, but the jury nevertheless heard the evidence. RT 1518, 1719. The error was also compounded by prosecution evidence that Andre Chappell had been shot to death in the neighborhood where both appellant and Chappell lived.[35] The fact that the jury knew that Andre Chappell had been shot to death made it more likely that the jury used the evidence of appellant's conversation with Dickson to show that appellant was a bad man with a murderous character who therefore likely killed Adkins. Even worse, given the failure of the trial court to sever the Adkins homicide from the police officer homicides (see Argument VI, *supra*) there is the

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[35]Appellant argues below that the evidence of Andre Chappell's shooting death was erroneously admitted. *See* Argument XII, *infra*.

significant possibility that the jury also used the evidence of the statement to conclude that appellant was a murderous man who could have killed the police officers.

Any consideration of the effect of the unlimited evidence of the conversation about Andre Chappell on the fairness of appellant's trial must take into account other evidence of a fifth victim. During the cross-examination of Calvin Cooksey, it was revealed that he, like Dickson, had been placed with appellant while awaiting a court appearance. According to Cooksey, when appellant asked him why he was testifying against him, Cooksey asked appellant about his mother being shot, later mentioning that his mother was shot in the chest. Cooksey also testified that although appellant denied having anything to do with the shooting, Cooksey did not believe him. RT 3278-80. Appellant's jury was later told that it must accept the stipulation that law enforcement had done an investigation into the shooting of Cooksey's mother and had concluded that appellant had nothing to do with the death. RT 3362.[36] However, the evidence of another innocent person, who had been shot and who was connected with a witness who was to testify against appellant, surely increased the prejudicial impact of the conversation with Dickson. The evidence of the three victims in the case, in addition to the evidence of Cooksey's mother and the evidence of Andre Chappell made for five victims, just as trial counsel pointed out in a discussion of the evidence early in the case. RT 392. As trial counsel also pointed out, asking the jurors not to think about the two extra victims was like asking them not to think about a pink elephant. Once they were told

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[36]The exact language of the stipulation was as follows: "The Los Angeles Police Department conducted an investigation into the death of Calvin Cooksey's mother, and their findings were that Regis Thomas was not directly or indirectly responsible for the death of Calvin Cooksey's mother." RT 3362.

not to think about the other victims that would be the first thing they would think about. RT 392.[37]

Compounding the error, the jury actually knew about a sixth victim in connection with appellant. Prosecution witness Mark Buster testified against appellant at trial. As will be discussed more fully below, the jury committed misconduct when it read newspaper accounts of the shooting death of Buster's wife and discussed the death in its guilt phase deliberations. The jury speculated about whether Mrs. Buster had been killed before or after Mark Buster testified and at least one juror thought that the jury should have had this evidence for its deliberations, suggesting that the jurors thought that other shooting evidence was relevant to show that appellant was guilty of the crimes in this case. *See* Argument XIX, *infra*. This sixth victim increased the prejudice of the unlimited admission of the statement to Dickson beyond any tolerable level.

Respondent may argue that any prejudice from the admission of the evidence without limitation could have been cured by a properly framed instruction. This is not so. It would have done no good for the court to

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[37]Trial counsel's comments about the jury inevitably thinking about other shooting victims were actually in the context of whether the jury should be instructed if the evidence of Cooksey's mother and Andre Chappell were admitted:

> But I think the court has to tread real carefully on this particular issue because we are not talking about one death. We are talking about two deaths. And now we have at least five dead bodies. And the jury is asked not to consider the fact that Cooksey's mother was killed and Andre Chappel was killed, and they are further told that the defendant had nothing to do with that.
>
> Well, even if you give that cautionary instruction, it's as if you tell the jury don't think about a pink elephant. I mean the first thing they are going to do is think about it.

RT 392.

admonish the jury to ignore improper uses of the evidence, since the jury would have thought about the five bodies (the "pink elephants") however they were instructed. *See People v. Gibson*, 56 Cal.App.3d 119, 130 (1976) ("[I]t is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect."); *see also Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (""The naive assumption that prejudicial effects can be overcome by instructions to the jury, [citation], all practicing lawyers know to be unmitigated fiction. [Citation]""); *People v. Guerrero*, 16 Cal.3d 719, 729 (1976) ("no limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds [the inadmissible evidence]").

Under either the federal "harmless beyond a reasonable doubt" standard of prejudice (*Chapman*, 386 U.S. at 24) or the state "reasonably probable" standard (*Watson*, 46 Cal.2d at 836), the erroneous admission of the evidence of the conversation without limitation must be seen as prejudicial, whether considered by itself or in conjunction with the other errors and jury misconduct in this case. *See, e.g., Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (state law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair). As noted in the Statement of Facts, the defense tried to show that appellant did not intend to kill Adkins because the killing was the result of a struggle with a drug intoxicated person. *See* Statement of Facts, *supra*. Surely, the jury considered the remarks appellant supposedly made to Dickson in their conclusion that appellant intended to kill Adkins, and in its decision to sentence appellant to death. As such, the prosecution cannot show that the

verdict was not attributable to the error, and, as such it violates appellant's right to be free from cruel and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Accordingly, the error in admitting appellant's statement to Bernard Dickson without limitation requires reversal of appellant's death sentence.

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XII

THE TRIAL COURT ERRONEOUSLY ADMITTED THE EVIDENCE OF THE SHOOTING DEATH OF A WITNESS

As appellant has shown above, he was denied a fair trial by the unlimited admission of appellant's statements to Bernard Dickson about Andre Chappell. *See* Argument XI, *supra*. This error was compounded by erroneous admission of evidence that Andre Chappell had been shot and killed in the neighborhood where appellant lived. The error in admitting this evidence, along with the prosecution's reference to the evidence in its opening statement, violated appellant's constitutional and statutory rights.

The erroneous application of California's evidentiary rules deprived appellant of an important procedural protection and liberty interest that is protected under the federal Due Process Clause, as well as his state right to a trial judge who safeguards the rights of the accused. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). The erroneous admission of the evidence also resulted in a jury verdict based on unreliable evidence in violation of due process and the ban on cruel and unusual punishment in the Eighth and Fourteenth Amendments. U.S. Const. amends VIII & XIV; *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plur. opn.); *see also Beck v. Alabama* 447 U.S. 625, 637-38 (1980); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The admission of the evidence rendered appellant's trial fundamentally unfair and violated his rights to due process of law. U.S. Const. amend V & XIV; *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (recognizing "fundamental fairness" standard).

Immediately before the start of trial, the defense stated that it believed that the prosecution intended to mention in its opening statement that Andre Chappell had been shot and killed. The defense objected to any

allusions to the homicide. The trial court overruled the objection. RT 1111. The prosecution then asserted in its opening statement that it would present evidence that Andre Chappell was shot multiple times with a nine-millimeter gun, and that the murder of Chappell had never been solved. RT 1128. After this statement, the prosecution sought explicit leave to put on evidence of Chappell's death. The prosecution argued that it should be permitted to put on evidence that Chappell had been shot to death in Nickerson Gardens after the Adkins' killing. According to the prosecution, the place of death was relevant because both Dickson and appellant had lived there. The prosecution also wanted to show that Chappell had been shot to death because the manner of Chappell's death helped explain Dickson's fear. According to the prosecution, evidence of the death also connected appellant to the Adkins' killing. RT 404.

The defense objected to the evidence of Andre's death on grounds that it was more prejudicial than probative and on grounds that the evidence was cumulative in that other witnesses had already mentioned that Andre Chappell was dead. RT 327. The defense disagreed that evidence of the death itself connected appellant with the Adkins' crime; rather, at best, the evidence was admissible to show Dickson's state of mind, and the jury already had this evidence from Dickson's himself. The trial court overruled appellant's objection to the evidence. RT 1636. The prosecution agreed that it would not put on evidence of the details of how Chappell was killed, although, as noted, the prosecution had already revealed in its opening statement that Chappell had been shot many times with a nine-millimeter. RT 1632; *see* RT 1128. Shortly later, the trial court read a stipulation to the jury that Andre Chappell had been shot and killed in front of 1432 East 111th Street in Nickerson Gardens. RT 1774.

The admission of evidence of Chappell's death was more prejudicial than probative. Cal. Evid. Code § 352. There was little probative value of the shooting evidence other to show that Dickson was afraid of appellant. However, Bernard Dickson testified that he believed that Chappell was shot, which was all the jury needed to know in evaluating the effect of the shooting death on Dickson's unwillingness to come forward in this case. As such, the evidence was cumulative. The prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant. *People v. Cardenas*, 31 Cal.3d 897, 905 (1982).

Moreover, the evidence of Chappell's death was more than just evidence that Chappell was shot; it was essentially evidence that Chappell had been murdered. As noted, the prosecution alluded specifically to Chappell's "unsolved murder" in its opening statement. RT 1128. This aspect of the evidence was highly prejudicial. Recall that the topic of Chappell's death was introduced as part of a threatening conversation in which appellant supposedly pointed out to Dickson that he or members of his family would be dead like Andre Chappell if Dickson testified. *See* Argument XI, *supra*. As such, the jury could only have believed that Chappell was shot in order to prevent his testimony. Moreover, the jury must have believed that appellant had something to do with that killing. As far as the jury knew, there was no other reason Chappell would have been shot other than because he had information about the Adkins killing. True, the jury did not have evidence that Chappell had been killed with a nine-millimeter; however, as noted, the prosecutor stated in his opening statement that Chappell had been killed with a nine-millimeter, which was the type of gun used both in the Adkins shooting and in the killing of the police officers, a point which the prosecution emphasized in argument. People's Exhibit Nos. 18 & 32; RT 1489; *see* RT 1120, 4083. Faced with

such inflammatory information, the jury must have considered there was a connection between the shootings in this case and the shooting of Chappell.

As with the evidence of the appellant's statements to Dickson discussed above (*see* Argument XI, *supra*), consideration of the effect of the evidence of the death of Chappell on the fairness of appellant's trial must take into account evidence of two other shooting victims. Recall that Calvin Cooksey blamed appellant for his mother's shooting death. The jury also considered the shooting death of Mark Buster's wife. The prejudice flowing from the error was compounded by the fact that the prosecution in the opening remarks went beyond what the trial court ultimately permitted, telling the jury that Chappell had been murdered and that the murder had been unsolved. RT 1128.

Under either the federal "harmless beyond a reasonable doubt" standard of prejudice (*Chapman*, 386 U.S. at 24) or the state "reasonably probable" standard (*Watson*, 46 Cal.2d at 836), the erroneous admission of the evidence must be seen as prejudicial. As noted in the previous argument (*see* Argument XI), the defense tried to show that appellant did not intend to kill Adkins because the killing was the result of a struggle with a drug-intoxicated person. *See* Statement of Facts, *supra*. Surely, the jury took into account an additional killing in its decision to disregard that evidence and find appellant guilty of intentional murder. As such, the prosecution cannot show that the verdict was not attributable to the error. The error in admitting evidence of the shooting death of Andre Chappell requires reversal of appellant's conviction for second degree murder. In addition, appellant's death sentence must be reversed, since there is a significant likelihood that appellant would not have been sentenced to death had the evidence of the Chappell shooting not been introduced. As such,

the error violated his right to be free from cruel and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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XIII

CALJIC 2.90 WAS CONSTITUTIONALLY DEFECTIVE

A. Introduction

Because this case presented the jurors with closely balanced factual issues to resolve, an accurate definition of reasonable doubt and of the burden of proof was critical. The jury in this case was read CALJIC 2.90 (1994 Rev) (5th Ed. 1988). CT 1063; RT 4032-33. The judgment should be reversed because the definitions of reasonable doubt and the burden of proof in this instruction was constitutionally deficient in a number of ways.[38]

B. The Instruction Erroneously Implied That Reasonable Doubt Requires the Jurors to Articulate Reason for Their Doubt

The second paragraph of CALJIC 2.90 was given to appellant's jury defined reasonable doubt as follows: "Reasonable doubt is defined as follows: it is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." CT 1063; RT 4032.

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citations.]" *Cage v. Louisiana*, 498 U.S. 39

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[38]There was no objection to the instruction below. However, the issue on appeal is not waived. Instructional errors which affect the defendant's fundamental rights are reversible without objection at trial. Cal. Pen. Code § 259.

(1990); *see also In re Winship*, 397 U.S. 358, 364 (1970). The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U.S. at 363; *see also Cage*, 498 U.S. at 40. "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" *Id.* at 40. An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. *See In re Winship*, 397 U.S. 358 (1970). It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. *See In re Winship*, 397 U.S. 358 (1970); *see also People v. Loggins*, 23 Cal.App.3d 597, 601-04 (1972). Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. *In re Winship*, 397 U.S. 358 (1970). Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. 397 U.S. 358 (1970).

Accordingly, it is constitutionally erroneous expressly to require the jurors to articulate concrete reasons for their doubt. *People v. Antommarchi*, (N.Y. 1992) 80 N.Y.2d 247, 252, 604 N.E.2d 95, 98, 590 N.Y.S.2d 33, 36; *see also Siberry v. State*, 133 Ind. 677, __, 33 N.E. 681, 685 (Ind. 1893). When jurors are required to articulate reasons for acquitting "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." *State v. Cohen*, 108 Iowa 208, 78 N.W. 857, 858 (Iowa 1899). In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations]" *Id.* at 858.

Moreover, the essence of reasonable doubt is a failure of proof: "It is the want of information and knowledge that creates the doubt." *Siberry*, 33 N.E. at 688. Such "want of knowledge" is not necessarily capable of

expression as an affirmative or logical "reason" for the doubt which is felt. This would require the juror to "prove a negative." Hence, such an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." *Siberry*, 33 N.E. 681 at 689.

In the present case the jurors were not expressly instructed that they must articulate reason and logic for their doubt. However, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard. As reasonably interpreted by the jurors (*Estelle v. McGuire*, 502 U.S. 62 (1991)), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

C. CALJIC 2.90 Unconstitutionally Admonished the Jury That a Possible Doubt Is Not a Reasonable Doubt

Part of the definition of reasonable doubt given to appellant's jury was: "Reasonable doubt is defined as follows: it is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." CT 1063; RT 4032.

The language admonishing the jury that "reasonable doubt... is not a mere possible doubt..." was unconstitutional because it failed to adequately limit the scope of possible doubt. Unlike an imaginary doubt, a possible doubt may be based on fact. When driving on a two-lane road reasonable drivers do not pass on a blind curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly give up higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment. In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. The question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable, even if it is merely possible. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 20-21 (1994) (hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be").

This formulation of reasonable doubt was approved in *United States v. Wilson*, 232 U.S. 563, 570 (1914), and has since been endorsed by a number of state and federal courts. *See, e.g., Holland v. United States*, 348 U.S. 121,140 (1954); *Hilbish v. State*, 891 P.2d 841, 850-51 (Alaska App. 1995). The federal circuits that provide for definition of reasonable doubt and many states use the *Wilson* hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" by relating it to the notion of reliance: a reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. *8th Circuit Model Jury Instructions - Criminal* 3.11 (Reasonable Doubt) (2000); *see also* Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions*, § 12:10 (Presumption Of Innocence, Burden Of Proof, And Reasonable Doubt) (West, 5th ed. 2000).[39]

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[39]Other jurisdictions include similar definitions. *See e.g., Pennsylvania Suggested Standard Criminal Jury Instructions*, Pa. SSJI (Crim) 7.01 ¶ 3, sent. 2 (Presumption Of Innocence: Burden Of Proof; Reasonable Doubt) (Pennsylvania Bar Institute, PBI Press); *South Carolina Criminal Jury Instructions* 1-14 (Reasonable Doubt Charge) (South Carolina Bar, 1995); W. Scott Carpenter, & Paul J.McClung, *McClung's Texas Criminal Jury Charges*, § 1 (II)(B)(2) ¶ 4 (proper.chg) (James Publishing, 2000); *Criminal Jury Instructions For The District of Columbia*, Instr. 2.09, (Reasonable Doubt) (Bar Association of the District of Columbia, 4th ed. 1993); *South Dakota Pattern Jury Instructions - Criminal*, SDCL 1-6-2 & 1-6-3 (Reasonable Doubt (Alternates 1 & 2)) (State Bar of South Dakota, 2000); *Alaska Pattern Criminal Jury Instructions*, 1.52 (Presumption Of Innocence, Burden Of Proof Beyond A Reasonable Doubt) (Alaska Bar Association, 1987); *Arkansas Model Jury Instructions - Criminal,* AMCI 2d 110 (Introductory Instructions-Reasonable Doubt) (Lexis, 2nd ed. 1997); *Colorado Jury Instructions*, COLJI - Crim 3:04 (Presumption Of Innocence-Burden Of Proof Generally-Reasonable Doubt) (West, 1983); *Connecticut Selected Jury Instructions - Criminal* 2.8 (General Jury Instructions-Reasonable Doubt) (The Commission on Official Legal Publications Judicial Branch, 3rd ed. 1996); *Idaho Criminal Jury Instructions*, ICJI 103A (Reasonable Doubt (Alternative)) (Idaho Law Foundation, Inc., 1995); *Maryland Criminal Pattern Jury Instructions*, MPJI-Cr 1.04 (Reasonable Doubt) (Micpel, 1999); *New Mexico Uniform Jury Instructions - Criminal*, UJI Criminal 14-5060 (Presumption Of Innocence; Reasonable Doubt; Burden Of Proof) (Lexis, 1998); *Instructions for Virginia & West Virginia* 24-401 (Reasonable Doubt Defined Generally) (Lexis, 4th ed. 1996); *Wisconsin Jury Instructions - Criminal*, WIS-JI-Criminal 140 (Burden Of Pool And Presumption Of Innocence) (University of Wisconsin Law School, 2000); *6th Circuit Pattern Jury Instructions - Criminal* 1.03 (Presumption Of Innocence, Burden Of Proof, Reasonable Doubt) (1991).

Alternatively, it may be said that reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." *Siberry*, 33 N.E. 681 at 689. However, in the present case reasonable doubt was not so defined. Instead, the jury was admonished that a doubt is not reasonable if it is "merely possible." Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.

Moreover, by stating that merely possible doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

D. The Instruction Was Deficient and Misleading Because the Instruction Failed to Affirmatively Instruct That the Defense Had No Obligation to Present or Refute Evidence

The instructional language which defined and explained the presumption of innocence was the first paragraph of CALJIC 2.90 which provided as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the prosecution the burden of proving him guilty beyond a reasonable doubt. CT 1063; RT 4032. The instruction omitted one of the most fundamental underpinnings of the presumption of innocence, *i.e.*, that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt.

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. *In re Winship* 397 U.S. 358 (1970); *see People v. Hill*, 17 Cal.4th 800, 831 (1998) ("...to the extent [the prosecution] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence..."); *see also State v. Miller*, 197 W. Va. 588, 610, 476 S.E.2d 535, 557 (W. Va. 1996) (if requested court must instruct that defendant has no obligation to offer evidence); *United States v. Maccini* 721 F.2d 840, 843 (lst Cir. 1983); Federal Judicial Center, *Pattern Criminal Jury Instructions*, 22 (1988) ("[A] defendant has an absolute right not to ... offer evidence.").

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The

> bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony.

Maccini , 721 F.2d at 843. An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases where the defense does present affirmative evidence because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

When considering the instructions as a whole (as required by the instructions (CT 1112; CALJIC 1.01) and presumed by the law[40]), the jurors were reasonably likely to assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which such an erroneous assumption would have been made included the following:

-- "RESPECTIVE DUTIES OF JUDGE AND JURY." CT 1033-35; CALJIC 1.00. This instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict ...." These descriptions implied a weighing of the evidence presented by both parties to determine what actually happened which would be consistent with the jurors' natural intuition. However, the jurors' duty under the presumption of innocence is not to determine the ultimate truth but rather to determine

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[40]"Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." *People v. Lawson*, 189 Cal.App.3d 741, 748 (1987); *see also People v. Hardy*, 2 Cal.4th 86, 208 (1992). "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324-25 n 9 (1985).

whether the prosecution had proved guilt beyond a reasonable doubt and, hence, this instruction was misleading.

-- "PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED." CT 1046; CALJIC 2.11. Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence. This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to present evidence. By expressly telling the jury that neither side is required to "call... all" potential witnesses to an event or "produce all objects or documents..." the instruction suggested that the production of evidence by both sides was required. *See e.g., Commonwealth v. Bird*, 240 Pa. Super. 587, 590, 361 A.2d 737, 739 (Pa. 1976) (reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness); *State v. Mains*, 295 Or. 640, 647, 669 P.2d 1112, 1117 (1983).

-- "SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE GENERALLY." CT 1041-42; CALJIC 2.01. The circumstantial evidence instructions also exacerbated the deficiencies of the presumption of innocence instruction. It is true that CALJIC 2.01, paragraph 2 stated that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." CT 1041. However, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

-- "DEFENDANT NOT TESTIFYING - NO INFERENCE OF GUILT MAY BE DRAWN." CT 1056; CALJIC 2.60. This instruction was limited to the defendant's failure to testify. It did not apply to the failure to present evidence. Hence, this instruction further reinforced the misconception that the defense had the burden of producing evidence to raise a reasonable doubt.

-- "DEFENDANT MAY RELY ON STATE OF EVIDENCE." CT 1057; CALJIC 2.61. This instruction did discuss the defendant's reliance on a failure of proof by the prosecution: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element." However, by making the instruction specifically applicable to "deciding whether or not to testify" and by admonishing that "no lack of testimony on defendant's part will supply a failure of proof...," the instruction, by implication did not apply to the defendant's failure to present evidence.

-- "WITNESS WILLFULLY FALSE." CT 1120; CALJIC 2.21.2. This instruction further implied that the defendant was required to produce evidence to raise a reasonable doubt by admonishing the jury to evaluate a witness's testimony in terms of whether "the probability of truth favors his or her testimony ...." When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors.

-- "SUFFICIENCY OF TESTIMONY OF ONE WITNESS." CT 1054; CALJIC 2.27. The jury was instructed: Testimony concerning

any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends." By specifically referring to "any fact required to be established by the prosecution... ," this instruction suggested by implication that some facts were required to be proven by the defense. Hence, the instruction contributed to the misleading message of the instructions as a whole that the defense has a burden as to affirmative defense theories to raise a reasonable doubt. In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt.

E. The Instruction Was Constitutionally Deficient Because it Failed to Explain That Appellant's Attempt to Refute Prosecution Evidence Did Not Shift the Burden of Proof

Given the instructional failure to explain that appellant had no obligation to present affirmative evidence, it follows that the instructions erroneously failed to explain that appellant's presentation of evidence did not alter the burden. The prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish that the contrary is true, only that the witness is not credible. [Citations]." *People v. Woodberry*, 10 Cal.App.3d 695, 704 (1970). In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." *Edmondson v. State Bar*, 29 Cal.3d 339, 343; *see also Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958)("disbelief of petitioner's story... [cannot] fill the evidentiary gap in the Government's case"); *Moore v. Chesapeake & O.R. Co.*, 340 U.S. 573, 576 (1951) (disbelief of a witness will "not supply a

want of proof"); *Mandelbaum v. United States,* 251 F.2d 748,752 (2nd Cir. 1958) ("the disbelief of a witness does not necessarily establish an affirmative case"); *People v. Goodchild*, 68 Mich.App. 226, 235, 242 N.W.2d 465, 469-70 (Mich. 1976) ("mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion").

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to utilize its disbelief of the defendant's testimony or other defense evidence to conclude that the prosecution's burden has been met. The failure to adequately inform the jury concerning this principle violated appellant's federal constitutional rights to trial by jury and due process by allowing the jury to convict appellant even though the prosecution did not met its burden of proving him guilty beyond a reasonable doubt. U.S. Const. amends. VI & XIV.

F. The Jurors Should Have Been Told That A Conflict In The Evidence And/Or A Lack Of Evidence Could Leave Them With A Reasonable Doubt As To Guilt

CALJIC 2.90 was incomplete and misleading because it failed to expressly inform the jury that reasonable doubt could be based on a conflict in the evidence and/or a lack of evidence. Reasonable doubt may arise from a conflict in the evidence, lack of evidence or a combination of the two. *See Georgia Suggested Pattern Jury Instructions - Criminal Cases* part 2 (D) p. 7 (Instruction D) (Carl Vinson Institute of Government, University of Georgia, 2nd ed. 2000). This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." *Simmons v. Blodgett*, 110 F.3d

39, 41-42 (9th Cir. 1997); *see also Rexall v. Nihill*, 276 F.2d 637, 644 (9th Cir. 1960); *Reliance Ins. v. McGrath*, 671 F.Supp. 669, 675 (N.D. Cal. 1987); *Estate of Obernolte*, 91 Cal.App.3d 124, 129 (1979)["Equal probability does not satisfy a burden of proof..."].

G. CALJIC 2.90 Failed To Inform The Jury That The Presumption Of Innocence Continues Throughout The Entire Trial, Including Deliberations

It is well recognized that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. See *Clarke v. Commonwealth*, 159 Va. 908, 919, 166 S.E. 541, 545-46 (Va. 1932); *see also State v. Goff*, 166 W.Va. 47, 55, 272 S.E.2d 457, 463 (W. Va. 1980) (the burden never shifts to the defendant). Hence, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. *See United States v. Payne*, 944 F.2d 1458, 1462-63 (9th Cir. 1990); *see also People v. Johnson*, 4 Ill. App.3d 539, 541, 281 N.E.2d 451, 453 (Ill. App. Ct. 1972); *People v. Attard*, 346 N.Y.S.2d 851 (N.Y. App. Div. 1973); *State v. Tharp,* 27 Wash. App. 198, 211, 616 P.2d 693, 700 (Wash. App. 1980); *Washington Pattern Jury Instructions - Criminal*, WPIC 1.01 (Advance Oral Instruction-Introductory) comment (West, 2nd ed. 1994) (words "during your deliberations" were inserted into this instruction "to avoid any suggestion that the presumption could be overcome before all the evidence is in"). "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. [Citations.]"

(*Wisconsin Jury Instructions- Criminal, WIS-JI-Criminal* 140 [Burden Of Proof And Presumption Of Innocence] comment p. 4 (University of Wisconsin Law School, 2000). Hence, CALJIC 2.90 as given in the present case was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations.

H. CALJIC 2.90 Improperly Described the Prosecution's Burden as Continuing "Until" the Contrary Is Proved

The judge used CALJIC 2.90 to instruct the jury, in pertinent part, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved..." CT 1063; RT 4032-33. Use of the term "until" in this instruction undermined the prosecution' s burden of proof. Use of the word "until"- is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented. In apparent recognition of how use of the term "until" fails to comport with *Winship* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." *See, e.g., Idaho Criminal Jury Instructions* ICJI No. 1501 ("unless"); Oklahoma Uniform Jury Instruction Crim (2nd ed.) No. 1 (same); *State v. Hutchinson*, 898 S.W.2d 161, 172 (Tenn. 1994) (same); Criminal Jury Instructions--New York CJI (New York) (lst Ed. 1983) No. 3.05 ("unless and until"); Ky. Rev. Stat. § 532.025 (same); *Criminal Jury Instructions For The District of Columbia*, Instr. 1.03 (Bar Association of the District of Columbia, 4th ed. 1993) (same); Uniform Criminal Jury Instructions (Oregon) No. 1006 (same); 1st Circuit Model Instructions Criminal No. 1.01 (same); 8th Circuit Model Instructions, Criminal No. 1.01 (same).[41]

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[41]Alternatively, it has been recommended that the jury be more (continued...)

Hence, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

I. The Errors Violated The Federal and State Constitutions

For all of the above reasons CALJIC 2.90 failed to properly instruct the jury on the prosecution's burden of proof. The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state and federal constitutional rights to due process and fair trial by jury. U.S. Const. amends. VI & XIV; Cal. Const. art. I, §§ 1, 7, 15, 16 & 17; *In re Winship*, 397 U.S. 358 (1970); *see also Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Neder v. United States*, 527 U.S. 1 (1999); *Cage v. Louisiana*, 498 U.S. 39 (1990); *Jackson v. Virginia*, 443 U.S. 307 (1979).

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment clauses of the federal constitution which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. U.S. Const. amends. VIII &

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[41](...continued)
directly instructed on this point as follows: "The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt." Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions*, § 4.01, Form 4-1 (1994). Another alternative is the following instruction from *United States v. Walker*, 9 F.3d 1245, 1250 (7th Cir. 1993): "The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty."

XIV; *Beck v. Alabama*, 447 U.S. 625, 627-46 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995); *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Furthermore, verdict reliability is also required by the Due Process Clause of the federal Constitution. U.S. Const. amend XIV; *White v. Illinois*, 502 U.S. 346, 363-64 (1992); *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974). Further, because appellant was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and evidence code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV; Cal. Evid. Code §§ 500-02; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991); *see also People v. Sutton*, 19 Cal.App.4th 795, 804 (1993); *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991).

J. The Judgment Should Be Reversed

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of the system of criminal trials and deprives the criminal defendant of the right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). This court has reached a similar conclusion. *People v. Vann*, 12 Cal.3d 220, 225-26 (1974). Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. *Chapman*, 386 U.S. at 24; *see also In re Rodriguez*, 119 Cal.App.3d 457, 469-70 (1987) (*Chapman* standard applied to combined

impact of state and federal constitutional errors); *People* v. *Williams*, 22 Cal.App.3d 34, 58-59 (1971). Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under *Chapman*. Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt.

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XIV

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

A. Introduction

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord*, *Cage v. Louisiana*, 498 U.S. 39, 39-40 (1990); *People v. Roder*, 33 Cal.3d 491, 497 (1983). "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, 397 U.S. 358, 364 (1970)) and at the heart of the right to trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. *Sullivan*, 508 U.S. at 275.

B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC 2.90, 2.01, 2.02, 8.83 and 8.83.1)

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." CT 1063; RT 4032. These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC 2.90 defined reasonable doubt as follows:

> Reasonable doubt is defined as follows: it is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

CT 1063; RT 4032.

The jury was also given four interrelated instructions – CALJIC 2.01, 2.02, 8.83, and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. CT 1041-42; RT 4017-18 (sufficiency of circumstantial evidence); CT 1043-44; RT 4018-19 (sufficiency of circumstantial evidence to prove specific intent or mental state); CT 1082-83; RT 4042-43 (special circumstances – sufficiency of circumstantial evidence); CT 1084-85; RT 4043-44 (special circumstances – sufficiency of circumstantial evidence to prove required mental state). These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." CT 1042, 1044, 1083, 1085; RT 4018, 4019, 4043, 4044. These instructions informed the jurors that if appellant *reasonably*

appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This four-time repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const. amends. V & XIV; Cal. Const. art. 1, §§ 7 & 15), trial by jury (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, § 16), and a reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17). *See Sullivan*, 508 U.S. at 278; *Carella v. California*, 491 U.S. 263, 265 (1989); *Beck v. Alabama*, 447 U.S. 625, 627-46 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995).[42]

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. *See Winship*, 397 U.S. at 364. The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." CT 1041, 1044, 1083, 1085; RT 4018, 4019, 4043, 4044. An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 315; *see Sullivan*, 508 U.S. at 278 ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty,"

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[42]Although defense counsel did not object to these instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they are such as to affect a defendant's substantive rights. Cal. Pen. Code §§ 1259 & 1469; *see People v. Flood*, 18 Cal.4th 470, 482 n.7 (1998); *People v. Jones*, 17 Cal.4th 279, 312 (1998).

(emphasis added)). Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." *Francis v. Franklin*, 471 U.S. 307, 314 (1985) (emphasis added). Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. *Id.* at 314-18; *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

Here, all four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." CT 1042, 1044, 1083, 1085; RT 4018, 4019, 4043, 4044. In *Roder*, 33 Cal.3d at 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he was a likely suspect, rather than because they believed him guilty beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." *People v. Gonzalez*, 51 Cal.3d 1179, 1214-15 (1990), *citing Winship*, 397 U.S. at 364, and *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *accord*, *People v. Allison*, 48 Cal.3d 879, 893 (1989). There is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required. *Boyde v. California*, 494 US 370, 380 (1990).

C. Other Instructions Also Vitiated the Reasonable Doubt Standard (CALJIC 1.00, 2.21.1, 2.21.2 2.22, 2.27 and 2.51)

The trial court gave six other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC 1.00, regarding the respective duties of the judge and jury (CT 1033-35; RT 4012-13); CALJIC 2.21.1, regarding discrepancies in testimony (CT 1050; RT 4021-22); CALJIC 2.21.2, regarding willfully false testimony (CT 1051); CALJIC 2.22, regarding weighing conflicting

testimony (CT 1053; RT 4022-23); CALJIC 2.27, regarding sufficiency of evidence of one witness (CT 1054; RT 4024); and CALJIC 2.51, regarding motive (CT 1055; RT 4024). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Cage v. Louisiana*, 498 U.S. 39 (1990); *In re Winship*, 397 U.S. 358 (1970).

As a preliminary matter, several instructions violated appellant's constitutional rights as enumerated in section A of this argument by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." CT 1034; RT 4013. CALJIC 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." CT 1041; RT 4017-18.

CALJIC 2.51, regarding motive, informed the jury:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.

CT 1055; RT 4024. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. *Jackson*, 443 U.S. at 320 (a "mere modicum" of evidence is not sufficient). Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. *See, e.g., United States v. Mitchell*, 172 F.3d 1104 , 1108-09 (9th Cir. 1999) (motive based on poverty is insufficient to prove theft or robbery). The instruction allowed the jury to determine guilt based on motive alone.

This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find that premeditation in order to convict appellant of first degree murder or, intent to kill to find him guilty of second degree murder, or to find true the special circumstances. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all twelve, of the jurors so concluded. *See, e.g., Francis,* 471 U.S. at 322.

Further, CALJIC 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. *Winship*, 397 U.S. at 368. The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. *See Beck v. Alabama*, 447 U.S. at 637-38 (reliability concerns extend to guilt phase).

Similarly, CALJIC 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." CT 1050-51 (emphasis added). These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. *See People v. Rivers*, 20 Cal.App.4th 1040, 1046 (1993) (instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability" standard is "somewhat suspect").[43] The essential mandate of *Winship* – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." *See Sullivan*, 508 U.S. at 278; *Winship*, 397 U.S. at 364.

CALJIC 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other.

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[43]The court in *Rivers* nevertheless followed *People v. Salas*, 51 Cal.App.3d 151, 155-57 (1975), wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. *But see Gibson v. Ortiz*, 387 F.3d 812, 822-25 (9th Cir. 2004) (CALJIC 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde,* 494 U.S. at 384-85, error not cured by correct reasonable doubt and presumption of innocence instructions).

> You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

CT 1053; RT 4022-23.

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," *i.e.*, "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." *See Sullivan*, 508 U.S. at 277-78; *Winship*, 397 U.S. at 364.

CALJIC 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 1054; RT 4024), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without

qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that the homicide was not a felony murder and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." *People v. Turner*, 50 Cal.3d 668, 697 (1990). This Court's understated observation does not begin to address the unconstitutional effect of CALJIC 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial. U.S. Const. amends. VI & XIV.

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364. Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by

operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. *See, e.g., People v. Riel*, 22 Cal.4th 1153, 1200 (2000) (addressing false testimony and circumstantial evidence instructions); *People v. Crittenden*, 9 Cal.4th 83, 144 (1994) (addressing circumstantial evidence instructions); *People v. Noguera*, 4 Cal.4th 599, 633-34 (1992) (addressing CALJIC 2.01, 2.02, 2.21, 2.27); *People v. Jennings*, 53 Cal.3d 334, 386 (1991) (addressing circumstantial evidence instructions).)[44] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. *See Jennings*, 53 Cal.3d at 386. The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, 502 U.S. 62, 72 (1991)), and there certainly is a reasonable

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[44]Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. *See Salas*, 51 Cal.App.3d at 155-57 (challenge to former version of CALJIC 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC 2.90); *People v. Estep*, 42 Cal.App.4th 733, 738-39 (1996), *citing People v. Wilson*, 3 Cal.4th 926, 943 (1992) (CALJIC 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC 2.90).

likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC 2.90 – requires reconsideration. *See Crittenden*, 9 Cal.4th at 144. An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. *United States v. Hall*, 525 F.2d 1254, 1256 (5th Cir. 1976); *see generally Francis*, 471 U.S. at 322 ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"); *People v. Kainzrants*, 45 Cal.App.4th 1068, 1075 (1996), *citing People v. Westlake*, 124 Cal. 452, 457 (1899) (if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge); *People v. Stewart*, 145 Cal.App.3d 967, 975 (1983) (specific jury instructions prevail over general ones). "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." *Buzgheia v. Leasco Sierra Grove*, 60 Cal.App.4th 374, 395 (1997).

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[45] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

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[45]A reasonable doubt instruction also was given in *Roder*, 33 Cal.3d at 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard six separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard. Appellant has shown above the many ways in which this instruction falls short of constitutional requirements. *See* Argument XIII, *supra*. Moreover, this Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." *Wilson*, 3 Cal.4th at 943 (citations omitted). Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

Most recently, the Ninth Circuit Court of Appeals agreed with the foregoing analysis. In *Gibson v. Ortiz*, 387 F.3d 812 (9th Cir. 2004), the Ninth Circuit found that CALJIC 2.50.01 violated *Winship* and *Sullivan*, and further held that under *Boyde,* 494 U.S. at 379-80, the error was not cured by CALJIC 2.90, because "[w]hen a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, 'the unconstitutionality of any of the theories requires that the convictions be set aside.'" *Gibson,* 387 F.3d at 825. The court in *Gibson* held, as appellant argues here, that a

correct general instruction does not cure the harm of an incorrect more specific instruction, when the jury is not told how to harmonize the two instructions. *Id.* at 825.

E. The Judgment Should Be Reversed

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. *Sullivan*, 508 U.S. at 280-82. If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. *Carella*, 491 U.S. at 266-67. Here, that showing cannot be made. The questions of guilt of first degree murder, second degree murder and the truth of the special circumstances were close so that the dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. *See Sullivan*, 508 U.S. at 278-82; *Cage*, 498 U.S. at 41; *Roder*, 33 Cal.3d at 504. Accordingly, the judgment must be reversed. The instructions also violated the fundamental Eighth Amendment requirement for reliability in a capital case it undermined the mitigating factor of lingering doubt and by allowing appellant to be convicted without the prosecution having to present the full measure of proof. *Beck*, 447 U.S. at 637-38.

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XV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON VOLUNTARY AND INVOLUNTARY MANSLAUGHTER

A. Introduction

During a discussion of guilt-phase jury instructions, the defense requested instructions on the lesser included offenses of voluntary and involuntary manslaughter in relation to the Adkins homicide. RT 3923. The requested instructions were CALJIC 8.40 (Voluntary Manslaughter Defined) and CALJIC 8.45 (Involuntary Manslaughter Defined). CT 914-15. The trial court refused to instruct on either crime. CT 914-15; RT 3937. Because there was substantial evidence to support both a conviction for voluntary manslaughter and one for involuntary manslaughter, the trial court erred in failing to give these instructions.

The trial court's refusal to give the requested instructions deprived appellant of his rights to present a defense, to due process and a fair trial, to have the jury determine each material issue, to have the prosecution establish beyond a reasonable doubt every elemental fact necessary to establish the offense, to have to a reliable determination of guilt and penalty, and to a properly instructed jury. U.S. Const. amends. V, VI, VIII, & XIV; Cal. Const. art 1, §§ 1, 7, 15, 16, & 17; *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Because the right to instructions on lesser included offenses shown by the evidence and the right for a jury to be instructed on the defense's theory of the case are well-established rights under state law (*People v. Breverman*, 19 Cal.4th 142, 154 (1998) [right to lesser included instructions]; *People v. Wickersham*, 32 Cal.3d 307, 324 (1982) [right to instructions on the defense

theory of the case]), the erroneous failure to instruct on manslaughter also violated appellant's right to federal due process because it arbitrarily deprived him of a liberty interest created by state law. U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. The Trial Court Refused to Give Requested Instructions on Manslaughter and Involuntary Manslaughter

In its argument in support of its request for manslaughter instructions, the defense contended that it was entitled to involuntary manslaughter instructions in relation to the Adkins homicide because the killing could have happened in the course of the brandishing a weapon. This, the defense contended, was a misdemeanor that justified misdemeanor manslaughter instructions. RT 3924. In support of the brandishing theory, counsel cited Bernard Dickson's testimony that appellant told him that the killing would not have happened if Carlos Adkins had not grabbed for the gun. RT 3924. Defense counsel argued that involuntary manslaughter instructions were warranted because the gun could have gone off accidentally during a struggle over the weapon. RT 3928. The prosecutor argued that the incident did not support a brandishing; rather, according to the prosecution, the evidence suggested that there had been an assault with a firearm, which is a felony, so that misdemeanor manslaughter instructions were not required. RT 3925. The prosecution also argued that voluntary manslaughter instructions were not necessary because there was insufficient evidence of provocation. RT 3926-27.

The trial court refused to instruct on voluntary and involuntary manslaughter. It held that there was insufficient evidence of provocation and insufficient evidence that appellant's reason had been obscured by any

such provocation to warrant the instruction. RT 3937. The trial court characterized Dickson as testifying that appellant said that he would "blow [Adkins'] brains out," which he reasoned was a threat. He stated that neither voluntary nor involuntary manslaughter instructions were justified when a victim resists a gun being pointed at the head. RT 3937-38.

The jury was instructed on both first and second degree murder in relation to the Adkins homicide. CT 1073-74 (CALJIC 8.20 [Premeditated and deliberate murder]), 1075 (CALJIC 8.30 [Unpremeditated murder of the second degree]); RT 4037-39. Appellant was found guilty of second degree murder for the killing of Carlos Adkins. CT 972.

C. Appellant Had a State and Federal Constitutional Right to Instructions on Manslaughter

A defendant has a state constitutional due process right to instructions on a lesser included offense where the evidence raises "a question as to whether all the elements of the charged offense were present." *People v. Valdez*, 32 Cal.4th 73, 115 (2004), *quoting Breverman*, 19 Cal.4th at 154; *People v. Sedeno*, 10 Cal.3d 703, 715 (1974). The necessity for instructions on lesser included offenses is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence. *People v. Rankeesoon*, 39 Cal.3d 346, 351 (1985); *People v. Geiger*, 35 Cal. 3d 510, 520 (1984). It serves the policy of preventing the jury from being faced with an all-or-nothing choice where the prosecution has no legitimate interest in obtaining a greater conviction than that established by the evidence, and the defendant has no right to complete acquittal since the evidence establishes he committed the lesser offense. *Sedeno*, 10 Cal.3d at 716; *People v. St. Martin*, 1 Cal.3d 524, 533 (1970) ("Our courts are not gambling halls but forums for the discovery of truth"). The jury must be allowed to "'consider the *full range* of possible

verdicts-not limited by the strategy, ignorance, or mistakes of the parties,' so as to 'ensure that the verdict is no harsher or more lenient than the evidence merits.'" *Breverman*, 19 Cal.4th at 160 (emphasis in original), *citing Wickersham*, 32 Cal.3d at 324. The rule requiring lesser included instructions is "to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." *Id.* at 160.

For the instruction to be required, there must be "evidence that would justify a conviction of such a lesser offense." *People v. Hardy*, 2 Cal.4th 86, 184 (1992), *quoting People v. Cooper*, 53 Cal.3d 771, 827 (1991). Put otherwise, the instruction is required if the evidence is substantial enough to warrant consideration by the jury. *People v. Barton*, 12 Cal.4th 186, 195 n.4 (1995), *citing People v. Flannel*, 25 Cal.3d 668, 684-85 n.12 (1979). In making the determination whether to instruct on a lesser included offense the "trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury." *Flannel*, 25 Cal.3d at 684. "[T]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon." *Id.* at 684, *quoting People v. Carmen*, 36 Cal.2d 768, 773 (1951). Any doubts about whether the evidence is sufficient to warrant the instructions are resolved in favor of the defendant. *Id.* at 685; *People v. Cleaves,* 229 Cal.App.3d 367, 372 (1991). Importantly, even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true. *People v. Burnham*, 176 Cal.App.3d 1134, 1143.

It is the duty of defense counsel to request appropriate instructions which will advise the jury of the defendant's theory of the case. *Sedeno*, 10

Cal.3d at 717 n.7. It is the duty of the trial court, assuming that the instruction offered by defense counsel is a correct statement of law, to give the instruction. *Wright*, 45 Cal.3d at 1137. If the defense requests an instruction on a particular defense or a lesser included offense, an instruction must be given so long as there is substantial evidence in support of the defense or lesser included crime. *Wickersham*, 32 Cal.3d at 324.

Standards under federal law are similar to those in state court. A defendant in a capital case has a federal constitutional due process right to an instruction on a lesser included offense to a charge of murder where failing to give the instruction enhances "the risk of an unwarranted conviction" so that the State is constitutionally prohibited from withdrawing that option from the jury in a capital case. *Beck*, 447 U.S. at 638; *see Hopkins v. Reeves,* 524 U.S. 88, 94 (1998); *Schad v. Arizona*, 501 U.S. 624, 646-47 (1991). Giving the lesser included instruction will preclude the occurrence of an "all or nothing" choice between conviction for capital murder or acquittal. *Shad*, 501 U.S. at 646-47.[46]

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[46]Citing *Schad*, in *People v. Yeoman*, 31 Cal.4th 93, 130 (2003), this Court held that failure to instruct on a lesser included offense did not implicate federal due process where the trial court did instruct on some lesser included offenses so that the jury was not faced with an "all or nothing choice" between conviction of a capital offense and acquittal. *Yeoman* is distinguishable and federal due process considerations are implicated in appellant's case. As this Court noted in *People v. Hawkins*, 10 Cal.4th 920 (1995), the rationale of *Beck* "applies when a first degree murder verdict renders defendant eligible for the death penalty." *Id.* at 953-54, *citing Vickers v. Ricketts*, 798 F.2d 369, 370-74 (9th Cir. 1986). Similarly, the rationale of *Beck* applies when a second degree murder verdict would render the defendant eligible for the death penalty. Here appellant was charged with the special circumstance that he had been convicted of more than one murder of the first or second degree. Cal. Pen. Code § 190.2(a)(3); CT 597-602. The multiple murder special circumstance could not have been found true had appellant been convicted

(continued...)

The failure to instruct on the lesser included offense makes it likely that "'the jury . . . resolve[d] its doubts in favor of conviction.'" *Beck*, 447 U.S. at 634, *quoting Keeble v. United States*, 412 U.S. 205, 208 (1973). The failure to give a "third" option inevitably enhances the risk of an unwarranted conviction. This "kind of risk cannot be tolerated in a case where a defendant's life is at stake." *Keeble*, 412 U.S. at 208. Giving the jury the opportunity to convict on a lesser offense when supported by the evidence ensures that the jury will give the defendant the full benefit of the reasonable doubt standard. *Beck*, 447 U.S. at 637-38. This "third option" must be for an offense that is supported by the evidence. *Shad*, 501 U.S. at 646-47; *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (due process requires that the instruction be given when the evidence warrants the instruction).

Moreover, failure to instruct on a defense theory violates the defendant's rights to due process and to present a defense under the Sixth and Fourteenth Amendments. *Mathews v. United States,* 485 U.S. 58, 63 (1988), *citing Stevenson v. United States*, 162 U.S. 313 (1896) ("as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."); *see Keeble*, 412 U.S. at 213; *Conde v. Henry*, 198 F.3d 734, 739-40 (9th Cir. 1999); *United States v. Escobar de Bright*, 742 F.2d 1196, 1201-02 (9th Cir. 1984) (...[T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support

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[46](...continued)
of the lesser included offense of voluntary manslaughter or that of involuntary manslaughter (assuming he was not convicted of the police homicides). As such, the failure to give lesser included instructions forced the jury into either convicting appellant of an offense (first or second degree murder) or acquitting him. This is precisely what was forbidden in *Beck.*

that theory."). Moreover, a criminal defendant is constitutionally entitled to present "all relevant evidence of significant probative value in his favor . . . " *People v. Marshall,* 13 Cal.4th 799, 836 (1996); *see Washington v. Texas*, 388 U.S. 14, 19 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974). The failure to instruct on the defense theory encompassed by the defendant's evidence undermines the constitutional rights which allow the evidence to be presented to the jury. *See, e.g., United States v. Hicks*, 748 F2d 854, 857-58 (4th Cir. 1984) (rights to trial by jury and due process abridged by failure to instruct on defense theory of the case which dilutes the jury's consideration of the issues and directs a verdict against the defendant). "[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in proof, no matter how tenuous the defense may appear to the trial." *United States v. Dove*, 916 F2d 41, 47 (2nd Cir. 1990).

Failure to instruct on the offenses which negate the element of malice in a homicide case (such as voluntary or involuntary manslaughter) is a denial of adequate instructions on the charged homicide and hence a denial of a defendant's right to proof beyond a reasonable doubt on every element of the crime. *Mulaney v. Wilbur*, 421 U.S. 684, 685, 689 (1975) (due process required the State to treat the absence of heat of passion as part of the definition of murder and to assume the burden of proving that the defendant did not act in the heat of passion); *see Breverman*, 19 Cal.4th at 190-91 (Kennard, J., dissenting) ("The absence of heat of passion must be treated as part of the definition of murder for jury instruction purposes.").

Finally, fundamental fairness in the criminal procedures by which a defendant is convicted of a crime and sentenced to death requires that requested instructions on lesser included instructions be given. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) ("Due process

guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'"); *Ford v. Wainright*, 477 US 399, 414 (1986) (when the State seeks death, courts must ensure that every safeguard designed to guarantee fairness and accuracy in the process requisite to the taking of a human life is painstakingly observed); *see Breverman*, 19 Cal.4th at 190-91 (Kennard, J., dissenting) ("To omit the instruction (on manslaughter) creates the very real possibility that the defendant will be convicted of an offense of which, in the jury's view, he is factually innocent under the evidence presented at trial, and it is hard to imagine anything more fundamentally unfair than that.").

D. Manslaughter Is a Lesser Included Offense of Murder

Voluntary manslaughter is a lesser included offense of murder. *People v. Gutierrez*, 28 Cal.4th 1083, 1145 (2002), *citing People v. Prettyman*, 14 Cal.4th 248, 274 (1996). The distinguishing element between the offenses of murder and manslaughter is malice. Cal. Pen. Code § 192(a); *People v. Coad*, 181 Cal.App.3d 1094, 1106 (1986). A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. *Barton*, 12 Cal.4th at 199; *Breverman*, 19 Cal.4th at 153. An intentional unlawful homicide is voluntary manslaughter if the killer's reason "was actually obscured as the result of a strong passion aroused by provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than judgment." *People v. Lasko*, 23 Cal.4th 101, 108 (2000). A killing may constitute voluntary manslaughter if "shown to have been committed in a heat of passion upon sufficient provocation" (*Sedeno*, 10 Cal.3d at 719), because in such a case the absence of malice is presumed. *People v. Berry*, 18 Cal.3d 509, 515 (1976). Thus, a person who intentionally or unintentionally kills as a result of provocation, that is, upon

a sudden quarrel or heat of passion, lacks malice and is guilty not of murder, but of the lesser offense of voluntary manslaughter. *Lasko*, 23 Cal.4th at 108-09.

Involuntary manslaughter is also a lesser included offense of murder. Manslaughter is involuntary when the killing is in the commission of an unlawful act, not amounting to a felony. Cal. Pen. Code § 192(b). Involuntary manslaughter is "the unlawful killing of a human being in certain unlawful ways without any intention of doing so." *People v. McManis*, 122 Cal.App.2d 891, 898 (1954). The great majority of cases of involuntary manslaughter involve simple assault or battery. *See* 1 Witkin & Epstein, *California Criminal Law*, Crimes Against the Person, §222 (3d ed. 2000). However, brandishing a weapon can be a grounds for an involuntary manslaughter conviction. *People v. Beach*, 147 Cal.App.3d 612, 625-26 (1983); *People v. Wilson*, 66 Cal.2d 749, 757 (1967); *see People v. Lee*, 20 Cal.4th 47, 60-61 (1999) (discussing court of appeal's conclusion that it was error not to instruct on brandishing a weapon in a manslaughter case); *People v. Southack*, 39 Cal.2d 578, 584 (1952) (brandishing is an inherently dangerous offense for the purpose of establishing liability under the misdemeanor manslaughter rule); *People v. McKinzie*, 179 Cal.App.3d 789, 793-94 (1986).

E. The Evidence Called for Manslaughter Instructions

Because the evidence supported a conclusion that the Adkins homicide was an accidental killing in the course of appellant's brandishing a firearm, involuntary manslaughter instructions should have been given. Respondent may argue, as did the prosecution, that there was no brandishing in this case because appellant pointed the gun at Adkins' head before the killing. Rather, the evidence was of a felony, *i.e.*, assault with a firearm. Cal. Pen. Code § 245(a)(2); *see* RT 3925 (prosecution's

argument). There is no question that should a defendant be convicted of assault with a firearm, evidence that the person pointed a loaded gun at the victim's head would be sufficient evidence to sustain the conviction on appeal. *See People v. Schwartz*, 2 Cal.App.4th 1319, 1325 (1992). However, that is not the question here.

Although the evidence is susceptible to such an interpretation, the evidence also demonstrates that the shots occurred immediately after Adkins grabbed for the gun. RT 1321-22 (Testimony of Bernard Dickson). There was also evidence that Adkins had a high level of phencyclidine ("PCP") in his blood stream at the time he was shot (RT 3749), and that individuals with such extreme levels of PCP in their systems often behave erratically. RT 3749, 3751, 3781. From this, it would be reasonable for a properly instructed jury to conclude that appellant fired the shots accidentally during the struggle that followed after appellant brandished the gun at the victim. In other words, the facts of the killing are not incompatible with a conclusion that the killing was accidental.

On this point, *People v. Lemus,* 203 Cal.App.3d 470 (1988) is helpful. In *Lemus*, the government presented witnesses who testified that the defendant had engaged in an unprovoked knife assault on the victim. In contrast, the defendant testified that the victim had tried to stab him and had threatened to kill him. Thus, according to the defendant, he stabbed the victim in self defense. On these facts, the trial court refused to instruct on a self defense theory. In so holding, the trial court relied on the lack of independent proof that the victim possessed a knife. On appeal, the trial court's ruling was reversed: "We conclude there was evidence worthy of consideration by the jury that [defendant] was acting in self-defense. Regardless of how incredible that evidence may have appeared, it was error for the trial court to determine unilaterally that the jury not be allowed to

weigh and assess the credibility of [defendant's] testimony . . ." *Lemus,* 203 Cal.App.3d at 478. Here, just as in *Lemus*, the trial court should not have "unilaterally" determined that the evidence was not credible. Since the defendant had a right to have the jury assess whether the evidence was credible, involuntary manslaughter instructions should have been given.

Moreover, the trial court was required to give voluntary manslaughter instructions. To justify manslaughter instructions, there must be evidence sufficient to "deserve consideration by the jury, *i.e.*, 'evidence from which a jury composed of reasonable men could have concluded' [Citation]" that the homicide was an intentional homicide without malice. *Flannel*, 25 Cal.3d at 684-85 n.12. Again, this standard does not depend on the trial judge's personal belief as to whether witnesses have credibly testified to such facts. "[I]t merely frees the court from an obligation to instruct upon lesser included offenses which the jury could not reasonably find to exist." *Wickersham*, 32 Cal.3d at 324-25. As one court of appeal case suggested, "when the evidence suggests that the defendant acted in the heat of passion upon adequate provocation, the trial court must instruct on voluntary manslaughter. [Citation.] Both provocation and heat of passion must be affirmatively demonstrated. [Citations.]." *People v. Fenenbock*, 46 Cal.App.4th 1688, 1703-04 (1996). A subjective "heat of passion" sufficient to negate malice "may be any violent, intense, high-wrought or enthusiastic emotion," other than revenge, and the defendant may be aroused to it "over a considerable period of time[,]" as long as the defendant acts "under [its] smart . . . ." *Wickersham*, 32 Cal.3d at 326-27 (internal quotation marks omitted). Evidence that the defendant acted in an uncontrollable rage is sufficient. *Berry*, 18 Cal.3d at 516. As to the objective element of provocation, there is no specific type required, and verbal provocation may be sufficient. *Id.* at 515. It may be anything which

arouses great anger. *Fenenbock*, 46 Cal.App.4th at 1704. The evidence must be sufficient to suggest that the provocation would have "arouse[d] feelings of homicidal rage or passion in an ordinarily reasonable person. [Citation.]" *People v. Pride*, 3 Cal.4th 195, 250 (1992).

The same evidence that mandated involuntary manslaughter instructions makes voluntary manslaughter instructions necessary. The evidence suggests that Adkins was killed when appellant went into a rage, having been provoked by Adkins, who made a grab for the gun while he was intoxicated with PCP. Given these circumstances, a reasonable jury "*could* conclude there was adequate provocation." *People v. Glenn*, 229 Cal.App.3d 1461, 1465 (emphasis in original).

In ruling that manslaughter instructions were not required, the trial court stated that he did not believe that there was credible evidence requiring an instruction on voluntary manslaughter. However, as noted, the issue is not whether the testimony was believed by the trial court, but whether the question of manslaughter should have been submitted to the jury. *People v. Edwards*, 39 Cal.3d 107, 116 (1985); *People v. Ceja*, 26 Cal.App.4th 78, 85 (1994). It is a jury's task, not the trial court's, ". . . to determine whether it will accept all, none, or some of the evidence in support of the prosecution's case; the same is true for evidence in support of the defense case." *People v. Valdez*, 32 Cal.4th 73, 142-43 (2004) (Chin, J., dissenting), *citing People v. Jeter*, 60 Cal.2d 671, 675-76 (1964). The jury, not the trial court, must weigh and independently assess the evidence. *Id.* at 675-76. Thus, the issue here is whether the *jury* – in assessing and weighing the evidence independently – *could have reasonably concluded* that defendant committed manslaughter, rather than murder. Unless the evidence shows as a matter of law that the jury could only have convicted of first or second degree murder, the jury should have been instructed on the

lesser included offense of manslaughter. *Jeter*, 60 Cal.2d at 675; *People v. Lessard*, 58 Cal.2d 447, 453 (1962) (lesser included instructions on murder not required where murder not disputed and the only issue offered by the defendant was identity). It is only "under these circumstances, that a trial court 'is justified in withdrawing' the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of murder." *Valdez*, 32 Cal.4th at 143 (Chin, J., dissenting) (second degree murder instruction required because evidence did not point indisputably to first degree felony murder). In this case, as shown above, the evidence does not "point indisputably" to murder. Here, there was sufficient evidence, if believed by the jury, which could have warranted a conviction of either voluntary or involuntary manslaughter.

F. The Judgment Must Be Reversed

Failure to instruct on the defendant's theory of the case is reversible per se under federal law. The United States Supreme Court has indicated that per se reversal is required when an error "vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (emphasis in original). Stated otherwise, per se reversal is compelled when the consequences of an error "are necessarily unquantifiable . . . " *Id.* at 282; *accord*, *Neder v. United States*, 527 U.S. 1, 10-11 (1999). Since it is impossible to know whether a jury would have accepted a defense which it never had occasion to consider, it follows that the effect of the instructional omission is "necessarily unquantifiable." *See Conde*, 198 F.3d at 740-41 (structural error found where the defense was precluded from presenting its "theory of the case"); *United States v. Sarno*, 73 F.3d 1470, 1485 (9th Cir. 1995) ("failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis"). As the court in *United States v. Escobar De Bright*, 742 F.2d 1196 (9th Cir. 1984), stated:

> The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

742 F.2d at 1201-02; *see People v. Spearman*, 25 Cal.3d 107, 119 (1979) (Reversal required where errors "deprive a litigant of the opportunity to present his version of the case". . . "since there is no way of evaluating whether or not they affected the judgment. [Citation.]").[47]

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[47]In *Schad*, 501 U.S. at 646-47, the Supreme Court suggested that reversal is not required absent a risk that the jury will convict "simply to avoid setting the defendant free . . . " *People v. Lipscomb*, 17 Cal.App.4th 564, 571 n.4 (1993), interpreted *Schad* to preclude reversal so long as any of several charged counts contains a lesser option. However, because *Lipscomb* held that there was no right to the lesser instruction, this discussion of prejudice is dictum. Moreover, even if this result was appropriate under the facts of *Lipscomb*, reversal is required under *Schad* in this case. Here appellant was charged with counts based on different incidents. The count connected with the Adkins homicide improperly failed to include some lesser offenses; the counts connected with the homicide of the police officers did not. If the evidence fails to prove appellant's connection with the police officer crimes, then the lesser offenses as to those counts are not a real options unless the jurors are willing to convict appellant of a crime which has not been proven by the prosecution. Providing the jury with such an unreasonable option in the police officer case would not cure the due process problems created by the improper choice in the Adkins case.

Moreover, ". . . it is reversible error to refuse a manslaughter instruction in a case where murder is charged, . . . the evidence would warrant a conviction of manslaughter," and the factual questions posed by the omitted manslaughter instructions were not necessarily resolved against the defendant under other instructions. *Edwards*, 39 Cal.3d at 117; *People v. Ceja,* 26 Cal.App.4th 78, 86 (1994). Appellant has shown above that the evidence warranted the instruction. Moreover, the question posed by the manslaughter instructions was not necessarily resolved against appellant. As noted above, the distinguishing element between murder and manslaughter is malice. The only other instruction which involved the question of malice were the first degree murder instructions, charging appellant with premeditated and deliberate murder. CT 1073-74; CALJIC 8.20; *see People v. Barnett*, 17 Cal.4th, 1044, 1155-56 (1998) (failure to instruct on voluntary manslaughter not prejudicial where defendant found guilty of first degree premeditated murder); *People v. Turner*, 50 Cal.3d 668, 693 (1990) (there appears no chance the jury was misled by an "all-or-nothing choice" because the special circumstance instructions required the jury to confront the issue which was removed by the failure to instruct on the lesser included offense). However, appellant was not found guilty of first degree murder for the Adkins crime (CT 972; RT 4391), so the jury must have found that there was insufficient evidence of premeditation and deliberation. As such, the malice question was not necessarily resolved against him.

However, even if appellant must show it is reasonably probable that the defendant would have received a more favorable result in the absence of the error, reversal is required. *Watson*, 46 Cal.2d at 836; *Breverman*, 19 Cal.4th at 149 (failure to instruct on a lesser included offense requires review under *Watson* and the "miscarriage of justice" standard). Moreover,

since appellant's death sentence relies on an unreliable guilt verdict, it was obtained in violation of his Eighth Amendment right to be free from cruel and unusual punishment. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As such, appellant's sentence of death must also be reversed.

* * * * *

XVI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS ABOUT THE DEGREE OF HOMICIDE

A. Factual Background

In a jury instruction session before trial, the prosecution requested that Court read CALJIC 8.74, which instructed that jury that it must be unanimous about the degree of murder and must be unanimous about whether a murder was voluntary or involuntary manslaughter. The version of CALJIC 8.74, the prosecution proposed read as follows:

> UNANIMOUS AS TO OFFENSE – FIRST OR SECOND DEGREE MURDER OR MANSLAUGHTER
>
> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find [him] guilty of an unlawful killing, you must agree unanimously as to whether [he][she] is guilty of [murder of the first degree][or][[voluntary][or][involuntary][manslaughter].

CT 913. The trial judge stated he would not give the instruction because it dealt with manslaughter, not murder. RT 3972. Although defense counsel suggested that the court should read CALJIC 8.71, which told the jury that if it had a reasonable doubt about the degree of the murder it must return a verdict of second degree (RT 3972) the court did not read this instruction either.

The jury began deliberations on May 1, 1995. RT 4255; CT 888. On May 16, after almost two weeks of deliberation, the jury returned with a question: "Is it necessary to have a unanimous decision as to whether a murder is of the second or first degree?" CT 909; RT 4382. It was after it got this note, apparently on May 17, that the trial court became concerned that he might not have read CALJIC 8.74 to the jury. RT 4382. The court then checked a copy of the written instructions the jury had been provided

and confirmed that the instruction had not been given. RT 4383. He noted that the jury had been given CALJIC 17.50, which, according to the trial court, instructed the jury that in order to reach a verdict all twelve jurors had to agree.[48] RT 4383; *see* CT 1108 and RT 4254. In response to the jury's inquiry, the trial court proposed that he belatedly read CALJIC 8.74, together with CALJIC 8.70[49] and CALJIC 8.71[50], which, he stated, also dealt with the need unanimously to find the degree of murder. Trial counsel agreed that these instructions could be read. RT 4383. A few minutes later, the trial court read the three instructions to the jury.

At 9:20 AM, immediately after being read the instructions, the jury resumed its deliberation. About two and a half hours later, at 11:50 AM, the jury returned with a verdict, finding appellant guilty of two counts of first degree murder and one count of second degree murder. CT 985. The verdicts were signed by the foreperson and given to the clerk. It was only after the clerk received the verdicts from the jury that it was revealed that

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[48]CALJIC 17.50 read: "You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. In order to reach verdicts, all twelve juror must agree to the decision and to any finding you have been instructed to include in your verdict. As soon as all of you have agreed upon a verdict, so that when polled each may state truthfully that the verdicts express his or her vote, have them dated and signed by your foreperson and then return with them to this courtroom. Return any unsigned verdict forms." CT 1108; RT 4254.

[49]CALJIC 8.70 read: "Murder is classified into two degrees, and if you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree." CT 1076; RT 4385.

[50]CALJIC 8.71 read: "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." CT 1077; RT 4385.

the first degree murder verdicts on the homicides for the two police officers (counts two and three) were signed on May 12, 1995, which was five days before the jury had been instructed with CALJIC 8.74. CT 980-81.

Shortly after the verdicts were returned, trial counsel moved for a new trial based on the trial court's failure to read CALJIC 8.74 until two weeks into the jury's deliberations. RT 4425. Trial counsel pointed out in his written motion that the court did not instruct the jury with CALJIC 8.74 until May 17, but that the jury had reached a verdict on the homicides of the two police officers on May 12, so that they had deliberated on the police officer homicides without the benefit of CALJIC 8.74. Counsel cited *People v. Aikins*, 19 Cal.App.3d 685 (1971), for the proposition that the trial court had a *sua sponte* duty to instruct the jury that it must be unanimous on the degree of a murder. CT 995-99.

The trial court denied the motion. The court recognized that the parties believed that he would give the instruction, and that he had failed to do so. RT 4428. However, that trial court believed that it was sufficient that he gave the instruction plus CALJIC 8.70 and 8.71 when the jury had a question. RT 4425. The trial court stated that, in any case, he believed that the jury had been properly instructed prior to the reading of CALJIC 8.74, so that the reading of the instruction was only a "clarification." RT 4428-29.

As appellant shows below, the failure to instruct the jury with CALJIC 8.74 until two weeks into the deliberation was error which infringed on appellant's due process right to present a defense (U.S. Const. amends. V & XIV; Cal. Const., art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)); his right to a fair and reliable capital trial (U.S. Const. amends. VII & XIV; Cal. Const., art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)); and his right to the presumption of innocence, the

requirement of proof beyond a reasonable doubt, and right to a fair trial. U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const. Amends. VI & XIV; Cal. Const., art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)) and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence. U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. The Trial Court Had a Duty to Instruct the Jury that It Must Be Unanimous on the Degree of Homicide

In any case involving an offense divided into degrees such as murder, which is divided in to first degree premeditated murder and second degree intentional murder, the jury must be advised to convict only of the lesser degree if it has a reasonable doubt of which degree applies. Penal Code section 1097 provides as follows:

> When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two of more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees *only*.

Cal. Pen. Code § 1097 (emphasis added). Moreover, California Evidence Code section 502 states that the jury must always be instructed on the burden of proof:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a

> preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Cal. Evid. Code § 502. Combining the requirement of Penal Code section 1097 with that of Evidence Code section 502, it is apparent that the jury must be instructed that if it has a reasonable doubt about whether the defendant is guilty of first degree or second degree murder it must convict the defendant only of the second degree murder.

Moreover, the jury must be instructed that it must be unanimous about the degree of the crime. It is a fundamental rule of law under the California Constitution, that a jury's verdict must be unanimous as to all issues on which a finding is required. *People v. Crawford,* 131 Cal.App.3d 591, 595 (1982); Witkin & Epstein, *California Criminal Law*, § 3040 (2nd Ed. 1989). Moreover, under the Sixth and Fourteenth Amendments, there are unanimity limits necessary to preserve the essence of the right to jury trial. *Brown v. Louisiana*, 447 U.S. 323, 330 (1980). In any case, appellant has a due process right to a unanimous jury as guaranteed by state law, and therefore has a due process right to have the jury instructed that it must be unanimous. U.S. Const. amend. XIV; *Hicks*, 447 U.S. at 346. As such, because jurors must be unanimous, before a jury may properly convict a defendant of first-degree murder, the jurors must unanimously agree not only upon the defendant's guilt, but also upon the degree of the defendant's guilt. *People v. Nye*, 63 Cal.2d 166, 173 (1965); *People v. Chavez*, 37 Cal.2d 656, 670-71 (1951). CALJIC 8.74 informs the jury of precisely this, *i.e.*, that it must unanimously determine whether the defendant is guilty of murder of the first or of the second degree.

"It is settled that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation] The general principles of law

governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." *Kelly v. South Carolina*, 534 US 246 (2002), *citing* C. Wright, *Federal Practice and Procedure* § 485 (3d ed. 2000) ("It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not"); *see People v. St. Martin*, 1 Cal.3d 524, 531 (1970); *People v. Sedeno*, 10 Cal.3d 703, 716 (1974). If an instruction is necessary to enable the a jury to perform its function in conformity with the applicable law, a trial court has a duty to give the instruction. *People v. Sanchez*, 35 Cal.2d 522, 528 (1950). It follows that the trial court had a duty to instruct the jury that it must be unanimous on the degree of murder.

This conclusion is consistent with *People v. Aikin*, 19 Cal.App.3d 685 (1971), the case cited by trial counsel. In *Aikin*, the jury was instructed on second degree murder and on the lesser included offense of involuntary manslaughter. The reviewing court found multiple errors and reduced the defendant's second-degree murder conviction to a conviction for involuntary manslaughter because, in part, the trial court failed to inform the jury that if it had a reasonable doubt about whether the defendant was guilty of murder or manslaughter, it could only convict of manslaughter. However, the court also found that there was error in failing to instruct the jury that it needed to be unanimous on the question of murder versus manslaughter. *Aikin*, 19 Cal.App.3d at 703 n.15. The fairest reading of *Aikin* is that it also establishes a duty to give an instruction that the jury must be unanimous on the degree of murder, which is exactly what CALJIC 8.74 does. This is the position which has been adopted by the drafters of CALJIC, who cite *Aikin* for the proposition that CALJIC 8.74 should be given even without a request. *See* Use Note to CALJIC 8.74 (Jan. 2004

rev.) (7th ed. 2003); *but see People v. Kozel,* 133 Cal.App.3d 509, 528 (1982).

A duty to instruct on the necessity for uniformity on the degree of murder is appropriate where the evidence supports a conviction for two or more types of homicide, since in such a case CALJIC 8.74 constitutes an instruction on "[t]he general principles of law relevant to the issues raised by the evidence." *St. Martin*, 1 Cal.3d at 531. In this case, the court gave instructions on first-degree murder and second-degree murder, thus finding there was evidence supporting a conviction for two types of homicide. *People v. Melton*, 44 Cal.3d 713, 746 (1988) ("The court must instruct on a lesser included offense, even if not requested to do so, 'when the evidence raises a question as to whether all the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citations]."); RT 4037-39. The court did not, however, give CALJIC 8.74, nor did it give any other instruction advising the jury it must unanimously agree on the degree of appellant's guilt. Under the above authorities, this was error.

C. The Judgment Must Be Reversed

The trial judge premised its denial of appellant's new trial motion on grounds that appellant's jury had been properly instructed even without CALJIC 8.74. RT 4426. Appellant acknowledges the court gave an instruction similar to the one given in *Aikin*, namely CALJIC 17.50. The jury was thus told, "[i]n order to reach a verdict, all 12 jurors to whom the case is submitted must agree to the decision and to any finding you've been instructed to include in your verdict." CT 1108; RT 4254. The trial court also read CALJIC 8.71. CT 1077; RT 4385. Under *Aikin*, these instructions reduced the prejudice appellant suffered from the absence of

CALJIC 8.74, but it did not wholly eliminate that prejudice. *Aikin*, 19 Cal.App.3d at 703 n.13.

What remains to be seen is whether the prejudice appellant did suffer was sufficient, on the facts of this case, to require appellate relief. It was. In this case, there was evidence that the killings of the police officers were not first degree, *i.e.*, not premeditated and deliberate. There was evidence that the killering was a panic action, so that there was intent to kill, but not premeditation. So, the defense argued in closing that the shooting of the officers was a panic reaction in response to an arrest which did not involve planning. RT 4146-47. As such, the defense was prejudiced without an instruction informing them that they needed to be unanimous about the degree of murder.

Respondent will argue that this Court should assume that the jury went back and reconsidered its first degree murder verdicts on the police officer cases after it was finally read CALJIC 8.74. However, it is clear that in this case the jury simply did not do that. First, the jury's question about unanimity was clearly directed to count one (the Adkins' homicide) on which they had not yet reached a verdict. They had already completed their deliberations about the murders of the police officers. The jury was not asked to recommence its deliberations about the officers again in light of the new instruction. Moreover, there was little more than two hours between the time the jury was instructed and the time that the jury returned with final verdicts. A large majority of the evidence presented by the prosecution pertained to the killings of the police officers. It is simply not possible that the jury could have re-weighed all the evidence pertaining to the police officer homicides in the short time between the time it was instructed with CALJIC 8.74 and the time it returned a verdict.

On these facts, there is reasonable doubt that appellant would have received a more favorable result, but for the instructional error. Since the error is one of federal constitutional proportions, a reasonable doubt is all appellant need show. *Chapman*, 386 U.S. at 21. This Court should either reverse appellant's convictions on counts two and three or reduce them to convictions for second-degree murder. The failure to give the instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case. As such, the error requires the reversal of appellant's death sentence. *Caldwell v. Mississippi*, 472 US 320 (1985).

* * * * *

XVII

APPELLANT WAS DENIED HIS RIGHTS TO STATE AND FEDERAL DUE PROCESS AND TO A FAIR TRIAL BY JURY BY THE PROSECUTION'S REFERENCE TO ITSELF AS "THE PEOPLE"

A. Trial Proceedings

Throughout appellant's trial, the prosecution referred to himself as representing "the People." *See, e.g.,* RT 25, 105, 107, 409, 685, 728, 783, 823, 1089, 1105, 1720, 2620, 2814, 4591. The trial court also repeatedly referred to the prosecution as "the People" (RT 82, 500, 667, 726, 727, 824, 859, 908, 909, 998, 1026, 1027, 1043, 1046, 2972, 3742, 4994, 5003, 5037) and to the case against appellant as "the People" versus Regis Deon Thomas (RT 205, 232, 277, 308, 483, 541, 1114, 5037). All the exhibits introduced by the prosecution were called "People's Exhibits." The trial court also read the jurors instructions which referred to the prosecution as "the People." RT 495 (definition of "reasonable doubt"), RT 496 (right of defendant not to testify), RT 4025 (CALJIC 2.61), RT 4032 (CALJIC 2.90); RT 4039 (CALJIC 8.80.1); RT 4050 (CALJIC 12.43); RT 4249 (CALJIC 17.40); RT 4926 (CALJIC 8.84.1); RT 4939 (CALJIC 2.90); RT 4940 (CALJIC 17.40).

B. Calling the Prosecution "the People" Violates State and Federal Constitutional Principles

It is fundamentally unfair and a violation of the Due Process Clause of the state and federal Constitutions to refer to the prosecution as "The People," rather than correctly as the governmental branch responsible for prosecuting individual people. Calling the prosecution "The People" is a structural defect, requiring reversal per se. However, assuming *arguendo* this Court does not agree with appellant's systemic argument, reversal of appellant's sentence is still required in this case because members of the

victims' families contrasted appellant (who they wished to see executed) with the good "people" from appellant's neighborhood.

It is incorrect and unfair to refer to the prosecuting bodies of the State of California as "The People" in criminal cases. The prosecution is part of the executive branch of government we the people established in the federal Constitution. *Clinton v. Jones*, 520 U.S. 681 (1997). The prosecution is part of the State. It is not "The People." This is a distinction which every federal district and 45 of the 50 states recognize by referring to the prosecution in criminal cases as either "The State," "The Commonwealth," or "The United States," depending upon the jurisdiction. In stark contrast, only California, Colorado, Illinois, Michigan and New York refer to the prosecution as "The People."[51]

Referring to the prosecution as "The People" violates criminal defendants' state and federal substantive due process rights. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court recognized that to find whether a substantive due process right exists and has been violated, "[w]e . . . examin[e] our Nation's history, legal traditions, and practices." *Id.* at 710 (Washington state statute criminalizing assisted suicide did not violate substantive due process because historical analysis and current state consensus showed no fundamental right to assisted suicide). Both our nation's history and legal practices indicate that referring to the prosecution as "The People" violates substantive due process rights. In addition, in a death penalty case, the reference to the prosecution as "the People," denies a defendant his right to a reliable guilt and penalty verdict and thus violates the federal constitutional ban on cruel and unusual punishment. U.S. Const. amends. V, VIII & XIV; *Beck* v. *Alabama*, 447

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[51]This statement is based on a WESTLAW search of captions in all 50 states and federal district courts conducted October 25, 2004.

U.S. 625, 638 (1980); *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986); *Murray* v. *Giarratano*, 492 U.S. 1, 109 (1989); *Johnson* v. *Mississippi*, 486 U.S. 578 (1988).

As appellant has set forth above, the vast majority of jurisdictions in the United States recognize the constitutionally correct way for a jurisdiction's legal system to refer to its prosecution is not as "The People." The Supreme Court recognized in *Duncan v. Louisiana*, 391 U.S. 145 (1968) that while "virtually unanimous adherence" to a standard "may not conclusively establish it as a requirement of due process," such overwhelming consensus "does reflect a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 155. California currently operates in a tiny minority of jurisdictions which have not yet recognized the more constitutionally sound manner of administering justice. The virtually unanimous adherence to this standard elsewhere indicates California's practice of calling the prosecution "The People" violates due process.

Historically, it is clear that the Framers of the federal Constitution and its amendments envisioned "the People" and "the State" as fundamentally different. According to its Preamble, "We the People . . . ordain and establish this Constitution for the United States of America."[52] U.S. Const. pmbl. In this Constitution, we the people vested powers in three branches of government -- executive, legislative and judiciary. These checks and balances were designed to prevent the State from overzealously usurping the rights of the very people who granted authority to those branches of government.

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[52]The Preamble to the California state Constitution begins similarly: "We, the People . . ." Cal. Const. pmbl.

Maintaining the correct relationship between individual people and the State was so overwhelmingly crucial that when the Constitution was amended with the Bill of Rights, four of the ten amendments explicitly delineated the rights of "the people" (Fourth Amendment), a "person" (Fifth Amendment) and "the accused" (Sixth Amendment) in criminal matters. Later, the Fourteenth Amendment articulated specific protection of individual liberties from state (versus federal government) encroachment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV. On the other hand, the government is emphatically not referred to as "The People" anywhere in the document. It is the people whose rights the Constitution was drafted to protect. *See Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (noting that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression"); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("[T]he touchstone of due process is protection of the individual against arbitrary action of the government"); *People v. Hill*, 17 Cal.4th 800, 818-19 (1998) (the prosecution represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is . . . that justice shall be done," *citing Berger v. United States*, 295 U.S. 78, 88 (1935)).

As well as violating substantive due process rights, referring to the prosecution as "The People" also violates criminal defendants' state and federal constitutional rights to a fair trial by a jury of their peers, and to the presumption of innocence. The fact that "The People" have charged a defendant with a crime necessarily means that the people of his community

cannot presume he is innocent. "The People" are not starting with a tabula rosa. "The People" have charged him with a crime. Calling the prosecution "The People" necessarily blurs and confuses critical distinctions. It is the prosecution's duty, on behalf of the executive branch of government, to litigate against criminal defendants. It the jury's duty, as representatives of the people of a defendant's community, to listen impartially to the evidence presented by the prosecution and then decide guilt. *See J.E.B. v. Alabama*, 511 U.S. 127 (1993), *Powers v. Ohio* 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing protections to ensure juries are not selected based on impermissible exclusionary practices); *See also* Argument V, *supra* (discussing need for jury to put aside any suspicion about the defendant's guilt). Unfortunately, in California, both groups purportedly represent "The People" of the state -- the jurors actually, and the prosecution putatively through its title in criminal cases. Thus, confusion necessarily reigns when all are referred to as "the People."

All, that is, except the defendant. While California's custom unconstitutionally aligns groups of people who have vastly different tasks to perform in the criminal justice system, it simultaneously excludes the defendant. The caption in every California criminal case reads "The People of the State of California versus The Defendant." This dichotomy is reinforced in every criminal case when the jury is instructed with CALJIC 1.00 ("Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence . . . .") and CALJIC 17.40 ("The People and the defendant are entitled to the individual opinion of each juror").

In other words, there are "The People," and then there is "the defendant." While the message is subtle, these oppositional phrases necessarily imply to jurors that defendants are somehow "other than"

people. Even more ironically and importantly, while the dichotomy suggests "the Defendant" is not one of "The People," the dichotomy expressly states the government is. This distinction in the language that juries hear over and over again in court is critical. One need only look to recent changes in legal language to see that the courts are becoming increasingly aware of what linguists and sociologists have learned: language shapes people's perceptions.[53] We no longer exclusively use "he" to refer to the third person, singular. Similarly, CALJIC 1.27 defines "firefighter," rather than only a "fireman" and CALJIC 1.26 defines "peace officer," rather than "highway patrolman," or "policeman." These changes in the language of the criminal justice system reflect our belief that the precise words we choose actually do reflect and shape people's perceptions.

From the beginning of the proceedings and consistently throughout trial, pitting "The People" against "the Defendant" suggests to a criminal defendant's jury that the defendant is something (at worst) or someone (at best) other than the rest of us. To the extent this dichotomy suggests criminal defendants are something other than people, this clearly violates due process. To the extent this dichotomy suggests criminal defendants are

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[53]"We dissect nature along lines laid down by our native languages. The categories and types that we isolate from the world of phenomena we do not find there because they stare every observer in the face; on the contrary, the world is presented in a kaleidoscopic flux of impressions which has to be organized by our minds -- and this means largely by the linguistic systems in our minds. We cut nature up, organize it in this way -- an agreement that holds throughout our speech community and is codified in the patterns of our language. The agreement is, of course, an implicit and unstated one, but its terms are absolutely obligatory; we cannot talk at all except by subscribing to the organization and classification of data which the agreement decrees." Benjamin Lee Whorf, *Language, Thought and Reality* 247-48 (MIT Press 1956).

someone other than the people, this violates the defendant's right to trial by jury of his or her peers.

In this case, there is an excellent example of the way in which the constant use of the term "the People" to refer to the prosecution sent a message to the jury that appellant was set against them and was not one of "the People." James MacDonald, the father of one of the deceased officers, testified several times that his son liked Compton because "*the people*" there treated him well and were good. RT 4524, 4534 (emphasis added). Appellant was from Compton, but obviously Mr. MacDonald was not referring to appellant as one of "the People." The subtle but clear message was that the jury and the victims were on one side, and the defendant was on another side. The People were opposed to the defendant. This was a violation of due process. In sum, California's reference to the prosecution as "The People" versus "the Defendant" violates both the letter and spirit of the state and federal Constitutions. The phrase "The People" impermissibly aligns two separate bodies with different functions -- the prosecution and the jury -- at the same time the phrase "versus the Defendant" excludes the defendant from the community of his peers who form his jury.

This error is simple to remedy. The fact criminal cases in California have always referred to the prosecution as "The People" does not necessarily mean the behavior comports with the state and federal Constitutions. For example, before the United States Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 335 (1963), the courts had not recognized for nearly two hundred years that the federal Constitution guaranteed indigent criminal defendants the right to counsel. This Court should require the prosecuting bodies of the state of California to do as 45 other states and the federal government -- refer to itself as "the State of

California." Let "The People" judge a defendant's guilt, as the state and federal Constitutions demand.

C. Referring to the Prosecution as "the People" Is a Structural Defect That Requires Reversal Per Se

Referring to the prosecution as "The People" represents the quintessence of structural, rather than trial, error and thus requires reversal per se. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). That is precisely what occurs when the prosecution is referred to as "The People." This ubiquitous reference permeates the criminal justice system and necessarily affects the framework within which any defendant's trial proceeds.

Structural error occurs in only a limited number of situations: lack of an impartial trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)); total deprivation of right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)); denial of right of self-representation at trial (*McCaskle v. Wiggins*, 465 U.S. 168 (1984); denial of right to public trial (*Waller v. Georgia,* 467 U.S. 39 (1984)); unlawful exclusion of grand jurors of defendant's race (*Vasquez v. Hillery* 474 U.S. 254 (1986)); and erroneous reasonable-doubt instruction to jury (*Sullivan v. Louisiana*, 508 U.S. 275 (1993)).

It is clear that referring to the prosecution as "The People" fits precisely into this list. All these errors represent "structural defects in the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. As appellant has set forth above, it is undeniably error to refer to the prosecution as "The People." However, it is not possible to measure that error on a case-specific basis. The error defies harmless error analysis. The defect is structural, and thus requires reversal per se.

Even if the error is not structural in this case, the case must be reversed. As noted, one of the victim's family members referred to the good "people," who the family member was implicitly contrasting with appellant . The statement reenforced the impression that the trial was a matter of the People against the defendant. Because the prosecution cannot show the error was harmless, appellant's sentence of death must be reversed. *Chapman*, 386 U.S. at 24.

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XVIII

THE KILLING OF A PEACE OFFICER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY OVERBROAD

Appellant was found death eligible based upon the peace officer killing special circumstance. Cal. Pen. Code § 190.2(a)(7); RT 4392-93. This special circumstance, as interpreted by the California courts, presents a broad class composed of persons of many different levels of culpability, and is overly broad in violation of the Eighth Amendment. This special circumstance creates "the potential for impermissibly disparate and irrational sentencing because [it] encompass[es] a broad class of death eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them." U.S. Const. amend. VIII; *United States v. Cheely*, 21 F.3d 914, 918 (9th Cir. 1994). As such, appellant's death sentence must be vacated.

As defined at the time of appellant's trial, in order find the intentional killing of a police officer special circumstance true pursuant to Penal Code section 190.2, subdivision (a)(7), it had to be shown that the victim was a peace officer who was engaged in the course of performance of duties. It also had to be shown that the victim was intentionally killed and that the defendant knew, or reasonably should have known, that victim was police officer engaged in performance of duties. The statute also provided that the police officer special circumstance applied where the victim was peace officer or former peace officer who was intentionally killed in retaliation for performance of official duties. Cal. Pen. Code § 190.2(a)(7). A "peace officer" was defined in a number of penal code sections. *See* Cal. Pen. Code §§ 830, 830.1, 830.2, 830.31, 830.35, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 & 830.12.

The police officer special circumstance broadens the application of California's death penalty statute by using a very broad definition of "peace officer," encompassing virtually everybody involved in law enforcement, security and investigation, and defining those terms very broadly indeed. So, for example, a "peace officer" includes "child support investigators" (Cal. Pen. Code § 830.35), "Hastings College of Law Security Officers" (Cal. Pen. Code § 830.4), "state lottery security personnel" (Cal. Pen. Code § 830.3), "voluntary fire wardens" (Cal. Pen. Code § 830.37), and "California horse racing board investigators" (Cal. Pen. Code § 830.3)[54].

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[54]A complete list of individuals who qualify as police officers under the statute is stunning. It includes UC Police and Department Members (Cal. Pen. Code§ 830.2); BART police (Cal. Pen. Code§ 830.33); Fish and Game Enforcement Officers (Cal. Pen. Code§ 830.2); Department of Health investigators, including investigators for the Departments of Social Services, Mental Health, Developmental Services, Alcohol and Drug Programs, Office of Statewide Health Planning and Development, and Public Employee's Retirement System; (Cal. Pen. Code§ 830.3); all port police (Cal. Pen. Code§ 830.33); California State Police (Cal. Pen. Code§ 830.4); Sergeant at Arms (Cal. Pen. Code§ 830.36); Bailiffs at Supreme Court and Court of Appeal (Cal. Pen. Code§ 830.36); Guards and Messengers at Treasurer Office (Cal. Pen. Code§ 830.4); State Hospital Administrators and Officers (Cal. Pen. Code§ 830.38); Railroad Police (Cal. Pen. Code§ 830.33); Harbor Police (Cal. Pen. Code§ 830.33) Airport Officers (Cal. Pen. Code§ 830.33); Correctional Officers (Cal. Pen. Code§ 830.2); Parole Officers (Cal. Pen. Code§ 830.5); Probations Officers (Cal. Pen. Code§ 830.5); Law Enforcement Liaison Unit of Dept. of Corrections (Cal. Pen. Code§ 830.2), Reserve or Auxiliary Officers (Cal. Pen. Code§ 830.6); Deputies, including individuals deputized as sheriffs, city police, regional park district police, transit district police, deputies of Dept. of Fish and Game, and agents of Dept. of Justice (Cal. Pen. Code§ 830.6); Persons Summoned to the Aid of Peace Officers (Cal. Pen. Code§ 830.6); Coroners and Deputy Coroners (Cal. Pen. Code§ 830.35); Welfare Fraud Investigators and Inspectors (Cal. Pen. Code§ 830.35); Municipal Utility District Security Officers (Cal. Pen. Code§ 830.34); Port Wardens or Officers of LA Harbor Dept. (Cal. Pen. Code§ 830.1); Voluntary Fire

(continued...)

Moreover, different categories of "peace officers" perform a variety of duties in a variety of settings, some of which are quite obscure, and because the statute includes defendants who "reasonably should have known" (Cal. Pen. Code § 190.2(a)(7)) that the victim was a police officer acting in the course of his or her duties, it is much more likely that a defendant could kill a peace officer whom he did not know (but *should* have known) is an officer. This is especially true for victims who have peace officer status only when performing certain limited functions. For example, a person summoned to the aid of a uniformed officer is considered to be a peace officer under section 190.2(a)(7). *See* Cal. Pen. Code § 830.6. If a defendant intentionally killed someone called to aid a uniformed officer, erroneously believing that he or she was not a "peace officer," a jury could find the special circumstance if it concluded that the defendant should have known a person aiding the officer is "protected" under the statute.

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[54](...continued)
Wardens (Cal. Pen. Code§ 830.3); Bureau of Fraudulent Claims of the Department of Insurance Investigators, Dept. of Housing and Community Development Employees, Office of Controller Investigators, Department of Corporations Investigators, Contractors' State License Board Employees, Office of Emergency Services, Law Enforcement Division, Office of Secretary of State Investigators, Deputy Director for Security and Lottery Security Personnel, Employment Department Investigators (Cal. Pen. Code§ 830.30); County Water District Security Officers, Public Utilities Commission Security Directors, (Cal. Pen. Code§ 830.34) Child Support Investigators (Cal. Pen. Code§ 830.35); Court Service Officers (Cal. Pen. Code§ 830.36); Voluntary Fire Wardens (Cal. Pen. Code§ 830.37); Military Firefighter/Security Guards (Cal. Pen. Code§ 830.4), Hastings College of Law Security Officers (Cal. Pen. Code§ 830.5); Department of Corrections Medical Employees (Cal. Pen. Code§ 830.50). The following employees can be peace officers under some circumstances: State Banking Department, Department of Savings and Loan, Department. of Real Estate, State Lands Commission (Cal. Pen. Code§ 830.11); and Litter Control Officers, Vehicle Abatement Officers, Registered Sanitarians, Solid Waste Specialists (Cal. Pen. Code§ 830.12.)

The statute provides that the victim must be "engaged in the course of his duties." Cal. Pen. Code § 190.2(a)(7). However, this is not sufficient to assure the constitutionality of the statute. This Court has interpreted this language to mean that the officer must be "lawfully" engaged in duties. *People v. Gonzalez*, 51 Cal. 3d 1179, 1217 (1990). The plain language of this statute sweeps very broadly to cover a huge number of activities. For example, the suggested jury instruction pertaining to section 190.2(a)(7), CALJIC No. 8.81.8, delineates many duties covered by the statue. They are numerous: making or attempting to make a lawful arrest; lawfully detaining or attempting to detain a person for questioning or investigation; accepting or exercising custody over a person who has been arrested by a private citizen; guarding or transporting any person lawfully under arrest or undergoing imprisonment in any city or county jail or in any prison or institution under the jurisdiction of the California Department of Corrections or California Youth Authority. The instruction provides that both lawful arrests and reasonable temporary detentions are lawful. CALJIC No. 8.81.8.

Moreover, this Court has interpreted the statute to sweep broadly to include cases where the defendant believed, even reasonably believed that the officer's conduct was not authorized, so long as the officer believed he was acting reasonably. For example, in *People v. Gonzalez* 51 Cal. 3d 1179 (1990), this Court concluded that an officer who is executing a warrant that is valid on its face is lawfully engaged in duty for purposes of the special circumstance, even if the facts disclosed to the magistrate in support of the warrant were not sufficient to establish probable cause. *Id.* at 1217-18. In *People v. Jenkins*, 22 Cal.4th 900 (2000), the appellant argued that the law enforcement special circumstance did not apply where the defendant believed the officer was attempting to manufacture a robbery case against

him and was thus not engaged in the lawful discharge of his duties. The Supreme Court rejected this challenge, concluding that section 190.2(a)(7) did not require proof of the defendant's *subjective* understanding that the officer's conduct was lawful. Rather, the officer's lawful conduct must only be established as an *objective* fact. *Id.* at 1020-21; *see* Cal. Pen. Code § 190.2(a)(7). This Court then determined that the investigating detective's conduct was lawful where solid evidence pointed to the defendant's involvement in the robbery. In *People v. Jackson*, 49 Cal. 3d 1170, 1198 (1989), this Court rejected the claim that the officer the appellant killed was not engaged in the performance of his duties at the time of the killing because his conduct was so aggressive that he lost his peace officer status.

Finally, the plain language of the statute includes individuals who kill someone he or she negligently believes is not a police officer. In *People v. Rodriguez*, 42 Cal. 3d 730 (1986), this Court concluded that sentencing a person to death because he *should have known* his victim was a peace officer did not offend the Eighth Amendment. *Id.* at 781-82. This Court rejected the contention that the term "reasonable" does not provide an ascertainable and fixed standard of guilt, rendering the special circumstance overbroad. *Id.* at 781-82; *see also People v. Daniels*, 2 Cal. 3d 815 (1991). Furthermore, in *People v. Brown*, 46 Cal. 3d 432 (1988), this Court found that the special circumstance was constitutional even if the defendant suffered self-induced "diminished" capacity at the time he killed the peace officer. *Id.* at 444.

Under *Furman v. Georgia*, 408 U.S. 238 (1972) "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*, 486 U.S. 356, 362 (1988). Moreover, death-penalty statutes must "genuinely

narrow" the subclass of offenders who can be subjected to a sentence of death at the election of prosecutors and juries. *Gregg v. Georgia,* 428 U.S. 153, 188-89 (1976); *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The threshold requirement is that death must be a penalty proportionate to the crime for which the defendant is convicted. *Coker v. Georgia*, 433 U.S. 584 (1977). However, in addition, a statute that includes capital punishment as a possible penalty 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,* 462 U.S. at 877.

The peace officer statute does not narrow the class of individuals who are eligible for the death penalty to one in which the imposition of a more severe sentence is justified as compared to others found guilty of murder as required by *Zant*. Given the huge number of classes of individuals who qualify as "peace officers," the statute sweeps to include many homicides, where there is no reason to give the individuals who commit these crimes the death penalty, and not give other individuals convicted of murder the death penalty. It would be another matter entirely if the statute were limited to individuals who are traditionally involved in law enforcement, such as police officers or correctional officers, but it makes no sense to impose the death penalty for an individual convicted of killing an inspector for the Public Retirement System, lottery inspector, or an inspector at a race track. Moreover, the individuals covered by the special provide diverse services as "peace officers," many of which do not fall in traditional law enforcement functions. There is no meaningful distinction between individuals who have been convicted of killing individuals engaged in the course of such duties and other individuals convicted of murder.

Additionally, the language of the special circumstance makes someone eligible for the death penalty for mere negligence, since it permits imposition of the death penalty for someone who did not know that the victim was a peace officer. At first cut, this would seem to make little difference to a constitutional analysis, but since the statute sweeps into its wake an enormous number of "peace officers," many whom one would not expect to be peace officers and many who are sometimes peace officer and sometimes not peace officers, the chance that the statute will sweep someone into its ambit who is in a class of individuals who do not deserve the death penalty is great. Moreover, as discussed above, this Court has interpreted the special to include individuals who were mistaken about whether the peace officer was lawfully engaged in his or her duties. Hence, the special makes individuals who did not know that someone was a law enforcement officer and who did not know that person was lawfully engaged in duties eligible for the death penalty. As such, the special authorizes the death penalty not only for persons who knew they were killing a peace officer engaged in duties, but also for a much broader class of less-culpable individuals.

It is true that the United States Supreme Court has upheld the death penalty where the statue carves out well defined subclasses of murderers involving highly aggravating factors. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 242-43 (1988); *Jurek v. Texas,* 428 U.S. 252, 265-66 (1976). However, in the case of the police officer special circumstance the class is not a well-defined subclass because the class of "peace officers" has been expanded to include so many individuals who are not traditional law enforcement officers, performing so many functions that are not traditional law enforcement functions. Moreover, the subclass is not highly aggravated in that it encompasses individuals who act out of negligence or even

ignorance. As such, the peace officer special circumstance violates the dictates of *Zant*, 462 U.S. at 877, and is incompatible with the Eighth Amendments ban on cruel and unusual punishment.

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XIX

THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY OVERBROAD

The multiple murder special circumstance upon which appellant was found death eligible (RT 4040, 4292) and sentenced to death presents a broad class, composed of persons of many different levels of culpability, and is overly broad in violation of the Eighth Amendment. This special circumstance creates "the potential for impermissibly disparate and irrational sentencing because [it] encompass[es] a broad class of death eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them." *United States v. Cheely*, 21 F.3d 914, 918 (9th Cir. 1994). Appellant acknowledges this claim has been rejected in *People v. Sapp*, 31 Cal.4th 240, 286 (2003), but requests that this Court reconsider that holding.

The narrowing factor for the multiple murder special circumstance is not the defendant's mental state, but the act which was committed, and thus the relative culpability of defendants is determined by the *actus reus* alone and not *mens rea*. Death eligibility is based entirely upon the fact that more than one murder has been committed, without any consideration of whether the defendant's mental state is more culpable than had only one murder been committed. For example, where the murders could have been accidental or without express malice but based on a felony murder theory, the mental state of a multiple murder defendant is less morally culpable than the mental state of a defendant who kills a single victim in premeditated cold blood. This is not a rational means of distinguishing those cases in which the defendant is death eligible from those cases in which he is not, and therefore fails to provide a rational basis for infliction of the death penalty.

The multiple murder special circumstance is so overbroad as to permit death eligibility for defendants whose crimes are of wildly disparate levels of culpability. The multiple murder special circumstance elevates the defendant convicted of first degree murder to death eligibility upon the truthful finding of a commission of another murder in the first or second degree. Thus, a defendant can be death eligible for many combinations of murder and under many scenarios where the relative culpability is decidedly disparate.

The basic unfairness and irrationality of the California death penalty law resulted in appellant being sentenced to death, which, in his case, is not proportionate to his individual culpability or to the punishment assessed against similarly situated defendants throughout the state in violation of his rights to due process and equal protection of law, to a reliable determination of his factual innocence of capital murder, and to a reliable, non-arbitrary, individualized determination that death is the appropriate penalty in his case, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, VI, VIII & XIV. His death sentence must be reversed.

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XX

THE JURY'S CONSIDERATION OF THE UNRELATED MURDER OF A WITNESS' WIFE WAS REVERSIBLE MISCONDUCT

A. Introduction

"It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgement. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox v. United States,* 148 U.S. 140, 149 (1892). Although appellant's jury had been instructed not to read newspapers relating to the case (RT 1001), some jurors read an article about the shooting death of the wife of one of the witnesses against appellant. Although there was no evidence that appellant was involved with this killing, during their deliberations some of the jurors considered this information. This was misconduct. This misconduct, in combination with other errors at trial permitting the jury's consideration of other shooting deaths with which appellant was not connected, was reversible error, and requires the reversal of appellant's conviction and sentence of death.

The jury's misconduct violated appellant's rights to a fair trial by twelve unbiased impartial jurors, to the assistance of counsel, to confront all witnesses against him, and to require the attendance of witnesses. U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 1, 15, 16 & 17; *Parker v. Gladden*, 385 U.S. 363 (1966); *In re Hamilton*, 20 Cal.4th 273, 293-94 (1999); *People v. Nesler*, 16 Cal.4th 561, 578 (1997); *Tinsley v. Borg*, 895 F.2d 520, 523-24 (1990 9th Cir.); *Jeffries v. Wood*, 114 F.3d 1484, 1490 (1997 9th Cir.) (en banc); *Rodriguez v. Marshall*, 125 F.3d 729, 744 (1997 9th Cir.); *Mariano v. Vasquez*, 812 F.2d 499, 505 (1987 9th Cir.). It also violates appellant's rights to due process of law under the Fifth and

Fourteenth Amendments to the United States Constitution and their counterparts in the California Constitution. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Finally, the misconduct violates the Eighth Amendment requirement of heightened reliability and right to conviction and sentence based on evidence in the record. U.S. Const. amends. VIII & XIV; *Beck v. Alabama* 447 U.S. 625, 638 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, Powell, and Stevens, JJ.); *Johnson v. Mississippi*, 486 U.S. 578 (1988), *People v. Cudjo*, 6 Cal.4th 585, 623 (1993).

B. The Jury Discussed the Murder of Mark Buster's Wife

Midway through the guilt phase of appellant's trial, the prosecutor noted that one of his up-coming witnesses, Mark Wayne Buster, had been in the news. Buster's wife had been murdered with a gun fired from 140 yards. RT 1615. The trial court observed that appellant had nothing whatsoever to do with the shooting. RT 1616. Later that day, Buster provided evidence for the prosecution connecting appellant with a red truck which the prosecution claimed was the same truck used in the shooting of the officers. He testified that a man named "Regis" bought his used red Chevrolet "454" truck in late 1991. RT 1643-45. Buster also testified that since the sale of the truck he had occasionally seen appellant riding around the neighborhood in the truck. RT 1654.

The jury was never informed about the murder of Buster's wife. Nevertheless, the shooting death was a part of the jury's deliberations, a fact which was revealed in a round about way. During guilt phase deliberations, one of the jurors wrote a note to the court complaining about the behavior of a second juror, alleging that this juror violated court orders. CT 900. As part of its inquiry into the note, the trial court questioned the jurors in chambers. In the course of questioning the jurors about the misconduct

mentioned by the juror who wrote the note, one of the jurors, Juror No. 1129 (also identified as Juror No. 49), mentioned that another of their number had informed the assembled group that Mark Buster's wife had been shot. RT 4308. According to Juror No. 1129, there was a discussion of this fact, which "got out of hand." During this discussion some of the jurors mentioned that they thought that this evidence should have been presented. Juror No. 1129 admitted that he was one of the individuals who "elaborated" on the issue of Mark Buster's wife. RT 4309.

Defense counsel expressed concern about the jury's discussion of Buster's wife. He noted that the jurors had discussed evidence not presented to them in direct violation of their orders. He was also concerned that the jurors had now been presented with evidence of a third shooting death that was completely unconnected with the case. On top of the evidence of the killing of Calvin Cooksey's mother and the shooting death of Andre Chappell, the jury now had considered a third violent death, in addition to the three crimes with which appellant was charged. RT 4323-24. The defense was particularly concerned that the jury was speculating that there was a connection between the murder of Buster's wife and appellant, because, as a matter of fact, appellant and Buster had good relations. RT 4324. The trial court noted that Buster had shook appellant's hand following his testimony. RT 4327.

After a short break, defense counsel moved for a mistrial based on the jury's misconduct in considering the evidence of the shooting of Buster's wife. RT 4328. Trial counsel stated that simply rereading the instructions about a jurors duties would not be sufficient because the discussion had reportedly been "animated." RT 4332. The trial court stated that it wanted to speak to the jurors before ruling on appellant's motion. RT 4329. During this discussion, the trial court mentioned that the Los

Angeles Times had covered the murder of Mark Buster's wife, and that the article stated that she had been killed by a stray bullet. The article contained a picture of Mark Buster. RT 4330.

The trial court then questioned each juror about what discussions there had been of Mark Buster's wife. Eleven of the twelve jurors recalled that Mark Buster's wife's murder had been discussed.[55] A lot of the jurors had seen something about the shooting on television. RT 4350 (Juror No. 6752 [Juror No. 36]). Juror No. 1801 (Juror No. 59), who was identified as the foreman, stated that there had been a discussion of Mark Buster's spouse. The jury discussed the fact that his wife had been shot in front of her church. The juror brought it up to the other jurors because he had worked out that the woman shot was related to the man who testified. According to Juror No. 1801, the jurors were "curious" about what had happened. RT 4335. It was then noted that Mr. Buster's wife was shot protecting a child and that there might have been gang involvement. RT 4336. Juror No. 1801 thought that the discussion had not lasted more than a few minutes and that Mark Buster's wife had not played a part in the deliberations. RT 4336. Three jurors mentioned that Buster's wife was killed in a drive-by shooting. RT 4342 (Juror No. 8475 [Juror No. 84]); RT 4349 (Juror No. 5902 [Juror No. 97]); RT 4350 (Juror No. 6752 [Juror No. 36]). One mentioned that this fact was really scary. RT 4349 (Juror No. 5902 [Juror No. 97]). There was some speculation that Buster's wife had

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[55]*See* RT 4335-36 (Juror No. 1801 [Juror No. 59]); RT 4338-39 (Juror No. 1129 [Juror No. 49]); RT 4340-41 (Juror No. 0784 [Juror No. 68]); RT 4342-43, 4345-46 (Juror No. 8475 [Juror No. 84]); RT 4344-45 (Juror No. 6491 [Juror No. 11]); RT 4346-47 (Juror No. 0965 [Juror No. 23]); RT 4349-50 (Juror No. 5902 [Juror No. 97]); RT 4350-52 (Juror No. 6752 [Juror No. 36]); RT 4352-54 (Juror No. 4315 [Juror No. 88]); RT 4354-56 (Juror No. 0077 [Juror No. 13]); RT 4356-57 (Juror No. 3609 [Juror No. 95]).

been killed the day of or the day before Buster testified. RT 4342 (Juror No. 8475 [Juror No. 84), RT 4355 (Juror No. 0077 [Juror No. 13]).

After the jurors were questioned, the defense moved again for a mistrial. RT 4359. The trial denied the motion. RT 4359. The judge informed the jury that the death of Buster's wife had nothing to do with the case and should not enter into their deliberations. RT 4361. The trial court also read CALJIC 1.03, (Juror Forbidden to Make Any Independent Investigation) and CALJIC 17.40 (Individual Opinion Required – Duty to Deliberate). RT 4361-62. The defense also moved for a new trial based on the jury's misconduct in discussing Buster's wife. CT 1180-202. The motion for new trial was denied. CT 1150.

C. The Juror's Discussion of the Murder Was Inherently Prejudicial, So Reversal Is Required

It is beyond dispute that the consideration of media accounts relating to the case upon which the juror is sitting is misconduct. Juror misconduct, such as the receipt of media accounts that were not part of the evidence received at trial, "leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations]" *Nesler,* 16 Cal.4th at 578. The effect of out-of-court information upon the jury is assessed as follows:

> When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant. If we find a substantial likelihood that a juror was actually biased, we

> must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

Id. at 578-79.

In this case, the information about the murder of Buster's wife was inherently prejudicial, so that the prosecution cannot rebut the inference of prejudice. The prejudice inherent in the jury's consideration of the murder of Buster's wife must be seen in context of other errors at the trial. Appellant has argued above that the trial court erroneously admitted evidence of Andre Chappell's violent death, which, appellant has shown, prejudiced appellant at the guilt and penalty phases of his trial. *See* Argument XII, *supra*. The jury also heard Cooksey's testimony that he believed his mother had been killed by appellant and that Cooksey did not believe appellant had nothing to do with it. RT 3278-80. The jury had thus already heard that two other individuals who were connected to appellant had been killed. The jury could then have likely believed that three killings in connection with the case could not possibly have been coincidence and that appellant must have had something to do with some or all of the killings. This is all the more likely since the shooting of Buster's wife was very near in time to when Buster testified for the prosecution. Moreover, even if they did not believe appellant was directly involved they would likely have believed that appellant was involved with individuals who would kill and therefore would have been less likely to give appellant the benefit of the doubt. This was especially likely because the jury knew that Buster's wife had been likely killed in a gang-related drive by killing. The prejudice of the shooting of Buster's wife must also be seen in context of the trial court's error in ordering that appellant's jury be anonymous. As

appellant has argued (*see* Argument I, *supra*), the fact that the jury was anonymous likely lead the jury to believe that appellant was a frightening person. The information about Buster's wife would only have compounded that fear.

Moreover, even if the information was not inherently prejudicial at guilt it certainly was at penalty. At penalty, the jurors task was to determine whether appellant deserved to live or die. *See People v. Brown*, 46 Cal.3d 432, 448 (1988). Since the jurors had information that appellant had been involved in additional killing, they were more likely to sentence him to death.

Respondent will surely argue that the jurors told the trial court that the discussion of the murder of Mark Buster's wife did not make a difference to their deliberations. The jurors' opinion that the evidence of the murder of Buster's wife would not affect their deliberations does not control the issue. *Jeffries*, 114 F.3d at, 1491; *United States v. Bolinger*, 837 F.2d 436, 440 (1987 11th Cir.). "The effect of extrinsic prejudicial evidence on a juror's deliberation may be substantial even though it is not perceived by the juror and 'a juror's good faith cannot counter this effect.'" *Jeffries*, 114 F.3d at 1491, *citing United States v. Williams*, 568 F.2d 464, 471 (1978 5th Cir.). Hence assurances of the jurors "may not be adequate" to assure that the material did not have a prejudicial effect on the jury. Moreover, it is the court's responsibility, not the jurors, to determine whether material is so inherently prejudicial as to require reversal. *See United States v. Hyde*, 448 F.2d 815, 848 n.38 (1971 5th Cir.) ("It is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to."); *Wright v. State*, 131 Md.App. 243, 271, 748 A.2d 1050, 1065 (Md. 2000) ("Although the jurors may have honestly thought that they could disregard the information . . . , in

our judgment, any doubts the jurors may have had, reasonable or otherwise, would have been resolved against appellant--even if only subconsciously--as a result of the information. . .")

Because the information about Buster's wife's murder, in the context of the other evidence in this case, was inherently prejudicial, appellant's conviction and sentence of death must be reversed.

* * * * *

ERRORS RELATING PRIMARILY TO THE PENALTY PHASE

XXI

THE ADMISSION OF THE WEAPONS CONVICTIONS WAS REVERSIBLE ERROR

A. Introduction

Appellant's death sentence was unlawfully obtained in violation of state law and of his Eighth and Fourteenth Amendment rights to the due process enforcement of the mandatory requirements of the state's sentencing statute and a reliable penalty determination as a result of the introduction of a felony conviction, entered after the commission of the present offense. U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, §§ 7 & 15. The error requires reversal.

B. The Acts Underlying the Gun Convictions Occurred After Those of the Capital Offense

On March 20, 1995, appellant pled guilty to two gun related felonies. He pled guilty to being an ex-felon in possession of a firearm in violation of Penal Code section 12021, subdivision (a), and pled guilty to being in possession of a concealed weapon in violation of Penal Code section 12025, subdivision (a)(1). RT 447-60; Cal. Pen. Code §§ 12021(a) & 12025(a)(1). The date on which the acts underlying the pleas occurred was May 23, 1992. CT 597-602, 603-08. The date of these acts was after the events charged in the capital counts which were January 31, 1992 and February 22, 1993. *See* CT 597-602; 603-08. Appellant took the stand as part of the plea. The prosecution asked appellant a few questions about the gun possession. Appellant admitted that he knew that the gun was in the truck. The gun was in the console of the truck, but appellant did not put it there and he did not know how it had gotten there. RT 455-56.

Prior to the opening of penalty phase evidence, appellant's trial counsel objected to the admission of the prior convictions as factor (c)

evidence. *See* Cal. Pen. Code § 190.2(c). Trial counsel argued that the purpose of factor (c) evidence was to show that the defendant had not changed in spite of prior convictions:

> [. . .] I thought it was the law that the reason why the prior becomes admissible is to show that the prior conviction did not in any way diminish or did not affect the defendant's criminal behavior in the future. It did not limit the criminal, the defendant's criminal behavior in the future and that is why a prior conviction is important as an aggravating circumstance so the jury can see how his conduct has changed as a result of the prior conviction. The fact that he suffers, even though the incident occurred before the murders, the conviction occurred after the murders, and, therefore, how could a prior conviction which occurs after the murders affect his behavior?
>
> And I think the purpose of showing the prior conviction is to show that his criminal conduct was not deterred as a result of a prior criminal conviction.

RT 4442. The prosecution argued that the conviction was admissible because the incident occurred before the conviction in the capital case. He also argued that the convictions were also admissible as factor (a) evidence, *i.e.*, as part of the circumstances of the crime. RT 4442. Trial counsel cited *People v. Balderas*, 41 Cal.3d 144 (1985), as authority for his argument. RT 4443.

The trial court overruled the defense objection and admitted the prior convictions under factor (c), stating that he believed that *Balderas* had been overruled and that he would follow the dissenting opinion in *Balderas*.[56] RT 4444. The trial court did not admit the evidence as factor (a) evidence.

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[56]This is an apparent reference to the dissent of Justice Lucas, who dissented from the majority's finding that a conviction is inadmissible under Penal Code section 190.2, subdivision (c) because it did not occur prior to defendant's commission of the capital offense, and accordingly, was not a "prior conviction" within the meaning of the 1978 death penalty law. *See Balderas*, 41 Cal.3d at 208 (Lucas, J., dissenting).

As part of its case in penalty, the prosecution introduced a certified copy of the March 20, 1995 convictions. RT 4559; People's Exhibit No. 119.

C. The Admission of the Prior Convictions Was Constitutional Error and Requires Reversal

The admission of the appellant's convictions was clear error. Evidence is not admissible as a prior conviction unless the date of the guilty plea or guilty verdict preceded the commission of the capital crime. *People v. Williams*, 16 Cal.4th 153, 273 (1997); *People v. Scott*, 15 Cal.4th 1188, 1222-23 (1997); *People v. Bradford*, 15 Cal.4th 1229, 1373-74 (1997). The trial court's belief that *Balderas* had been overruled was mistaken.

Nor were the two crimes to which appellant plead guilty admissible under section 190.2, subdivision (b), a crime involving violence or a threat of violence against other people. This Court has recognized that a violation of section 12021 "is not, in every circumstance, an act committed with actual or implied force." *People v. Jackson*, 13 Cal.4th 1164, 1235 (1996). In *People v. Cox*, 30 Cal.4th 916, 973 (2003), this Court held that "mere possession of guns" does not constitute a crime of violence under factor (b). Similarly, in *People v. Bloom*, 48 Cal.3d 1194, 1231 (1989), this Court assumed that a defendant's mere possession of a concealed weapon (a BB-gun) was insufficient to demonstrate prior criminal activity. *See also People v. Satchell*, 6 Cal.3d 28, 42 (1971) (in prohibiting mere possession by anyone convicted of a felony, "the intent or propensity for violence of the possessor has been rendered irrelevant."); *People v. Azevedo*, 161 Cal.App.3d 235, 240 (1984) (Penal Code section 12020 did not require proof that "the defendant contemplated an unlawful use for the shotgun (citation omitted) or had an intent or propensity for violence." (Cal. Pen. Code § 12020)).

The cases holding that possession of a gun is admissible under 190.2, subdivision (b) are distinguishable. In *Jackson*, 13 Cal.4th at 1235-36, this Court upheld the admission of evidence that the defendant had a loaded handgun in his suitcase when he was arrested three months after he raped a woman. The Court held that the evidence was admissible under subdivision (b) because the defendant had armed himself after he had escaped from custody, so that it could be presumed that he possessed the gun to assist his continued flight "rather than for some legitimate self-defense or some other lawful purpose. Possession under these circumstances amounts to 'substantial evidence of an implied threat of violence' admissible under section 190.3." *Id.* at 1236, *citing People v. Tuilaepa*, 4 Cal.4th 569, 587 (1992); Cal. Pen. Code § 190.3(b). In *People v. Quartermain*, 16 Cal.4th 600, 631 (1997), the Court held that evidence that sawed-off shotguns, silencers and instructions for making silencers were found in appellant's home were admissible as evidence of other violent criminal activity because "[p]ossession of sawed-off firearms and silencer materials carries an implied threat of violence because their obvious purpose is to harm humans." *Id.* at 631, *citing People v. Garceau*, 6 Cal.4th 140, 203-04 (1993).

In this case, there is no evidence that appellant planned to use the gun in any manner. In fact, the only evidence on the record about the details of the possession of the gun is appellant's testimony that he knew that the gun was in the car, but did not know how it got there. RT 455-56. There was no evidence that appellant planned to use the gun; nor did the fact that the gun was in the console of the truck have any significance, since

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appellant did not place the gun in the car, but only knew it was there.[57] The gun found in appellant's truck did not by itself carry an implied threat of violence. Unlike the sawed-off shotgun and silencer at issue in *Quartermain*, which are illegal for anyone to own, a handgun, such as that possessed by appellant, may be lawfully possessed in some circumstances.

In *People v. Michaels*, 28 Cal.4th 486 (2002), evidence was presented that the defendant possessed knives, daggers and a concealed handgun. This Court held that the evidence of these weapons was admissible under subdivision (b) because the knives and daggers had long blades and were thus weapons of violence and were similar to the knife used to kill the victim. The concealed firearm was the same gun that the defendant had used to rob someone else. *Id.* at 535-36. In this case, the gun found in May 1992 was obviously not the same gun as the guns used to kill the victims in this case. Moreover, a handgun is not necessarily a weapon of violence. For instance, Deshaunna Cody testified that she possessed a nine-millimeter gun because she needed one for protection. RT 2917. It is true that the victims in this case were killed with nine-millimeters. However, there is no evidence about why appellant possessed the gun found in 1992. More importantly, there is no evidence that appellant possessed the gun in 1992 in order to threaten or harm anyone in particular. In *People v. Belmontes*, 45 Cal.3d 744, 809 (1988), this court held that factor (b) requires that an express or implied threat must be "'directed at a particular victim or victims . . . '" *Id.* at 809, *citing People v. Phillips*, 41 Cal.3d 29, 72 (1985). Because there is no evidence that appellant's possession of the

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[57]The prosecution asserted that it could put on evidence in relation to the gun possession that appellant was trying to reach for his gun when he was arrested. RT 98. However, the prosecution put on no evidence of this kind.

gun was aimed at anyone in particular, the gun convictions were not admissible under subdivision (b). Cal. Pen. Code § 190.2(b).

Appellant's constitutional rights under state and federal law were violated by the admission of the prior. His due process rights were violated by the failure of the state to follow its own capital sentencing statute (*see Hicks v Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991)), and the violation of the reliability requirement in capital sentencing mandated by the Eighth Amendment. U.S. Const. amends. VIII & XIV; *Caldwell v. Mississippi*, 472 U. S. 320 (1985).

Because the error implicates appellant's due process rights, the admission of the prior convictions requires reversal unless the prosecution can show that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. In this case, the penalty phase case was close, as is shown by the jury's lengthy deliberations of over ten days. *See* CT 1020-21, 1023-24, 1026; RT 4945-51, 4961-62; CT 1028-31; 4967-71, 4979; CT 1141; RT 4982. The prosecution also referred to the prior conviction (RT 4873-74), thus exploiting the error to appellant's prejudice. *Stringer* v. *Black*, 503 U.S. 222, 229-33 (1992). Finally, the trial judge relied in part on the inadmissible evidence as part of his determination of appellant's penalty pursuant to section 190.4. RT 5022; Cal. Pen. Code § 190.4. As such, the prosecution cannot show that the admission of the convictions was harmless and appellant's sentence must be reversed.

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XXII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE OF MISCONDUCT AT THE PENALTY PHASE

A. Introduction

Prosecutorial misconduct at the penalty phase violated appellant's right to due process and a reliable penalty verdict. In several instances, the prosecutor's actions in this case went beyond the limits of acceptable advocacy. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Prosecutorial misconduct violates state law if it involves the use of "deceptive or reprehensible methods" to attempt to persuade the jury. *People v. Hill*, 17 Cal.4th 800, 819 (1998). It also violates federal due process if it infects a trial with fundamental unfairness. U.S. Const. amends. V & XIV; *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Moreover, the Eighth and Fourteenth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Finally, the prosecution's misconduct introduced non-statutory factors in aggravation into the penalty phase deliberation and thereby arbitrarily deprived appellant of his due process liberty interest a penalty determination based solely on statutory factors. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). Accordingly, this Court should find that the misconduct violated federal and state due process guarantees and the requirements for a reliable death judgment and reverse appellant's conviction and death sentence.

A. The Misconduct

1. The Prosecution Asked an Improper Question About "Conjugal Relations"

During the testimony of appellant's wife, Deshaunna Cody, it was revealed that Cody and appellant had only gotten married after appellant was arrested on capital charges. The prosecution then asked Cody whether she intended to have conjugal relations with appellant if she were able. The defense objection to this remark was sustained. RT 4629.

2. The Prosecution Made Repeated References to an Expensive Truck and to Appellant's Lack of Employment

There had been testimony both at guilt and at penalty about the cost of appellant's red truck. Over the objection of the defense (RT 1111), witness Mark Buster testified that appellant bought an $18,000 truck from him. RT 1659. Deshaunna Cody stated that she had often seen appellant in a red truck. RT 2892. The prosecution then sought to show that appellant could not have paid for the truck through legal means because he did not have a job.[58] In his cross examination of Deshaunna Cody, the prosecution repeatedly asked where appellant got his money from, since it was apparent that appellant was not working regularly. Cody admitted that appellant had not had a job for a long time, but denied that she knew where appellant's money was coming from. RT 4621. She admitted that appellant did not have a bank account of any kind. RT 4622. After this answer, the defense objected to this line of questioning, stating in a bench conference that it was improper for the prosecution to get in evidence about possible drug dealing through cross examination. RT 4622.

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[58]In fact, as the prosecution knew, Cody had testified at the preliminary hearing that the truck was purchased for her with money from appellant and from other family members. CT 105-07.

The prosecution also asked other of appellant's penalty phase witnesses about whether appellant had a source of income. RT 4650 (Testimony of Kawasci Jackson); RT 4694 (Testimony of Kim Graham); RT 4742 (Testimony of Sheila Griggs); RT 4760 (Testimony of Patricia Mosley).

In closing argument the prosecution once again discussed the truck, noting that appellant only gave money to his family when he could, but "Yet he can afford a truck the cost of which is $18,000." RT 4879. Trial counsel's objection to this remark was overruled on the grounds that there had been testimony about what the truck had cost. RT 4879.

3. The Prosecution Suggested That If the Jury Did Not Sentence Appellant to Death He Might Get a "Freebie"

Shortly later, the prosecution told the jury that it should sentence appellant to death because:

> The defendant represents a danger to all. He killed Carlos Adkins for virtually no reason. Because Carlos Adkins said, "You don't know me, either," that is not a reason, and he killed these officers for virtually no reason. He executed them. So what danger does he present to other inmates who he should get upset with if allowed to live? If he engages in some type of acts of violence on another inmate without parole, what could be done to him? It would be a freebie.

RT 4883. Trial counsel objected to the remark "It would be a freebie," and the court told the jury to disregard "that." RT 4883. However, the jury was not told precisely what portion of the argument it should disregard.

B. These Actions Constitute Reversible Misconduct

The prosecution's actions delineated above constitute misconduct. Because questions appealing solely to emotion and passion distract from the jury's task at the penalty phase, a prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an

understanding of the law. *See United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985). The remark that appellant would be given a "freebie" if he was given life without the possibility of parole was designed to appeal purely to the jury's passions and prejudices. *See Cunningham v. Zant*, 928 F.2d 1006, 1019-21 (11th Cir. 1991) (Numerous comments, including, "how do you know that if you let him go this time it won't be done again" were designed to appeal "to the jury's passions and prejudices" and as such, required reversal.). In addition, the prosecutor's argument constituted a misstatement of the law since future dangerousness is not a proper aggravating factor under California law. *See* Cal. Pen. Code § 190.3; *People v. Boyd*, 38 Cal.3d 762, 772-76 (1985). The jury's consideration of future dangerousness in determining sentence violated due process by arbitrarily depriving appellant of his state-created liberty interest in a sentencing determination based solely on the statutory factors. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

The prosecution's question to appellant's wife about whether she would have conjugal relations with appellant was improper because it called for clearly irrelevant and inadmissible information, and, worse, insinuated that appellant would have sexual relations with his wife if he were given life without the possibility of parole. As such the question was misconduct. *See Berger*, 295 U.S. at 88 (Prosecutors have an obligation to avoid improper suggestions and insinuations). Moreover, even assuming that appellant could have conjugal relations with his wife if he were sentenced to life without the possibility of parole, such evidence is not a statutory sentencing factor, and is therefore an improper consideration for the jury. *Boyd*, 38 Cal.3d at 772-76.

Finally, the prosecution's repeated questions about where appellant got his money, and the reference in closing argument to appellant having money without any visible means of support was a clear attempt to suggest to the jury that appellant was involved with some sort of illegal activity, such as drug dealing, when there had been no evidence that appellant had anything at all to do with drug trafficking. This was misconduct as it is improper for the prosecutor to imply the existence of evidence known to the prosecutor, but not to the jury. *People v. Bolton*, 23 Cal.3d 208, 212-13 (1979). So too, it was improper for the prosecution to use his remarks or questions to go beyond the evidence or to refer to facts not in evidence in closing argument. *Hill*, 17 Cal.4th at 827-28; *United States v. Ver*a, 701 F.2d 1349, 1361 (11th cir. 1983). Referring to facts not in evidence during argument tends to make the prosecutor his own witness, offering unsworn testimony not subject to cross-examination in violation of the Sixth and Fourteenth Amendments. *Id.* at 1361. It was also improper for the prosecution to use cross examination or argument to suggest that a defendant has committed other bad acts. *Kincade v. Sparkman*, 175 F.3d 444, 446 (6th Cir. 1999); *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.'" (citation omitted)); *see Wainwright v. Lockhart*, 80 F.3d 1226, 1234 (8th Cir. 1996) (prosecutor's cross-examination comments improperly tended to link the petitioner to a street gang). The prosecution's insinuations about other bad acts appellant was supposedly involved in introduced non-statutory aggravation and the jury's consideration of this improper and inflammatory factor arbitrarily deprived appellant of his due process liberty interest in a

penalty determination based solely on statutory factors. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly*, 997 F.2d at 1300.

The prosecutor's speculations and insinuations were not evidence, and had no place in a trial where the defendant's life was at stake. The misconduct violated due process and undermined the reliability of appellant's sentencing process, necessitating reversal under state law and under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, VI, VIII, XIV. "[I]f, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring). So too prosecutorial comments that impede or prevent a juror's full consideration of mitigating evidence violate the Eighth Amendment right to a reliable determination. *Penry v. Lynaugh*, 492 U.S. 302, 326-27 (1989). In this case, the prosecution's remarks served to undermine appellant's penalty phase case by introducing inflammatory and irrelevant considerations to the jury which had the likely effect of precluding an individualized sentencing determination based on the facts and circumstances of this case and created the unacceptable risk that the jury's weighing of factors was based on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988), quoting *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983).

Absent the prosecution's improper remarks and questions, there is a reasonable possibility that the jury would not have sentenced appellant to death. *People v. Brown*, 46 Cal.3d 432, 448 (1988). Nor the prosecutor's constitutional violations were harmless beyond a reasonable doubt.

Chapman, 386 U.S. at 24. As such, appellant's sentence of death must be vacated.

* * * * *

XXIII

PHOTOGRAPHS OF THE VICTIMS AND THEIR FAMILIES WERE ERRONEOUSLY ADMITTED AT THE PENALTY PHASE

A. Introduction

During the penalty phase, the prosecution was permitted to put on extensive evidence from the victims' families. Mr. and Mrs. Burrell, Mr. and Mrs. MacDonald, Mrs. Adkins and Carlos Adkins daughter, Dalicia Adkins, all testified. This testimony was extremely emotional. *See* Statement of Facts and Case, *supra*. Indeed, many people in the courtroom, including the witnesses themselves and members of the audience, cried during this testimony. However, the prosecutor went farther than simply introducing testimony. He illustrated the testimony with photographs of the victims with their families. Introduction of the photographic victim impact evidence in this case effectively precluded any meaningful consideration by the jury of appellant's evidence on the subject of appropriate penalty and violated appellant's constitutional rights to due process, equal protection, and a reliable determination of guilt and penalty. U.S. Const., amends. V, VI, VIII, & XIV; Cal. Const. art. 1, §§ 7, 15, 16 & 17. The admission of the photographs was unduly prejudicial and rendered the trial fundamentally unfair. Because this evidence was critical in securing a death sentence, reversal is required.

B. Photos of the Victims and Their Families Were Admitted Over Defense Objection

In addition to the testimony of the family members, the prosecution sought to admit a number of items of real evidence as part of its case in aggravation. The defense objected to all the penalty phase victim impact photographic evidence. It argued that this evidence was a straight-up appeal to emotion rather than reason. RT 4445. The evidence the

prosecution sought to admit was a photo of Kevin Burrell in his uniform, a picture of Burrell with his arm around his mother. There was a picture of Burrell's baby, Kevin Jr. RT 4446. There was also a picture of James MacDonald with his brother as a child, one with his brother at a wedding, and one of MacDonald's graduation from the police academy. RT 4446-47. The trial court overruled most of appellant's objection. He ruled that he would admit all the photos except the picture of MacDonald and his brother when they were children and that of MacDonald at his brother's wedding. RT 4447; *see* RT 4594 and People's Exhibit No. 122 (MacDonald with brother as child); People's Exhibit No. 123 (MacDonald at brother's wedding).

During his examination of James MacDonald, Sr., the father of victim James MacDonald, the prosecution used a collection of three photos of the younger MacDonald and family. RT 4531; People's Exhibit No. 118. One of the photos showed MacDonald at his college graduation, a second showed him with his brother John and a third showed him in his uniform at another graduation. RT 4532; People's Exhibit No. 118. During his examination of Clark Burrell, the father of Kevin Burrell, the prosecution also introduced a collection of photographs. RT 4571; People Exhibit No. 120. One of the photos showed Burrell at his brother's wedding in uniform. RT 4572; People's Exhibit No. 118. A second showed him at a birthday party for his mother. A final photo showed him feeding his baby, Kevin Burrell, Jr. RT 4573; People's Exhibit No. 118. The prosecution also had Kevin, Jr. stand up for the jury. RT 4574. The prosecution asked Clark Burrell about a plaque which had been placed in honor of Burrell and MacDonald. The prosecution then showed the jury a photograph of the plaque. RT 4575; People's Exhibit No. 121.

In closing argument, the prosecution made explicit reference to the photographs of the officers, contrasting them with other photographs – the autopsy photographs – which had been admitted at guilt phase. First, the prosecution reminded the jury that all the evidence admitted at guilt phase, including the physical evidence, could be considered by the jury. RT 4863. Then, in its final remarks to the jury, the prosecution appealed to what the jury saw in the coroner's photographs as a reason to sentence appellant to death:

> If any of you are considering or pondering to give this defendant a life without parole sentence, before you do that, before you do that, take a look at the photographs of officer MacDonald. These. This is People's Exhibit 118 for identification. Look at the happy faces of John and his brother, the happy face of Jimmy and his parents when he graduated, and the happy face of Jimmy and his parents when he graduated at the police academy.
>
> And then look at the coroner photographs. Look at that dead face and those bullet wounds that were caused by him, this defendant and nobody else. And take a look at this. This is the exhibit of officer MacDonald.[59] This is 120 for identification there with his family smiling during the marriage of his older brother, there with his mom with his arm around her, and his dad there at the birthday party, and there he is feeding his baby son a bottle.
>
> And that is his son later on, the son that will never know a father. Look at these photos, ladies and gentlemen, and then look at the coroner photographs, the bullet hole in the face, through the bottom of the foot, through the top of the head, through the arm. None of this would have happened if this defendant didn't make the decision to murder these young men. There was no reason for it.

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[59]The prosecution erroneously identified People's Exhibit No. 120 as photographs of Officer MacDonald and his family. People's Exhibit No. 120 is a placard of photographs of Officer Burrell and his family.

RT 4897-98. The prosecution then went on to argue that the factors in aggravation "trounced" the factors in mitigation and urged the jury to extend appellant the "the sympathy that he extended to Carlos Adkins, to Jimmy MacDonald and to Kevin Burrell." RT 4899.

The photographs of the victims and their families were admitted into evidence and given to the jury. CT 1003. During its deliberations the jury asked to look at the coroner's photos to which the prosecution referred in its closing arguments. RT 4966; People's Exhibit Nos. 85 (photos display of Burrell autopsy); People's Exhibit No. 97 (photo display of MacDonald autopsy); People's Exhibit No. 50 (coroner's photographs of MacDonald and Burrell).

C. Admission of the Photos Requires Reversal of Appellant's Death Sentence

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The court held the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland*, 482 U.S. 49 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." *Payne*, 501 U.S. at 827; *see also id.* at 831 (O'Connor, J., concurring). The court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the

introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." *Payne*, 501 U.S. at 825; *see also id.* at 836-37 (Souter, J., concurring).

Relying on *Payne*, this Court in *People v. Edwards*, 54 Cal.3d 787, 832-35 (1991) upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, the Court stated:

> We thus hold that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne, supra*, 501 U.S. [808].

Edwards, 54 Cal.3d at 835. The Court went on to note:

> Our holding . . . does not mean there are no limits on emotional evidence and argument. . . . "[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed."

Edwards, 54 Cal.3d at 836, *quoting People v. Haskett*, 30 Cal.3d 841, 864 (1982).

Thus, both the *Payne* and *Edwards* decisions recognized that while the federal Constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Fifth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury.[60] *Payne*, 501 U.S. at 824-25; *Edwards*, 54 Cal.3d at 836; *see also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (discretion to determine whether a life should be taken must be suitably directed and limited so as to minimize an arbitrary and capricious response); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (decision to impose the death sentence must be, and appear to be, based on reason rather than caprice or emotion); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). The admissibility of victim impact evidence therefore must be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne*:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh,* 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown,* 479 U.S. 538, 545[] (1987) (O'CONNOR, J., concurring)); *Gholson v. Estelle,* 675 F.2d 734, 738 (CA5 1982) ("If a person is to be executed, it

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[60]The highest courts of other states have articulated a similar recognition. *See, e.g., Berry v. State,* 703 So.2d 269, 275 (Miss. 1997); *New Jersey v. Muhammad*, 145 N.J. 23, 55, 678 A.2d 164, 180-81 (N.J. 1996); *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998); *State v. Taylor,* 669 So.2d 364, 371-72 (La. 1996); *Conover v. State* 933 P.2d 904, 921 (Okl.Cr. 1997).

> should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

Payne, 501 U.S. at 836-37 (Souter, J., concurring), *citing Burger v. Kemp*, 483 U.S. 776, 785 (1987).

The striking feature of the victim impact evidence that *Payne* and *Edwards* deemed appropriate, and not so inflammatory as to risk a verdict based on passion, is the extremely limited nature of this evidence. In *Payne*, the grandmother of the three-year-old surviving victim testified in response to a single question. *Payne*, 501 U.S. at 826. In *Edwards,* the victim impact evidence consisted of photographs of the victim while alive, and the prosecutor's argument to the jury, "You can imagine what the experience was like for [the surviving victim] to go through. You can imagine [the deceased victim's] family and what it is like." *Edwards*, 54 Cal.3d at 838. To quote Justice O'Connor's concurring opinion in *Payne*, "surely this brief [evidence] did not inflame [the juror's] passions more than did the facts of the crime[s.]" *Payne,* 501 U.S. at 832 (O'Connor, J., concurring).

First, the prosecution's used the pictures themselves, as opposed to any information the pictures contained, to argue for death. The prosecutor asked the jury to reject life without the possibility of parole based on the contrast between these pictures and the pictures made at autopsy. His invitation to contrast the happy pictures of the officers while alive with the horrible pictures of the dead officers could only have the effect of inflaming the passions of the jury. Appellant argued above that it was error to admit

the coroner's photos because of their inflammatory nature. *See* Argument IX, *supra*. Here, it is clear that the prosecutor improperly used the photographs at the penalty phase. It might have been proper for the prosecution to argue the circumstances of the crime, including the location and manner in which the wounds were inflicted. It was not proper to play on the jury's natural revulsion at the sight of the photographs to urge appellant's death.

Moreover, the photographs in this case over-stepped the bounds of admissible victim impact evidence because they gave the jury no new information on the decision it had to make. As the majority in Payne put it: "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question ...." *Payne*, 501 U.S. at 825. But here the photographs told the jury not a single new thing that was relevant to the specific harm caused by the crime. The photos all portrayed the victims doing various things with family members such as MacDonald going to a graduation or MacDonald smiling with his brother (People's Exhibit No. 118); or Burrell smiling with a mother or Burrell feeding a baby (People's Exhibit No. 120). Everything in the photos which was relevant to the jurors sentencing decision was testified to by the family members themselves. MacDonald's father testified about his son's graduation and the relation he had with his brother. RT 4532. Clark Burrell testified about his son's mother and about Burrell's baby. RT 4573. Moreover, the photographs both had pictures of the men in their police uniforms, including one of Officer Burrell at a wedding in his police uniform. The jurors already knew the victims were police officers. People's Exhibit Nos. 18 & 120. The purpose of the photographs was

obviously not to communicate additional information to the jury: their sole purpose was to inflame the passions of the jury against appellant.

In short, the emotional and inflammatory nature of the photos which was exacerbated by the prosecutor's use of the photos in his argument, was so out of proportion to the evidence introduced in *Payne* and *Edwards* as to shift the focus of the jury from "a reasoned moral response" to appellant's personal culpability and the circumstances of his crime (*Penry*, 492 U.S. at 319) to a passionate, irrational, and purely subjective response to the grief of the victims' families. *See Cargle v. State*, 909 P.2d 806, 830 (Ok. Cr. App. 1995) ("The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."); *see, e.g., People v. Raley*, 2 Cal.4th 870, 916 (1992) (in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion.").

Clearly, this was not the type of evidence the *Payne* and *Edwards* decisions had in mind when they allowed evidence and argument on the specific harm caused by the defendants in those cases. To the contrary, the emotionally charged and photos and argument introduced in this case was precisely the type of evidence the *Payne* and *Edwards* recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. *Payne*, 501 U.S. at 825; *Edwards*, 54 Cal.3d at 836. Introduction of this testimony violated appellant's right to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty

mandated by the Eighth Amendment. As such his death sentence must be vacated.

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XXIV

THE TRIAL COURT ERRED IN FAILING TO READ AN INSTRUCTION GUIDING THE JURY'S CONSIDERATION OF VICTIM IMPACT EVIDENCE

A. Introduction

The prosecution based much of its case in aggravation on victim impact evidence, presented through the testimony of family members. Although the trial court acknowledged that the evidence would be very emotional, it refused a requested defense instruction explaining the proper use of victim impact evidence. Given the powerful nature of victim impact testimony, a jury instruction cautioning the jury about the proper use of such evidence and reminding the jury of its duty to determine soberly the moral worthiness of the defendant should be required under the state and federal constitutional guarantees to due process of law. Even if such an instruction is not always required, it was required under the circumstances of appellant's case. The trial court's failure to give appellant's requested instructions explaining the limited use of victim impact evidence violated his right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and reliable capital trial (U.S. Const., amends. VIII & XIV; Cal. Const., art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and his right to the presumption of innocence, the requirement of proof beyond a reasonable doubt, and right to a fair trial. U.S. Const., amend. XIV; Cal. Const., art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., Amends. VI & XIV; Cal. Const., art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145

(1968); *People v. Sedeno*, 10 Cal.3d 703, 720 (1974)), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. Appellant Asked the Trial Court to Guide the Jury's Consideration of Victim Impact Evidence

Shortly before the beginning of the penalty phase, the prosecution stated its intention to call members of the victims' families at the penalty phase. RT 4418. Appellant's counsel emphasized that the evidence should be limited: "[R]eason still has to be a part of the jury's decision when it comes to whether or not they would impose the punishment of death, rather than emotion." RT 4423. The trial court agreed with trial counsel's characterization of the evidence as "emotional." He added that the presence of the family members, in particular the presence of Mrs. MacDonald, the mother of James MacDonald had been very emotional for the parties:

> And as you say, Mr. Jaffe, there's going to be a lot of emotion. I think any time that a survivor is talking about somebody who has been killed, it is obviously very emotional.
>
> And, you know, Ms. MacDonald has sat through this whole case, and some days she cries -- most days she cries I believe is probably the appropriate characterization.

RT 4424. Immediately before the prosecution began its penalty phase evidence, out of the presence of the jury the Court again acknowledged that the evidence would be emotional and warned members of the audience to control themselves and to not blurt things out. RT 4449.

The prosecution called six family members to testify. *See* Statement of Facts, *supra*. Later, appellant's counsel sought to guide the jury's use of the victim impact evidence with a proposed jury instruction:

> CAUTIONARY AND LIMITING: VICTIM IMPACT
> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence was not received and may not be considered by you to divert your attention away from your proper role of deciding whether the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction of death as the result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

CT 956 (Defendant's Requested Instruction No. 29), citing CALJIC 8.85. The trial court refused to read the instruction. CT 956; RT 4793. The trial court also denied appellant's motion for a new trial for failure to read the cautionary instruction. RT 5010.

C. It Was Error to Fail to Give the Cautionary Instruction

1. The Problem With Victim Impact Evidence

Victim impact evidence is perhaps the most powerful evidence available to the State – highly emotional, frequently tearful testimony coming directly from the hearts and mouths of the survivors left behind by killings. "And it arrives at the precise time when the balance is at its most delicate and the stakes are highest when jurors are poised to make the visceral decision of whether the offender lives or dies after the defendant has been convicted of the most horrendous crime possible." Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 178 (1999). The United States Supreme Court first addressed the use of evidence in capital cases of the impact of a murder on the victim's family in *Booth v.*

Maryland, 482 U.S. 49 (1987). In *Booth*, the Court addressed a Maryland statute that permitted the introduction of information relating to the (1) personal characteristics of the murder victim and the emotional impact of the killing on the victim's family and (2) family members' opinions and characterizations of the crime and the defendant. Writing for a majority of five to four, and characterizing both types of evidence as irrelevant, Justice Powell rejected the assertion that such information was needed to allow jurors to assess the "gravity" of the offense. *Booth*, 482 U.S. at 504. According to *Booth*, victim impact evidence improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities and worth of the victim. *Id.* at 504. In so doing, the State created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" in violation of the Eighth Amendment. *Id.* at 503. The opinion explained:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. . . . The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases.

Id at 508-09.

Four years later, after a change in personnel, the Court reversed *Booth* in *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Payne*, a mother and her 3-year-old daughter were killed with a butcher knife in the presence of

the mother's 2-year-old son, who survived critical injuries suffered in the same attack. The prosecution presented the testimony of the boy's grandmother regarding how he missed his mother. *Id.* at 816. The Court concluded "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." *Id.* at 827.

For the reasons articulated in Justice Marshall's dissent in *Payne*, 501 U.S. at 844-56 (Marshall, J., dissenting), which are incorporated herein appellant argues that *Payne* was wrongly decided, and that the Eighth Amendment in fact bars all victim impact evidence. However, even if *Payne* is correct, in finding no Eighth Amendment bar to victim impact evidence, the *Payne* opinion did not mandate the introduction of such evidence, it did not suggest that such evidence should be admitted in all capital cases, nor did it suggest that the courts should abandon any attempt to guide the jury's consideration of the evidence. Justice O'Connor stated in her concurrence: "we do not hold today that victim impact evidence must be admitted, or even that it should be admitted." *Payne*, 502 U.S. at 831 (O'Connor, J., concurring). To the extent that such evidence is not constitutionally prohibited, it is left to the statutory scheme of the individual state to determine whether and how to permit the introduction of evidence of this type. The general constitutional guidelines regarding capital sentencing still apply. There is still the need for "extraordinary measures" to ensure the reliability of decisions regarding the punishment imposed in a death penalty trial. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J. concurring); *see Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Victim impact evidence and the manner in which the jury considers such evidence must be compatible with the jury's primary task which involves an assessment of the moral culpability of the defendant. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000). A series of United States Supreme Court opinions have instructed that the question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *see also Eddings*, 455 U.S. at 112; *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Unless the evidence introduced in aggravation has some bearing on the defendant's personal responsibility and moral guilt, its admission creates the risk that a death sentence might be based on considerations that are constitutionally impermissible or totally irrelevant to the sentencing process. So too, the jury must understand that victim impact evidence can only be used insofar as the evidence has a bearing on the issue of the defendant's moral responsibility and personal guilt. As such, this Court must ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gardner*, 430 U.S. at 358 ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

Under the California statutory scheme, there is no "victim impact" sentencing factor. The aggravating evidence at the penalty phase is limited to evidence relevant to the specific aggravating factors under Penal Code section 190.3. *People v. Boyd*, 38 Cal.3d 762, 771-76 (1985). In *People v. Edwards*, 54 Cal.3d 787 (1991), this Court held that "evidence of the

specific harm caused by the defendant" (*id.*, at 833, citing *Payne*, 501 U.S. at 825) is a circumstance of the crime admissible under factor (a) as something that materially, morally or logically surrounds the crime. *Id.* at 833. However, this Court did not hold that all victim impact evidence is admissible as "a circumstance of the crime." For the evidence to be admissible, there must be some connection to the defendant's knowledge or perception. *Id.* at 833; *see, e.g., Edwards*, 54 Cal.3d at 835-36 (Photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them.); *People v. Wash*, 6 Cal.4th 215, 267 (1993) (Evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime).

Moreover, under both *Edwards* and *Payne*, even when there is a relation to the defendant's "perception and knowledge," the evidence cannot be admitted if it is so emotional that the jury cannot reasonably assess the defendant's moral culpability. In *Payne*, the United States Supreme Court warned that there are definite limits to the introduction of victim impact evidence. Specifically such evidence will violate the Due Process Clause of the Fourteenth Amendment where it is so unduly prejudicial that it renders the trial fundamentally unfair. *Payne*, 501 U.S. at 825. In *Edwards*, this Court echoed *Payne*'s admonition about the admission of unduly prejudicial victim impact evidence. *Edwards*, 54 Cal.3d at 835. In so doing, the Court reiterated the importance of assuring that the victim impact evidence does not prevent the jury weighing the mitigation evidence: "the jury must face its obligation soberly and rationally and should not be given the impression that emotion may reign over reason." *Id.* at 836, *quoting People v. Haskett*, 30 Cal.3d 841, 864 (1982).

Edwards allows, depending on the particular situation, some evidence of the impact of the victim's death to be considered as a "circumstance of the crime." However, a capital trial must still be fair and the result constitutionally reliable.

2. Because of the Dangers of Emotional Victim Impact Evidence, a Cautionary Instruction Is Always Required

If an instruction is necessary to enable the jury to perform its function in conformity with the applicable law, a trial court has a *sua sponte* duty to give the instruction. *People v. Sanchez*, 35 Cal.2d 522, 528 (1950); *see also McDowell v. Calderon*, 130 F3d 833, 836 (9th Cir. 1997) ("A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions."). The trial judge is "a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts ...." *People v. Carlucci*, 23 C3d 249, 256 (1979). This judicial responsibility includes the responsibility to instruct the jury should justice require. *See People v. Ponce*, 44 Cal.App.4th 1380, 1387 (1996) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.")

A sentencing jury in a capital case is charged with the serious task of determining whether under all the circumstances, the aggravating circumstances so outweigh the mitigating circumstances that the jury believes that death is the appropriate punishment. In doing this, the jury must soberly evaluate the moral blameworthiness of the defendant. *Williams v. Taylor*, 529 U.S. 362, 398 (2000). An instruction cautioning the jury about the limited use of victim impact evidence is necessary to assure that the jury performs its duties in accordance with applicable law and therefore must be given *sua sponte* in every case where significant victim impact evidence is presented. Victim impact evidence presents unique dangers such that without guidance from a cautionary instruction there is a significant possibility that the jury would use victim impact evidence in an arbitrary and capricious manner.

First, victim impact evidence inevitably exposes the jury to intensely emotional evidence which is likely to divert the jury from its task in assessing the defendant's moral culpability. According to *Payne*, victim impact evidence directs the jury's attention to the effect of the defendant's crimes on victims, as part of assessing the moral blameworthiness of the defendant's act. However, this evidence is often so powerful that it overwhelms the jury, causing it to make the sentencing decision based solely on sympathy for the victims, or, worse, solely on a desire for revenge, which is constitutionally unacceptable. As Supreme Court Justice Marshall explained, the Eighth Amendment was adopted precisely to prevent punishment from becoming synonymous with vengeance: "If retribution alone could serve as a justification for any particular penalty, then all penalties selected by legislatures would by definition be acceptable means

for designating society's moral approbation of a particular act." *Furman v. Georgia*, 408 U.S. 238, 344 (1972).

Moreover, victim impact evidence improperly invites the jury to base its consideration of the proper sentence solely on the basis of the comparative worth of the defendant to the victim and his or her family. As such, victim impact evidence will inevitably expose the jury to factors which they are not permitted to consider. Victim impact statements, according to the Supreme Court, are not presented in order that the jury might determine the comparative "worth" of the victim's life; rather, they are presented so that the jury will be aware of the "uniqueness" of the victim. *Payne*, 501 U.S. at 809. But in considering this "uniqueness" evidence, the jury will unavoidably be presented with information with which they might make improper evaluations of the victim's worth. *See Livingston v. State*, 444 S.E.2d 748, 751 (Ga. 1994) (stating that victim impact statement statutes include information that could reflect on victim characteristics improperly considered by sentencing juries). As one commentator has noted: "The victim impact statement will communicate to the jury whether there are friends and family members who will miss the victim, and if so, how many of them there are. Victim impact statements also often tell the jury about the accomplishments, success, intelligence, and unfulfilled dreams of the victim. Lastly, the presentation itself often communicates indirectly to the jury the wealth or social class of the victim." Amy K. Phillips, *Thou Shalt Not Kill Nice People*, 35 Am. Crim. L. Rev. 93, 105-06 (1997). Although arguably admissible under *Payne*, such evidence will inevitably expose jurors to evidence which they may not consider (*i.e.*, the qualities that make the victim morally worthy), and will lead jurors to base their decision on an assessment of the value of the

victim's life and the extent to which a victim is missed by survivors. *See Booth*, 482 U.S. at 506 n.8 ("We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course our system of justice does not tolerate such distinctions.").

A limiting jury instruction is a standard manner for handling evidence which is admissible for one purpose, but which cannot be considered for a second purpose. Cal. Evid. Code § 355 ("When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose," a trial court is not required to exclude the evidence, but rather "upon request" is required to give a limiting instruction "restrict[ing] the evidence to its proper scope."). This Court has held "where evidence is inadmissible simply to show a person's character but is admitted on some other proper ground, the court may protect against the jurors' possible misuse of the evidence through a limiting instruction." *People v. Holloway*, 33 Cal.4th 96, 133 (2004). This Court has also found that, in some circumstances, a limiting instruction defining the purposes for which the evidence can be considered must always be given. So, for example, because of the potential for misuse of the evidence, a trial court has *sua sponte* duty to give a limiting instruction whenever child abuse or rape trauma syndrome ("CSAAS") evidence is offered by the prosecution. *People v. Housley*, 6 Cal.App.4th 947, 958-59 (1992) ("We thus conclude that because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a instruction limiting the use of such evidence.).

Moreover, in the context of victim impact evidence, the term "aggravation" is a technical term which the court has a *sua sponte* duty to define. The court has a duty to define terms which have a "technical meaning peculiar to the law." *People v. McElheny*, 137 Cal.App.3d 396, 403 (1982); *see also People v. Pitmon*, 170 Cal.App.3d 38, 52 (1985). Although this Court has held that "aggravation" is not a term requiring definition (*People v. Kirkpatrick*, 7 Cal.4th 988, 1018 (1994)), the issue of victim impact evidence is different. Victim impact evidence is only aggravation insofar as it is a "circumstance of the crime." The ordinary use of the phrase "circumstance of the crime" does not necessarily include the impact of the crime on family members. More important, the victim impact evidence is only a "circumstance of the crime" insofar there is some connection to the defendant's knowledge or perception. *See, e.g., Edwards*, 54 Cal.3d at 835-36. This limited use of the evidence is not clear from the ordinary meaning of the language, so that a clarifying instruction is necessary.

Indeed, the Supreme Courts of New Jersey and Tennessee have expressly required that a penalty jury must receive limiting instructions concerning victim impact evidence. *New Jersey v. Muhammad*, 145 N.J. 23, 678 A.2d 164 (N.J. 1996); *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998). In *Muhammad*, the New Jersey Supreme Court considered whether victim impact evidence, which had previously been inadmissible under New Jersey law, would be admissible following a statute designed to assure that victim impact evidence would be admitted in a manner consistent with the United States Supreme Court in *Payne*. The New Jersey Court observed that although *Payne* had stated that there was no Eighth Amendment bar to the evidence, that the United States Supreme Court had not stated that there

could be no limitations or regulations sought to assure that victim impact evidence. *Id.* at 42, 678 A.2d at 174, *citing Payne*, 501 U.S. at 831 (O'Connor, J., concurring) ("We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'").

Recognizing that victim impact evidence was not barred by the Eighth Amendment, but noting that victim impact evidence had the inherent potential for prejudice and improper influence, the court adopted a number of measures to assure that the evidence would harmonize with the defendant's right to due process. *Muhammud*, 145 N.J. at 50-54, 678 A.2d at 178-80. One of the measures the court adopted was a jury instruction informing the jury the use for which the victim impact evidence was admitted. *Id.* at p. 50, 678 A.2d at 178. The Court rejected the notion that such an instruction would be too complex and, while asserting that an instruction could not guarantee that victim impact evidence would be misused, expressed confidence in ". . . the ability of jurors to faithfully follow a trial judge's instructions in deliberating on a defendant's guilt, and, in the capital context, the appropriate sentence." *Id.* at p. 50, 678 A.2d at 178. The Court held that cautionary instructions were "necessary to minimize the possibility that victim impact statements made during the penalty phase of a capital trial will inflame the jury and prevent it from deciding the proper punishment on the basis of relevant evidence." *Id.* at 54, 678 A.2d at 180.

The Tennessee Supreme Court decision in *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998), is instructive because under Tennessee law, just as under California law, the exclusive rationale for the admissibility of

victim impact evidence is that it is part of the ""nature and circumstances"" of the capital crime. *See* Tenn. Code Ann. §§ 39-13-204(c); Cal. Pen. Code § 190.3(a). The Tennessee Supreme Court held that victim impact evidence was admissible to show the "nature and circumstances" of the capital crime because the impact on the victim's family is "one of those myriad factors encompassed within the statutory language *nature and circumstances of the crime.*" *Id.* at 890. However, like both the New Jersey Supreme Court and the United States Supreme Court, the Tennessee Supreme Court recognized that such evidence was a potential danger to a defendant's due process rights and his right to a reliable penalty determination. Because it is critical that the jury be properly informed of the correct legal principals when victim impact evidence is being considered the Tennessee Court proposed an instruction that did three things: 1) informed the jury of the purpose for which the evidence had been admitted; 2) informed them that they could consider the evidence in determining the appropriate penalty and 3) reminded them that the jury's "consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence." *Id.* at 892, *citing Cargle v. State*, 909 P.2d 806, 828 (Ok. 1995) *and Turner v. State*, 486 S.E.2d 839, 843 (Ga. 1997).[61]

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[61]The instruction proposed by the Tennessee Supreme Court is as follows:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a rational inquiry into the culpability of the

(continued...)

The instruction proposed by the appellant is consistent with the instruction used in Tennessee. Appellant asked that the jury be instructed that the evidence was admitted to show "the specific harm caused by the defendant." He also asked that the jury be reminded that its task was to determine whether the defendant should live or die, and also reminded them that it must face its task rationally. CT 956. Appellant's proposed instruction is also consistent with instructions in Oklahoma and Pennsylvania, which also require trial judges to provide the jury with limiting instructions regarding the use of victim impact evidence. In Oklahoma, the jury is instructed that victim impact evidence is not proof of an aggravating circumstance, but is presented only to demonstrate the "unique loss to society" caused by the murder. *Cargle*, 909 P.2d at 828. Pennsylvania's more limited instruction apprizes the jurors that victim impact evidence is another method of informing them about the nature and

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[61](...continued)
defendant, not an emotional response to the evidence. Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt.

Nesbit, 978 S.W.2d at 892.

circumstances of the crime. *See Commonwealth v. Means*, 773 A.2d 143, 159 (Pa. 2001).

This Court should follow the example of the Tennessee, Pennsylvania, and New Jersey Supreme Courts. Like those courts, this Court has expressed a concern that powerful victim impact evidence could prevent the jury from soberly weighing the evidence. *Edwards*, 54 Cal.3d at 836, *quoting Haskett* 30 Cal.3d at 864. Like the New Jersey court, this Court has expressed confidence in the ability of a properly instructed jury to decide whether to impose the ultimate punishment. *See People v. Pollock*, 32 Cal.4th 1153, 1196 (2004) (expressing confidence that properly instructed jury would not incorrectly weigh evidence). As such, instruction proposed in this case, explicitly informing the jury of the limited role of victim impact evidence, and reminding the jury of its ". . . proper role of deciding whether the defendant should live or die" (*see* CT 956), was required.

3. Given the Emotions Expressed on the Witness Stand and the Emotionally Charged Setting, a Cautionary Instruction Was Required in This Case

However, even if an instruction cautioning the jury about the use of victim impact evidence is not required in all cases, it was error not to give the instruction in this case. Here the prosecution's evidence was highly charged and was given in a highly charged setting, *i.e.*, the presence of a weeping mother in the audience, along with grieving police officers. Under such circumstances it was error to fail to give appellant's requested instruction explaining to the jury the purpose of the evidence and how the evidence could be used.

In this case, due process required explicit acknowledgment by the trial court that jurors are not to make use of impermissible victim impact evidence. *See State v. Hightower*, 146 N.J. 239, 263, 680 A.2d 649, 661 (N.J. 1996) ("Allowing victim impact information to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury's decision on whether to impose death."). This is so for several reasons. First, with the exception of brief evidence about a prior uncharged act (RT 4465-78 [Testimony of Judd Hudd]; RT 4479-97 [Testimony of George Holt]) and a prior conviction (RT 4498), the prosecution's case was dominated by victim impact evidence. There was testimony from three mothers and two fathers of the victims, each testifying about the loss of a child. RT 4498-507 (Testimony of Willie Mae Adkins); RT 4559-78 (Testimony of Clark Burrell); RT 4544-56 (Testimony of Tonia MacDonald); RT 4518-24, 4529-43 (Testimony of James MacDonald); RT 4579-87 (Testimony of Edna Burrell). There was also testimony from, Dalicia Adkins, who testified about the loss of her father. RT 4508-17. The large number of family members testifying made it more likely that the jury would focus on the family victim impact evidence. The large number of victims also made it more likely that the jury would consider how many people were interested in the death penalty being imposed in this case – making it more likely that the jury's feelings for the family would overwhelm their sense of obligation to "soberly" weigh the evidence.

However, more important than the volume of the evidence or the number of pages the evidence takes up in the transcript is "the quality of the evidence; the subject of the reference (;) and, in context, its potential significance on the decision the jury is called upon to make..." *Evans v. State*, 333 Md. 660, 687, 637 A.2d 117, 131 (Md. 1994). The victim impact

evidence in this case was precisely the kind of evidence which could be used in an impermissible way, *i.e.*, to elevate the moral worth of the victims, and of the families, thus putting appellant in a comparatively negative light. For instance, some of the family members focused on the fact that the victims (although adults), who were exceptionally loved by their families when they were babies. Tonia MacDonald did not want her son, "her baby," to "leave the nest," and become a policeman. RT 4547. When she found out from her husband that he had died she screamed and thought "he can't be dead, he's my baby." RT 4552. She missed him all the more because she had carried him for nine months: "That was part of my body that is dead now. . ." RT 4555. Mr. MacDonald focused in his testimony about the pain of losing a child. RT 4538.

The families also brought out evidence that the victims were successful sons, fathers, siblings, and friends. James MacDonald was close to his brother and was at his wedding. RT 4549. The brothers were best friends. RT 4520. He was good to his parents and came to visit them after he moved to Los Angeles. RT 4549-50. He called two or three times a day and always kissed his mother good-bye. RT 4553. Kevin Burrell hugged his mother. RT 4584. He had a son, who was present in court and stood up for the jury. RT 4573. The families also testified about the positive characteristics and the professions of the victims. According to his father, James MacDonald had a knack for helping people. RT 4522. He was a hard worker, who partially supported himself through college. RT 4529. According to his mother, Carlos Adkins was a good father, whose children were crazy about him and who loved architecture. RT 4503. All four of the parents of the police officers commented on how their sons worked hard at and loved police work. RT 4563-67, 4582, 4581-83. There was also

evidence about how the death of the police officers caused an impact in the greater community. RT 4541-42, 4577-78. Being a good son, father, brother, etc., may have been "unique" characteristics and thus admissible as victim impact evidence, but this was also evidence of the moral worthiness of the victims, which the jury was invited to compare with the lack of worthiness of appellant, who, after all, had just been convicted of terrible crimes.

The record also reflects the emotional impact the evidence had on everyone in the courtroom. As the trial court noted, the mother of one of the victims, Mrs. MacDonald, cried almost everyday. RT 4424. Several of the witnesses had to take breaks during their testimony, likely because they were overcome by their feelings. RT 4535-36 (James MacDonald); RT 4585-86 (Edna Burrell). As the trial court noted, the jurors cried. (RT 4809 ("Everybody has heard the jurors sitting and crying when people testify."). The audience, including several dozen uniformed policemen cried. RT 4809. The trial judge said that he had a hard time keeping from crying himself. RT 4809. Other members in the audience were perhaps "sobbing." *See* RT 4858. The prosecutor himself alluded to what a difficult day it had been for everyone when the victims testified. RT 4883. After the evidence, the Court commented on what an emotional wringer they had all been through:

> Everybody has heard the jurors sitting and crying when people testify, and as I said to someone the other day, I was talking to my wife, and I said that I realize that I probably had the worst seat in the house because the lawyers were only looking at the witness who was testifying, while I'm looking out in the audience and there must have been, I don't know, 30, 25, 30 police officers, the defendant's family, the victim's family and everybody is crying.

RT 4809. The trial court itself had been "blind faced" during the evidence but the court stated that it had been tough not to break down when he saw grown people crying. RT 4809. The displays of emotion on the stand must have distracted the jury from its responsibly to "soberly" weigh the evidence.

An instruction explaining the limited use of victim impact evidence was also necessary because of the way the prosecution chose to play on the jury's feelings in its argument. This Court has frequently looked to the prosecution's argument in assessing the impact of victim evidence on a jury. *See, e.g., People v. Minifie*, 13 Cal.4th 1055, 1071-72 (1996); *People v. Patino*, 160 Cal.App.3d 986, 994 (1984) (no prejudice where prosecutor does not dwell upon the evidence improperly admitted). The prosecutor made victim impact evidence the core of his arguments in support of the death penalty, in a manner which assured that the jury focused on the evidence in its deliberations. The prosecutor himself acknowledged that he wished to appeal to the feelings of the jury. In fact, he read from portions of the testimony of the victims' family so that the jury could "again *feel* and hear" what they said. RT 4884 (emphasis added). At the end of his argument, the prosecution asked the jury to remember the "feelings of anguish" and the "sense of loss" of the parents before it considered life without the possibility of parole. RT 4896.

The prosecution also referred to the status of the victims in its argument. The two police officer victims were referred to as "our protectors," who, the prosecution noted, were victims, when ordinarily police are the ones citizens call when they are victimized. RT 4869. The prosecution also referred to the status of these two victims when it explicitly asked the jury to "punish the defendant for what he has done," in killing

three people two of whom were "protectors." RT 4898. In so doing, the prosecution explicitly asked the jury not to give appellant sympathy because of the status of the victims: "Don't give him any sympathy. He doesn't deserve it." RT 4898. It might have been legitimate for the prosecution to comment the occupation of the police officers as part of the "uniqueness" of the victims. *See Payne*, 501 U.S. at 823. However, the prosecution went farther than this and used the evidence to comment on the relative status of the police officer victims and appellant.

In perhaps the most striking use of victim impact evidence by the prosecution to compare the worth of appellant and the victims, the prosecution suggested that appellant's mother feigned crying: "perhaps you noticed it, but when Ms. Thomas was testifying, and she appeared to be crying, I don't know if you noticed that the tissue never went up to the eyes and perhaps you noticed there were no tears." RT 4882. Then the prosecution pointed out the ways in which the victims' families, unlike appellant's mother, did feel extraordinary pain for their lost children. He pointed out that Carlos Adkins' daughter could not listen to the music she and her father used to listen to because it made her cry. RT 4885. His remarks about the alleged lack of loss appellant's mother felt, were obviously to be contrasted with the loss and anguish of the victims' families. Moreover, how could the jury forget that the witnesses cried, the audience cried, and they themselves cried? *See, e.g., People v. Raley*, 2 Cal.4th 870, 916 (1992) (in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion."). The prosecution also suggested to the jury that appellant had not been a good father. RT 4879-80. The prosecution's version of appellant's performance

was in obvious contrast to the good children and fathers the victims had been.

Thus, the victim impact testimony in this case was extensive and emotional and the prosecution used the evidence in a manner that invited the jury to base its sentencing decision on a moral comparison between the defendant and the victims. Accordingly, it violated appellant's rights to due process, a fair trial, and a reliable penalty verdict, not to read an instruction to the jury informing them that the victim impact evidence had been introduced for the specific and limited purpose of showing the specific harm caused by the defendant's crime and that the evidence could not be considered by the jury to divert its attention away from its role in determining whether the defendant should live or die. CT 956 (Defendant's Requested Instruction No. 29).

D. Failure to Give the Requested Instruction Requires Reversal

The Supreme Court in *Payne* anticipated that the state appellate court would oversee the use of victim impact evidence to assure that it was used in a manner consistent with due process. Justice O'Connor expressed optimism over the capacity of appellate courts to oversee the admission of impact evidence: "The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial." *Payne*, 501 U.S. at 831 (O'Connor, J., concurring).

United States Supreme Court precedent also demands that in evaluating an error at the penalty phase, the State must establish "beyond a reasonable doubt that the error complained of did not contribute to the (death sentence)." *Texas v. Satterwhite*, 486 U.S. 249, 254 (1988). Moreover, the "evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." *Id.* at 258. "The question," the Supreme Court stated, "is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59, *citing Chapman*, 386 U.S. at 24. The impact of improperly admitted victim impact evidence is particularly difficult to assess. *See Burns v. State*, 609 So. 2d 600, 607 (Fla. 1992) (remanding for new sentencing because harmlessness of impact evidence could not be determined with "certainty"); *Hightower*, 146 N.J. at 265, 680 A.2d at 662 (noting that "(t)he impact that improperly introduced victim impact evidence has on a jury is difficult to gauge"); *see also Hays v. Arave*, 977 F.2d 475, 481 n.12 (9th Cir. 1992) (noting that inability to accurately assess prejudicial effect is heightened given the "increasing use of victim impact testimony").

In this case the prosecution cannot show beyond a reasonable doubt that the jury did not base its decision on improper consideration of the victim impact evidence.[62] *Chapman*, 386 U.S. at 24. Moreover, it is

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[62]Nor is the error cured by the charge in CALJIC 8.85 that the jury was not to be swayed by prejudice against the defendant. CT 1125-26; RT 4935-36. Here the evidence created an emotional response in favor of the (continued...)

reasonably likely that, without additional guidance on the parameters of victim impact evidence, the jury applied the instructions in a way that violated appellant's constitutional rights. *Boyde v. California*, 494 U.S. 370, 380 (1990). Appellant has pointed out above the many ways in which the evidence was highly emotional, making it less likely that the jury strictly considered it as part of either the "uniqueness" of the victims or part of the "specific harm caused by the defendant" as *Payne* and *Edwards* required. Appellant has also pointed out the ways in which the prosecution argued that the evidence could be used for a purpose beyond that anticipated by those two cases. It was improper for the prosecution to laud the virtues of the victims and urge the jury to sentence appellant to death on that grounds. As such, it is likely that the jury was overwhelmed by the victim impact evidence and decided to sentence appellant to death on that basis.

As pointed out elsewhere in this brief (*see* Argument XXVII, *infra*), the decision about whether appellant should live or die was close. The jury deliberated extensively on the appropriate penalty. The penalty deliberations lasted approximately 10 days, longer than the penalty phase itself. (RT 4948-49, 4951, 4961-63, 4967-71, 4979-82; *see* Statement of the Case, *supra*; *see People v. Filson*, 22 Cal.App.4th 1841, 1852 (1994) (the court relied upon the length of the deliberations ["longer than the evidentiary phase of the trial"] to conclude that "the scope for doubt and misgivings is substantial".). It is clear that the jurors were confused by part

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[62](...continued)
victims' and their families rather than prejudice against the appellant per se. As such, the general instruction warning the jury not to be prejudiced against the defendant did not assure that they would not use their emotional response to the crime to decide that aggravation outweighed mitigation.

(k) of CALJIC 8.85, because mid-way through deliberations, the jury asked for additional instruction on the meaning of the word "extenuate" as it "applies to factor (k) of our instructions." CT 1022; RT 4952. Factor (k) is the factor under which appellant's mitigation evidence would have been considered, and it is apparent that the jury was confused about its scope. It is also apparent that the jurors were upset by the victim impact testimony. For example, in addition to some jurors crying during the testimony, at least one of the jurors asked the bailiff to let the jurors use the rear elevator (away from the public) to avoid the families because of how emotional this all was. RT 4780.

The trial court speculated at appellant's motion for new trial that the lengthy deliberations meant that the jury had carefully considered its decision and that the decision could not have been based on emotion. RT 5010. However, with this remark the trial judge ignored the fact that the jurors, as well as nearly everyone else in the courtroom were tearful and emotional. The trial court's conclusion also ignores that the jurors themselves said that the reason they gave the death penalty was the testimony of the family members. RT 5007. It is more likely that the length of the jury deliberations suggests how emotional and how close the case was.

Because the jury instructions did not adequately explain to the jury the role that victim impact evidence was to play in the jury's decision making, there is a significant probability that at least one juror factored the victim impact evidence into his or her decision making in an inappropriate manner. Under such circumstances, the failure to read appellant's proposed instruction created a risk "that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty." *Lockett v. Ohio*, 438 U.S.

586, 605 (1978). Had the jury been properly instructed, it is reasonably likely that the jury would not have sentence appellant to death. *Boyde*, 494 US at 380. As such, his sentence must be reversed.

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XXV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO INSTRUCT ON LINGERING DOUBT OF GUILT

Appellant requested that the following instruction be delivered to the penalty phase jury:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant committed the crimes, or to what extent did he premeditate or deliberate. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

CT 957 (Defendant's Requested Instruction No. 30). The prosecution objected to the instruction, citing *Franklin v. Lynaugh*, 487 U.S. 164 (1988), for the proposition that a lingering doubt instruction is not required at penalty phase. RT 4790. The trial court that ruled although the instruction was a valid statement of the law, there was no constitutional right to a lingering doubt instruction and refused to read the requested instruction. RT 4793. *Franklin*'s holding that a lingering doubt instruction is not required must be reconsidered. Moreover, under the facts of appellant's case, the trial court's refusal to give appellant's requested instruction violated state law and denied appellant's state and federal constitutional rights. The error was prejudicial, requiring reversal of the death judgment.

It is well established that a capital defendant has a right to have penalty phase jurors consider any residual or lingering doubt as to his guilt. *See, e.g., People v. Slaughter*, 27 Cal.4th 1187, 1219 (2002); *People v.*

DeSantis, 2 Cal.4th 1198, 1238 (1992); *People v. Coleman*, 71 Cal.2d 1159, 1168 (1969); *People v. Terry*, 61 Cal.2d 137, 145-48 (1964). A jury which determines both guilt and penalty may properly conclude that the prosecution has proved the defendant's guilt beyond a reasonable doubt, but it may demand a greater degree of certainty of guilt for the imposition of the death penalty. *Terry*, 61 Cal.2d at 145-48.

In *People v. Cox*, 53 Cal.3d 618, 675-79 (1991), this Court, relying on *Franklin*, 487 U.S. at 174 (the case cited by the prosecution at trial), held that although a capital defendant is entitled to present evidence on, and argue, residual doubt, neither the Eighth Amendment nor the California Constitution requires a residual-doubt instruction. This holding is error, at least as it pertains to the Eighth Amendment, in light of recent United States Supreme Court cases. This Court relied on *Franklin's* holding that because "lingering doubt" is a not an aspect of the defendant's character, record or a circumstance of the case, the trial court had no obligation to instruct on lingering doubt. *Cox*, 51 Cal.3d at 575, *citing Franklin*, 487 U.S. at 174. However, recent United States Supreme Court cases undermine this statement in *Franklin*, and suggest that a jury must consider lingering doubt, even if not a circumstance of the case or an aspect of the defendant's record or character.

Recently, the United States Supreme Court held: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Tennard v. Dretke*, __ U.S. __, 124 S.Ct. 2562, 2570 (2004), *citing McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). Mitigation evidence is any evidence the trier of fact could "reasonably find warrants a sentence less than death." *Id.* at 2570. There is nothing in this

statement which limits mitigation to "character," "record," or "circumstances of the case." Lingering doubt is an acknowledged factor which the jury could use to choose a sentence of life imprisonment, and because the "Eighth Amendment requires that the jury be able to consider and give effect to all of a capital defendant's mitigating evidence (*Boyde v. California,* 494 U.S. 370, 377-78 (1990)) an instruction making it clear that lingering doubt can be considered as mitigation is required.

This Court's rejection of a constitutional right to an instruction on lingering doubt is based upon the notion that CALJIC 8.85 adequately alerts the jury that it can consider lingering doubt it its penalty determination. *People v. Lawley*, 27 Cal.4th 102, 166 (2002); *People v. Osband*, 13 Cal.4th 622, 716 (1996). Specifically, this Court has held that factors (a) and (k) are adequate for a jury to give effect to lingering doubt. *Id.* at 716. This holding must be reconsidered. Factor (a) directs itself to circumstances of the crime. *See* CALJIC 8.85. A reasonable juror would believe that this relates to the manner in which the crime itself was effectuated and not necessarily to the defendant's involvement in the crime. Factor (a) encourages jurors to focus on the crime itself, not the culpability or guilt of the persons who may have committed the crime, so does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime. *See* CALJIC 8.85. Once again, this focuses on the nature of the crime and not any lingering doubt that the jury may have about a defendant's participation in the crime. This factor also directs the jury to consider any aspect of the defendant's character or record, but this does not relate to residual doubt of guilt. In fact, it steers the jury in the opposite direction, since an aspect of the defendant's character or record has nothing to do with

the crime. As such, factors (a) and (k) do not readily give the jury a way to address residual doubts regarding the defendant's guilt of the offense. Because of this, appellant's requested instruction, which provided a method for the jury to give effect to such residual doubt, should have been given by the trial court.

Because California's instructions do not adequately permit the jury to consider lingering doubt, failure to give the instruction is a violation of appellant's due process and Eighth Amendments rights. *Boyde*, 494 U.S. at 377-78 (1990); *see Penry v. Johnson*, 532 U.S. 782, 797 (2001) (it is constitutionally insufficient merely to tell the jury that it may "consider" mitigating circumstances).

Moreover, even if the instruction is not always required, a lingering doubt instruction should have been given in this case. This Court noted that, as a matter of statutory mandate under Penal Code section 1093, subdivision (f) (court should charge jury on "any points of law pertinent to the issue, if requested"), a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." *Cox*, 53 Cal.3d at 678 n.20; *see also People v. Thompson*, 45 Cal.3d 86, 134-35 (1988); *People v. Kaurish*, 52 Cal.3d 648, 705-06 (1990); Cal. Pen. Code § 1093(f); *People v. Morris*, 53 Cal.3d 152, 218-19 (1991). This case falls within that "warranted" situation which requires that a lingering-doubt instruction be given.

In this case, trial counsel argued that although the jury had found premeditation and deliberation, the evidence showed that not a lot of thought had gone into the killings. RT 4911-12. Although trial counsel clearly recognized that the jury had resolved the issue of premeditation and deliberation against appellant, he formulated an argument designed to show

the jury that there were still grounds on which one or more jurors might doubt their findings. In addition, appellant raised doubts about whether the Adkins homicide had been intentional. Yet, under the court's instructions, such a juror would have had no legal basis for applying such considerations to his or her penalty determination. *See Carter v. Kentucky*, 450 U.S. 288, 302 (1981) ("Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.").

Appellant's requested instruction was appropriately phrased, unlike other instructions rejected by this Court. *See Thompson*, 45 Cal.3d at 134. Unlike the requested instruction in *Thompson*, appellant's lingering-doubt instruction did not " invit[e] readjudication of matters resolved at the guilt phase" (*id.* at 135); instead, it properly "call[ed] upon residual feelings of doubt" (*id.* at 135), and nothing more. More particularly, it focused on the issue of premeditation and deliberation, about which the trial counsel wished to raise doubt. Unlike the requested instruction in *Cox,* which would have *required* the jury not only to consider lingering doubt, but also to consider it as a *mitigating* factor, the one proposed by trial counsel did not "erroneously prescribe[] that the jury evaluate this factor in a particular manner." *Cox*, 53 Cal.3d at 678 n.20. Instead, it merely *permitted* the jury to consider lingering doubt. In the plain, clearly understandable language of this instruction, it was only *if* a juror entertained such doubts that he or she "may" (not "must") consider them in determining the appropriate penalty. *See* CT 957 ("Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate."). Thus, the proposed instruction was effectively no different than the court-approved consciousness-of-guilt and

confession/admission instructions which read: "If you find . . . , you may consider. . . ." *See* CALJIC 2.03, 2.70 & 2.71.

However, in the capital sentencing context, defense counsel would have been justified in using the term "*must*" (rather than "may") consider, since a penalty juror is required to at least *consider* any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982); *People v. Brown*, 40 Cal.3d 512, 537-38 (1985), *reversed on other grounds in California v. Brown*, 479 U.S. 538 (1987); *see* Cal. Pen. Code § 190.3. Thus, far from not being neutrally-phrased, *i.e.*, presumably pro-defense, appellant's requested instruction actually asked from the jurors less, not more, than he was legally entitled to. In short, even if it is assumed that the trial court has the discretion under state law to refuse to give a requested lingering doubt instruction in most cases, it was an abuse of such discretion in the instant case because it was not just "warranted by the evidence" (*Cox*, 53 Cal.3d at 678 n.20), but *required* by it.

The trial court's refusal to give the instruction violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury, and a reliable and non-arbitrary penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments. U.S. Const. amends. V, VI, VIII & XIV. By refusing to specifically instruct on lingering doubt, the court failed to give guidance to the jury with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. *See, e.g., Eddings*, 455 U.S. at 110; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Heiney v. Florida*, 469 U.S. 920, 921-24 (1984) (Marshall, J., dissenting on denial of cert.) ("The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that

stems from common sense and fundamental notions of justice."). The failure to give the instruction also violated appellant's Sixth Amendment right to a properly instructed jury. *Carter v. Kentucky*, 450 U.S. 288 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Sedeno*, 10 Cal.3d 703, 720 (1974).

California law mandates that lingering doubt be considered as mitigation when warranted by the evidence. *Terry*, 61 Cal.3d at 145-47. All appellant was seeking in this instance was an instruction "intended to supplement or amplify more general instructions," *People v. Thompkins*, 195 Cal.App.3d 244, 257 (1987), as he was entitled to under state law. The refusal of the trial court to give appellant's lingering doubt instruction therefore violated the Due Process Clause of the Fourteenth Amendment by arbitrarily depriving him of his state-created liberty interest not to be sentenced to death by a jury that did not consider lingering doubt under appropriate instructions as a basis for a lesser sentence. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterley v. Paskett*, 997 F.2d 1295, 1300-01 (9th Cir. 1993). The denial to appellant of a state-created right granted to other capital defendants further violated the Equal Protection Clause of the Fourteenth Amendment. *See Myers v. Ylst*, 897 F.2d 417, 425 (9th Cir. 1990). The erroneous refusal to instruct on lingering doubt cannot be deemed harmless under any appropriate standard of review. *Chapman*, 386 U.S. at 24. The death judgment must therefore be reversed. *Brown*, 46 Cal.3d at 448.

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XXVI

THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

In a jury instruction session before penalty phase deliberations, trial counsel requested an instruction defining the sentence of life without the possibility of parole:

> You are instructed that life without possibility of parole means exactly what it says. The defendant will be imprisoned for the rest of his life.
>
> You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

CT 928 (Defense Requested Instruction No. 3). The trial court refused to give this instruction. RT 4784. Neither CALJIC 8.88, nor any other instruction given in this case, informed the jurors that a sentence of life without possibility of parole meant that appellant would never be considered for parole.

The failure to define for the jury "life without possibility of parole" violated due process by failing to inform the jury accurately of the meaning of the sentencing options, thereby violating appellant's right to a properly instructed jury. U.S. Const. amends. VI & XIV; Cal. Const. art. 1 § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Sedeno*, 10 Cal.3d 703, 720 (1974). The trial court's decision not to read the instruction violated appellant's right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and

reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and his right to a fair trial secured by due process of law (U.S. Const., amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976)). The error also violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence. U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). The failure prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. U.S. Const. amends. V, VI, VIII & XIV. Although this Court has rejected this argument in the past (*see, e.g., People v. Gordon*, 50 Cal.3d 1223, 1277 (1990); *People v. Thompson*, 45 Cal.3d 86, 130-31 (1988)), appellant respectfully requests that this Court reconsider its decisions in light of recent United States Supreme Court rulings.

In *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994), the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense notion that jurors are confused about the meaning of the term "life sentence." *Id.* at 169-70 n.9. The *Simmons* opinion has been twice reaffirmed by the United States Supreme Court. In 2001, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense.

Shafer v. South Carolina, 532 U.S. 36 (2001). The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" *Id.* at 52 (citation omitted). Most recently, in *Kelly v. South Carolina*, 534 U.S. 246 (2002), the Court again reversed a South Carolina death sentence for failure to give an instruction defining life without the possibility of parole in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Supreme Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." *Kelly*, 534 U.S. at 256.

In this case, just as in *Kelly*, and *Shafer*, there was an inference of future dangerousness sufficient to warrant an instruction on parole ineligibility. In *Kelly*, the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *Kelly*, 534 U.S. at 254 (footnote omitted). In *Kelly*, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the State's closing argument. *Id.* at 250-51; *see also Shafer*, 532 U.S. at 54-55; *Simmons*, 512 U.S. at 165, 171 (plur. opn.) (future dangerousness an issue because "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regard the [same]"); *id.*, at p. 174 (Ginsburg, J., concurring); *Id.*, at 177 (O'Connor, J., concurring). As Justice Rehnquist argued in his dissent from

the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." 534 U.S. at 261 (Rehnquist, J., dissenting) Appellant clearly satisfies this criteria. The evidence raised an implication of future dangerousness and the prosecution explicitly argued in his penalty phase closing argument that appellant would kill again. RT 4883. Given these circumstances, the *Simmons* instruction was required.

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is life without parole. *People* v. *Arias*, 13 Cal.4th 92, 172-74. This holding is erroneous and must be reconsidered. There is simply no evidence that juries accurately understand the meaning of life without the possibility of parole. Indeed, empirical evidence establishes widespread confusion about the meaning of such a sentence in California. One study revealed that, among a cross-section of 330 death-qualified potential venirepersons in Sacramento County, 77.8% disbelieved the literal language of life without parole. Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever*, 21 CACJ Forum No.2 at 42-45 (1994). In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. Craig Haney, Aida Hurtado & Luis Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians*, 19 CACJ Forum No. 4, at pp. 43, 45 (1992). California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real

consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death jurors cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. Craig Haney, Lorelei Sontag & Sally Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. Soc. Issues 149, 166 (1995); *see* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 643-71 (1999); *Simmons*, 512 U.S. at 168. The information given California jurors is not significantly different from that found wanting by the Supreme Court.

The jurors determining appellant's fate were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole means that defendant will never be released. In *Kelly*, counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. In that case, the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. *Kelly*, 534 U.S. at 257. In *Shafer*, the defense counsel argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." *Shafer*, 532 U.S. at 52. Yet the Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. *Id.* at 52-54. In *Simmons*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the

misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." *Simmons*, 512 U.S. at 170.

So too, here the instruction that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole. The core principle from *Simmons* is that the Constitution will not countenance a false perception, whether brought about as a result of inadequate instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. Since California's instruction about life without the possibility of parole does nothing to dispel the usual misconception about the sentence, a clarifying instruction such as that proposed by the defense must be given.

The inadequate instruction in this case also violated the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as interpreted in *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986), because the instructions taken as a whole "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without adequate instructional guidance on the meaning of life without parole, the jurors undoubtedly deliberated under the mistaken, but common misperception, that the choice they were asked to make was between death and a limited period of incarceration. *See Simmons*, 512 U.S. at 170. The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility.

The prejudicial effect of the instruction's failure to clarify the sentencing options is clear. There is a substantial likelihood that at least one of the jurors concluded that the non-death option offered was neither

real nor sufficiently severe and chose a sentence of death not because the juror deemed such punishment warranted, but because he or she feared that appellant would someday be released if they imposed any other sentence. *See Mayfield v. Woodford*, 270 F.3d 915, 937 (2001 9th Cir.) (Gould, J., concurring) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence'", *quoting Neal v. Puckett*, 239 F.3d 683, 691-92 (2001 5th Cir.).) Given the existence of evidence in this case from which the jurors might infer future dangerousness, the jurors should have been clearly instructed that a sentence of life without the possibility of parole meant that appellant would never be eligible for parole or that to base a sentencing decision on speculation about possible future release would be a violation of the jurors' oaths.

Moreover, in this case the prosecution explicitly suggested to the jury that appellant would be dangerous, urging it to sentence appellant to die because he had already killed more than one person. As such, the prosecution argued that appellant was a danger to all people. He was also a danger to other inmates and there was the possibility that he would kill again if sentenced to life without the possibility of parole. RT 4883. The prosecution warned that they should not consider life without the possibility of parole because if he hurt somebody in prison then appellant would have gotten a "freebie."[63] RT 4883. These statements increased the harm inherent in failing to instruct the jury on the definition of life without the

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[63]Appellant argued above that this comment was misconduct. *See* Argument XXII, *supra*.

possibility parole. Without the requested instruction, there was a substantial chance that the jury would sentence appellant because it believed that he was a dangerous person who might get out of prison and kill somebody else.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Had the jury been accurately instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. *Wiggins v. Smith*, 539 U.S. 510, __, 123 S.Ct. 2527, 2543 (2003); *Chapman*, 386 U.S. at 24. It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell*, 472 U.S. at 341. Accordingly, the judgment of death must be reversed.

* * * * *

XXVII

REFUSAL OF APPELLANT'S REQUESTED INSTRUCTIONS INFORMING THE JURY OF ITS ABILITY TO DISPENSE MERCY DEPRIVED APPELLANT OF A RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE

A. The Request Instructions Explained the Role of "Mercy" at Penalty

In a session on penalty phase instructions, defense counsel requested five different instructions dealing with mercy. Three of the instructions told the jury that it could be influenced by mercy in deciding what penalty to give appellant, and in deciding how to weigh mitigation. One read:

> Contrary to the law in the guilt phase, in this part of the trial the law permits you to be influenced by mercy, sympathy, compassion or pity for the defendant or his family in arriving at a proper penalty in this case.

CT 927 (Defendant's Requested Instruction No. 2). The defense also requested the court read:

> A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

CT 939 (Defendant's Requested Instruction No. 11). And:

> A mitigating circumstance is a fact about the offense or about the defendant which in fairness, sympathy or compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the defense.

CT 936 (Defendant's Requested Instruction No. 8). Two of the other instructions explicitly informed the jurors of their power to grant appellant mercy:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty.

CT 947 (Defendant's Requested Instruction No. 19). And:

> If a mitigating circumstance or aspect of the defendant's background or his character called to the attention of the jury by the evidence or its observation of the defendant arouses, mercy, sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without possibility of parole.

CT 951 (Defendant's Requested Instruction No. 23).

The trial court refused to give all of these instructions. CT 927, 939, 947, 951. No instruction given at the penalty phase mentioned mercy as a possible basis for a juror's decision of life versus death. The court simply gave a standard instruction (CALJIC 8.85), which states that the jury may consider:

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

CT 1126; RT 4937. As part of CALJIC 8.88, the trial court instructed the jurors that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." CT 1136, RT 4942.

While some of the proposed instructions expressed overlapping concepts, taken as a whole they appropriately described the role that mercy, sympathy or compassion plays in the jury's "reasoned moral response" (*see Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)), to evidence in aggravation

and mitigation. The trial court's refusal to instruct the jurors that they were empowered to exercise mercy when determining the appropriate sentence and its refusal to explain the role mercy plays in mitigation denied appellant his constitutional right to jury consideration of mitigating evidence warranting their mercy.

The trial court's refusal to give appellant's requested instructions on mercy violated his right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and right to fair trial secured by due process of law (U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const. amends. V & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. Because Some Mitigating Evidence Was Relevant Solely to Inspire the Jury to Afford Mercy, a Mercy Instruction Was Required

When the Supreme Court struck down the death penalty in the United States, juries exercised unbridled discretion in their sentencing decisions, such that the penalty could be, and in fact was, imposed in an arbitrary and capricious manner. *See Furman* v. *Georgia*, 408 U.S. 238

(1972). However, sentencing schemes that mandated a sentence of death for particular crimes were also held to be unconstitutional because they excluded consideration of particularized characteristics of the defendant which may have evoked a compassionate or merciful response from jurors. *See Roberts* v. *Louisiana*, 428 U.S. 325 (1976). As the Supreme Court also held:

> A process that accords no significance to relevant facets of the character and record of the individual offender . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind . . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. *North Carolina*, 428 U.S. 280, 304 (1976).

When the Supreme Court approved a revised death penalty scheme, the plurality required that jurors must be guided in their discretion to determine the appropriate sentence and acknowledged that such discretion included a determination of those cases fit for mercy: ". . . the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg* v. *Georgia*, 428 U.S. 153, 203 (1976). The Supreme Court has since held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." *Tennard v. Dretke*, __ U.S. __, 124 S.Ct. 2562 (2004); Lockett v. *Ohio*, 438 U.S. 586, 604 (1978); *see also Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987).

This Court has also acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." *People* v. *Haskett*, 30 Cal. 3d. 841, 864 (1982); *see People v. Lewis*, 50 Cal.3d 262, 284 (1990) (the court "should allow evidence and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction."). This statement implicitly recognizes that mercy plays a legitimate role in a jury's decision not to impose the ultimate penalty. As such, the capacity to show mercy is personal to the jurors; it is their part of a "reasoned moral response" (*Penry*, 492 U.S. at 328) to mitigating evidence, through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between statutory factors in aggravation and mitigation.

In this sense, mercy is an evidence-based consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder, and not withstanding what a jury thinks the defendant deserves. *See People* v. *Lanphear*, 36 Cal.3d 164, 169 (1984) (trial counsel's plea for "mercy" and "compassion" relevant only to whether death was an appropriate penalty for this individual notwithstanding his culpability in the commission of the murder). However, without instructional guidance there is a substantial likelihood the jury excluded any consideration of mercy – even when the concept was implicated by the evidence and arguments of

counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, which belief conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." *See California* v. *Brown*, 479 U.S. 538, 542-43, 546 (1987).[64]

Even in the absence of mitigating evidence, a mercy instruction should be required when requested. "Discretion to grant mercy -- perhaps capriciously -- is not curtailed." *Moore* v. *Balkcom*, 716 F.2d 1511, 1521 (11th Cir. 1983). Mercy offers a vehicle for the jury to deliver a just verdict even if it fails to find any mitigating factors, as defined by the legislature and presented by the defendant. This Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances. *See People* v. *Duncan*, 53 Cal. 3d 955, 979 (1991) (jury may decide that aggravating evidence not comparatively substantial enough to warrant death).

Thus, the jury must be provided with a vehicle for evaluating all mitigating evidence relevant to mercy, so it may express their "reasoned moral response" in a sentencing decision. If the jury is not told that it has the power to consider mercy, in the same way that it must consider all the statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors,

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[64]Justice Blackmun's dissent in *Brown*, expresses concern about the imposition of the death penalty without juries having considered mercy for the defendant. "In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value." *Brown*, 479 U.S. at 562-63.

leaving them no means of effecting a moral response to evidence falling outside the enumerated factors.

Because mercy is a concept distinct from sympathy, standard penalty phase instructions fail to guide juror discretion to consider mercy. Mercy is an intrinsic part of the guided discretion afforded to jurors, yet it holds a unique position in the sentencer's decisional process. Mercy can be defined as "compassion or forbearance shown especially to an offender," and sympathy as "an inclination to think or feel alike, the act or capacity of entering into or sharing the feelings or interests of another." *Webster's Collegiate Dictionary*, 727, 1195 (10th ed. 1981). Mercy is "a virtue that tempers or 'seasons' justice--something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of tempering seriously, to make it stronger." Jeffrie G. Murphy and Jean Hampton, Mercy and Legal Justice, in *Forgiveness and Mercy* 166 (1988). There are reasons not to give someone convicted of a serious murder the death penalty because he does not deserve it. If, for example, the defendant was impaired by drugs and alcohol or was under the dominance of another. These are reasons the death penalty would not be just. However, there are other reasons not to sentence someone to death because they are grounds for extending mercy. For example, he is loved by others or would serve as a good example to others if allowed to live. These are reasons to be merciful. Two areas are different; justice is different from mercy. *See* Stephen P. Garvey, *As the Gentle Rain From Heaven: Mercy in Capital Proceedings*, 81 Cornell L. Rev. 989, 1017 (1990) (drawing a distinction between kinds of mitigation).

Sympathetic background and character evidence is only one potential source of a juror's decision to be merciful. So, while much of the evidence

introduced pursuant to California Penal Code section 190.3(k) (factor (k) evidence) may evoke sympathy from jurors, significant aspects of appellant's background and character can be said to have no sympathetic value, nor do they extenuate the gravity of the crime. Justice Mosk recognized the distinction between mercy and sympathy by stating that mercy "is the power to choose life over death -- whether or not the defendant deserves sympathy -- simply because life is desirable and death is not." *People* v. *Andrews*, 49 Cal.3d 200, 236 (1989) (Mosk, J., dissenting).

At the penalty phase, appellant presented character evidence that was not sympathetic; he presented other evidence that was not necessarily sympathetic, but would still warrant the exercise of mercy on his behalf. Appellant put on evidence of a background of neglect and impoverishment which was designed to evoke sympathy. However, the defense also showed that others did not want appellant to die. Many relatives and friends asked the jury not to execute appellant on the grounds that they loved him greatly and they would miss appellant if he were executed. *See, e.g.*, RT 4613, 4642, 4659, 4700, 4759, 4772, 4775. Appellant's wife testified that she loved appellant and needed him to help with the children. RT 4613. Though this evidence might inspire sympathy for a wife and children and for family members and friends, it was unlikely to inspire sympathy for the defendant from the jury. The jury might not pity appellant, but it could reasonably have imposed a punishment less than death for the sake of appellant's family, an entirely different matter. Something which appellant's proposed instructions about mercy would have made clear. Without an instruction about the relationship of mercy to their sentencing decision, there is a substantial likelihood the jury was precluded from considering this constitutionally relevant evidence that does not fit neatly

into any statutory mitigating factor, including factor (k). *See* Cal. Pen. Code, § 190.3(d) - (k).

In response to his family's and friend's testimony that they did not want appellant to die (*see People v. Ochoa*, 19 Cal.4th 353, 456 (1998)) a jury could reasonably have determined that, despite the relative weight of statutory aggravating and mitigating factors, death was not appropriate for appellant, and he was deserving of the jurors' mercy. Absent an instruction to guide their reasoned moral impulse to grant mercy, however, the above family evidence becomes almost irrelevant as it does not portray appellant in a necessarily sympathetic light, nor does it extenuate the gravity of the crime.

C. Argument of the Prosecution Prevented Consideration of Mitigating Evidence Intended to Inspire the Jury to Be Merciful

In a capital case, penalty phase instructions must be examined as a whole to determine whether the jury was adequately informed. *People* v. *Melton*, 44 Cal. 3d 713, 759 (1988). In *Melton*, the jury received an instruction in the literal terms of factor (k), heard that mitigating circumstances may be considered in "fairness and mercy," and was informed that mitigating factors were unlimited. *Id.* at 760. In the present case, by contrast, the jury was not informed by the trial court of its ability to exercise mercy, and was instructed only pursuant to the literal terms of statutory mitigating factors. The relationship of mitigating evidence to the jury's prerogative to be merciful was not explained anywhere in the court's instructions. However, since *California* v. *Brown*, 479 U.S. 538 (1987), this Court has never found the failure of a trial court to instruct a jury regarding mercy or sympathy to be error. *See, e.g., People v. Griffin*, 33

Cal.4th 536, 591 (2004); *People* v. *Nicolaus*, 54 Cal.3d 551, 588 (1991). A mercy instruction has generally not been required by this Court on the theory that factor (k) leaves adequate room for the consideration of mercy in the statement that the jury is to consider "all relevant evidence," and that the jury can assign whatever moral value to the evidence it desires. *Griffin*, 33 Cal.4th at 591.

Appellant has elsewhere pointed out that this Court frequently upholds a trial court's failure to give instructions elaborating on factor (k) on the assumption that the instruction adequately informs the jury of its sentencing options. Appellant urges this Court reconsider its "one size fits all" approach to penalty phase instructions. However, whether or not factor (k) in the usual case adequately informs the jury of its power to dispense mercy, it is clear that here it did not. A mercy instruction was particularly required in appellant's case because of the prosecution's argument in closing. In contrast to cases where this Court found no mercy instruction was necessary because the prosecution's argument acknowledged that the jury could consider mercy (*see Andrews*, 49 Cal. 3d at 227-28), here the prosecution in closing argument vigorously argued appellant did not deserve sympathy without acknowledging that the jury could give mercy irrespective of whether they were sympathetic to appellant. Appellant, according to the prosecution, killed the victims without sympathy and without mercy, so he did not deserve sympathy. RT 4883. The prosecution emphasized the facts of the crime and argued that appellant should get what he deserved: the final statement in the prosecutor's argument was that appellant did not deserve sympathy. RT 4899.

The prosecutor also minimized the defense evidence presented at the penalty phase, stating that nothing about the evidence showed that appellant

deserved sympathy. He argued that appellant had not shown that he was a good father, or provider and as such did not deserve sympathy. RT 4879-80. He agreed that appellant had put on evidence that whether or not he was a good father he was loved by his family, but that this was not "such a great trait that it should be mitigated down and the defendant should not receive the ultimate penalty because he's nice to his family." RT 4882. Appellant's help to a disabled child should not generate sympathy for appellant either. Although the prosecutor claimed that he was not comparing appellant to other criminals, he noted that even the worst criminal, like Jeffrey Dahlmer, was nice to his parents, nice to his family and "nice to the less fortunate." RT 4883; *see Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8th Cir. 1989) (misconduct to link the defendant with several well-known mass murderers). The prosecution noted that appellant's mother got on the stand and asked for the jury to spare her "baby's life," but he then suggested to the jury that such should not weigh in the jury's decision because appellant had decided not to spare the lives of the other people's babies. RT 4882. In other words, the defense evidence did not create sympathy for appellant, so the jury should give death upon calculating that appellant, according to the prosecution, deserved it because his crime was horrible and he was not a sympathetic person. RT 4882-83. He did not tell the jury that it did not have to act on what it thought appellant deserved – he did not tell the jury that it could be merciful.

Moreover, the prosecution did not just argue that appellant did not deserve to have factor (k) count in his favor, without acknowledging that the evidence could be used to sentence to appellant to life with the possibility of parole, if the jury believed it should dispense mercy. He also used his closing to create sympathy for the victims and for their families.

The evidence was admitted as part of the circumstances of the crime (factor (a)); however, it had the effect of giving the jury a reason *not* to give appellant mercy – while at the same time the jury was not told that it could use their inclination dispense mercy to appellant as a ground not to give the death penalty. The prosecution called for the jury to understand the pain of the victims: "Surely you notice and you heard the pain that these people have gone through, and this pain, it just wasn't deserved. It wasn't called for." RT 4890. This remark suggested that any sympathy factor lay with the victim's family, without making it clear that the jury could show mercy, in spite of feelings about the victims' families as "compassion or forbearance shown especially to an offender." *Webster's Collegiate Dictionary*, 727, 1195 (10th ed. 1981).

Although the prosecution hammered home the point that the jury should be motivated by revenge to satisfy the families of the victim or because the crime was bad, the law does not require, or even allow, jurors to dispense mercy solely in proportion to the amount of mercy or of vengeance shown by the criminal to his victim. It allows the jury to be merciful. Indeed, as appellant has argued, the jury *must* at least consider mercy in determining which evidence is mitigating and in weighing aggravation against mitigation. Because the jury reasonably may have believed they were limited to consideration of the evidence in appellant's case which created sympathy for appellant himself, there was a false limitation on the jury's prerogative to exercise mercy. Such a misapprehension could easily have led them to reject appellant's evidence that appellant's execution would have been a tragedy for his children, his wife, and the rest of his family and friends. This was especially a factor in this case because the prosecution argued for the death penalty because of

feelings the jury might have for the victims' families. Thus, the prosecutor was able to secure a death sentence, based at least in part, on the jurors' misunderstanding that the facts of the crime or the pain of the victims' families prohibited consideration of mercy for appellant.

No question, appellant's counsel did use the word mercy in his closing argument, and discuss the concept of mercy. *See* RT 4917. However, even if this Court were to assume that the arguments of counsel informed the jury that it could exercise mercy, it is well settled that arguments of counsel cannot substitute for proper jury instructions (*see Taylor* v. *Kentucky*, 436 U.S. 478 (1978)), and appellant's jury was specifically instructed to consider the law only as stated in the court's instructions. CT 1111.

D. Appellant's Death Sentence Must Be Reversed

At the penalty phase, jury instructions must eliminate any ambiguity concerning the factors actually considered by the sentencing body in imposing a judgment of death. *People* v. *Easley*, 34 Cal. 3d 858, 878-79 (1983) (citations omitted). Appellant requested instructions appropriate to guide the jury's consideration and eliminate any ambiguity concerning mercy. Based on the instructions given, the jury was very likely misled and confused by the prosecutor's argument that the gravity of the crime called for punishment, not sympathy – when really there was a third alternative: mercy. Because they were so instructed, the jury would have believed only sympathetic evidence was relevant to a determination of the appropriate sentence. *See* CALJIC 8.85. However, had the trial court given the clarifying instructions appellant offered to explain the role of mercy in determining the appropriate sentence, the jury may reasonably have decided to afford appellant mercy.

Appellant introduced significant relevant non-statutory evidence in mitigation of punishment that was intended to inspire mercy in the jurors. The State may "not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998) (citations omitted). However, because the trial court's charge to the jury omitted appellant's requested instructions on the role of mercy in determining the appropriate sentence, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Penry*, 492 U.S. at 328. The standard jury instructions provided no means to give effect to evidence not necessarily displaying sympathetic aspects of appellant's background and character but nevertheless warranting the jurors' merciful response.

Moreover, failure explicitly to instruct the jury that it could dispense mercy if is so wished had a direct impact on the penalty phase deliberations. As appellant argues elsewhere (*see* Argument XXIX, *infra*), it is clear that at least one of the jurors was concerned with matters that related to the overall value judgment the jury was required to make. In particular, one of the jurors wanted to make a part of his or her consideration life for African-Americans in the projects. This unknown juror was clearly concerned about fairness and the context in which the crime in this case occurred. Such a worry could have been the focus of a decision that she or he wished to dispense mercy and sentence appellant to life without the possibility of parole, despite the fact that aggravation outweighed mitigation. However, the standard instruction did not adequately inform the jurors that mercy was an option.

Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of

constitutionally relevant evidence (*see Boyde* v. *California*, 494 U.S. 370, 380 (1990)), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. The prosecution has not shown that the error was harmless beyond a reasonable doubt. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Chapman*, 386 U.S. at 24. Appellant's judgment of death must be reversed.

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XXVIII

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS BY REFUSING TO INSTRUCT THE JURY THAT IT WAS IMPROPER TO RELY SOLELY UPON THE FACTS SUPPORTING THE MURDER VERDICTS AS AGGRAVATING FACTORS

Appellant requested an instruction that would have informed the jury that it could not sentence appellant to death based solely upon the same facts that caused it to find appellant guilty of first-degree murder:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. Thomas guilty beyond a reasonable doubt of murder in the first degree is not itself an aggravating circumstance.

CT 934 (Defense Requested Instruction No. 6). The trial court refused to give this instruction. CT 934. Failure to do so was a violation of appellant's right to due process, to a fair and reliable capital trial, and to be free from cruel and unusual punishment. U.S. Const. amends. V, VIII & XIV; *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Estelle v. Williams*, 425 U.S. 501. In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence. U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991). The error requires reversal.

It is well-settled that a state's capital-sentencing scheme must channel the sentencer's discretion to "reasonably justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983), quoted in *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *see also Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring opinion) (striking down capital sentencing statutes because "there is no meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not"). The rejected instruction was necessary to channel the jury's discretion at the penalty phase and to ensure that the jury would not sentence appellant to death merely because it had found him guilty of capital murder.

California has a three step procedure for the imposition of the death penalty. In the first two steps, the jury determines death eligibility. In the first step, the jury must initially determine if a defendant has committed first-degree murder (Cal. Pen. Code §§ 187 & 189); then, in the second step, after it found the defendant guilty of first degree murder, it must determine whether the alleged special circumstances are present (Cal. Pen. Code § 190.2). Only if these two findings are made is the defendant eligible for the death penalty and will the case proceed to a third phase, the penalty phase. In the third phase the jury has a different, but equally important, function: it must determine which of the individuals eligible for the death penalty deserve to die. The jury does this by weighing evidence of aggravating factors against evidence of mitigating factors. Cal. Pen. Code § 190.3; *see Pulley v. Harris*, 465 U.S. 37, 51 (1984) (summarizing California's procedure).

In other capital sentencing schemes, the death eligibility determination and the death worthiness determinations are combined. In these systems, the role of special circumstances (to determine death-eligibility) and aggravating circumstances (to determine death-worthiness) are presented together. *See, e.g.*, Nev. Rev. Stat. § 200.030(4)(a). These systems contemplate only a two-step process, with the first step involving the murder determination and the second step involving the penalty determination which combines death worthiness and death eligibility. Under this type of two-step system, whatever the additional finding at penalty phase is called, be it a "special circumstance" or an "aggravating factor," the jury determines whether the extra fact or facts exist and then weighs such facts against the mitigating evidence to determine whether a death sentence should be imposed. *See Valerio v. Crawford*, 306 F.3d 742, 752 (9th Cir 2002) ("In arriving at a penalty decision in a capital case, a Nevada jury is directed to weigh aggravating against mitigating circumstances. A Nevada jury may return a verdict of death for a death-eligible defendant 'only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.'").

Under such a capital-sentencing system, the constitutional requirement that the sentencer's discretion be channeled is met at the penalty phase by having the jury determine death-eligibility by ascertaining the existence of an aggravating factor from a limited category of such factors. The sentencer then weighs those aggravating factors against the mitigating factors, with the characteristics of the aggravating factors serving simultaneously to narrow death-eligibility and to constrain the jury's discretion in the weighing process. This determines death worthiness. This

type of capital-sentencing system precludes the jury from reaching a death determination based merely upon the same factors that caused it to find the defendant guilty of murder because it must first find an aggravating circumstance and then must weigh that fact against mitigating evidence to determine death worthiness.

Without an instruction such as that requested in this case, the California system provides no such constitutional safeguard. A California jury is told simply to weigh aggravation against mitigation. However, there is no assurance that the required constitutional channeling of discretion will occur simply by weighing aggravation against mitigation. The penalty phase in California does not in and of itself accomplish the required channeling task because, as the scheme currently works in California, the jury is given minimal guidance at the penalty phase. *See Tuilaepa v. California*, 512 U.S. 967 (1994) (California's system of aggravating factors not unconstitutional because it fails to instruct a jury on how to weigh any particular fact in the capital sentencing decision). In fact, rather than being given guidance as to how to channel its discretion, the jury is given free reign to consider all of the evidence previously admitted as a circumstance of the crime of which the defendant was convicted and the existence of any special circumstances found to be true. *See* Cal. Pen. Code § 190.3(a).[65] Indeed, appellant's jury was so instructed. CALJIC 8.85; CT 1125-26. However, without the modification proposed by appellant's trial counsel, which would have explicitly told the jury that it could not base a decision to sentence appellant to death on the facts it used to establish first degree

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[65]Appellant has argued below that the lack of guidelines in California's scheme for weighing aggravating factors violates the Eighth Amendment. *See* Argument XXXIV, *infra*.

murder, a jury is given no indication that it should not consider these very same facts as the only facts it utilizes to assess the death penalty. Thus, the jury's death sentencing determination is not channeled in a constitutionally acceptable manner.

The importance of channeling the jury's discretion regarding the balancing of aggravating and mitigating circumstances is magnified in California because the lengthy list of special circumstances minimally narrows the class of persons who are death eligible. Commentators have even questioned whether California's capital-sentencing statute is sufficient to perform this narrowing function in a proper manner.[66] *See* Stephen Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283 (1997). This is a legitimate concern, given that only seven limited categories of first-degree murders are not death eligible, and that between 1988 and 1992 approximately 87 percent of first-degree murders had findings of special circumstances. *Id.* at 1324-26, 1331. This basic problem has been noted by Justice Broussard, who wrote that the California capital-sentencing statute "sweeps so broadly that most murderers are subject to the death penalty, and only a few excluded." *People v. Adcox*, 47 Cal.3d 207, 275 (1988) (Broussard, J., concurring opinion). Given the minimal narrowing accomplished by the special circumstances and the open-ended nature of the aggravating factors in

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[66]Appellant is not raising a "failure-to-narrow" claim here, but is addressing the fact that when a capital sentencing scheme is problematic as a whole it is even more important to ensure that the jury's discretion is narrowed at the penalty phase. Any claim that California's capital scheme is unconstitutional because it fails to narrow requires the development of facts not in the appellate record and must therefore be raised by way of a petition for writ of habeas corpus.

section 190.3, the jury's discretion must be channeled at the penalty phase so that there can be a meaningful distinction between persons sentenced to death and persons who are death-eligible, but not sentenced to death. Cal. Pen. Code § 190.3.

If the California capital sentencing scheme is to pass constitutional muster, the use of the same facts to find the defendant guilty of capital murder and also to find that the defendant deserves to die must be curtailed. Permitting such double-counting would mean that the same facts that rendered a defendant death-eligible could then be used to sentence him to death, even in the absence of any additional facts being proved. Such a system is constitutionally impermissible. The death penalty is supposed to be reserved for those few who are the most culpable perpetrators of crime. *See Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) ("There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."). This is why it is impermissible to have a mandatory death penalty statute. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976). Even though there may be the presumption that those who are guilty of committing capital crimes could be among a group of the most culpable, and who are thus death eligible, there must still be an individualized determination that separates members of this group from each other. Some are death worthy and some are not.

Using the same evidence that the jury relied upon to find a defendant death eligible as the only evidence supporting the imposition of a death sentence eviscerates the distinction between death-eligibility and death-worthiness. This is particularly apparent where, as in this case, the defendant was convicted of committing first-degree murders with premeditation and deliberation. CT 982, 984; RT 4391-92. Evidence that

appellant unlawfully killed a person with malice aforethought following deliberation and premeditation satisfies the elements of deliberate and premeditated murder. *See* CALJIC 8.20 (defining premeditation and deliberation); CT 1073-74. The same evidence that is used to prove these elements obviously also constitutes a circumstance of the offense. Unless the jury is instructed otherwise, and assuming it finds the existence of a special circumstance, it can then impose a death sentence based on no evidence other than that used to prove the elements of premeditated and deliberate murder.

The bare fact that a defendant committed first-degree murder fails to justify giving that defendant a death sentence as compared to the life sentences given to others convicted of first-degree murder. *See Godfrey v. Georgia*, 446 U.S. 420, 428-33 (1980) (holding aggravating factor unconstitutional because "person of ordinary sensibility" could find it in almost every murder and, thus, aggravating factor failed to distinguish death-sentenced cases from life-sentenced cases). That evidence cannot be used as an aggravating factor because that evidence exists, and that aggravating factor would exist, in every single case in California. *See Tuilaepa*, 512 U.S. at 972 (holding aggravating factors must not apply to every defendant convicted of murder). Thus, the mere fact that appellant committed a first-degree murder cannot justify the imposition of a death sentence.

Moreover, using the evidence that was necessary to find appellant guilty of first-degree murder as aggravating evidence collapses the multi-step (eligibility/worthiness) inquiry required of capital-sentencing schemes. If the very facts needed to establish his death-eligibility are also the exclusive facts used to demonstrate death-worthiness, then the selection

phase's capability to ensure that only the most culpable defendants receive death sentences is hampered. Requiring different evidence at the worthiness phase would alleviate this problem. This is all that appellant asked from the trial court with his proposed instruction.

Appellant recognizes that the United States Supreme Court's cases have appeared to focus the channeling decision to the eligibility phase and emphasized that the sentencing phase is the place for a broad inquiry into all relevant mitigating evidence so that the jury can make an individualized determination regarding the appropriateness of a capital sentence. *See, e.g., Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) ("It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment.") However, decisions such as *Buchanan* do not contemplate a sentencing scheme such as that in place in California. The United States Supreme Court decisions de-emphasizing the need to constrain jury discretion at the penalty phase are rooted in the assumption that a capital-sentencing scheme effectively narrows the class of people eligible for the death penalty. *See Tuilaepa*, 512 U.S. at 981 (Stevens, J., concurring). However, since California's scheme allows for only minimal narrowing at the eligibility phase, the jury's discretion must be channeled at the selection phase in order to pass constitutional muster. Without employing such a ban, California's capital-sentencing scheme would not "adequately channel[] the sentencer's discretion so as to prevent arbitrary results." *Harris v. Alabama*, 513 U.S. 504, 511 (1995); *see Graham v. Collins*, 506 U.S. 461, 468 (1993) ("States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly.'").

As the Ninth Circuit Court of Appeals has recently held: "The Eighth Amendment requires that jury instructions in the penalty phase of a capital case sufficiently channel the jury's discretion to permit it to make a principled distinction between the subset of murders for which a death sentence is appropriate and the majority of murders for which it is not." *Valerio*, 306 F.3d at 750. This is what appellant's requested instruction would have accomplished. By telling the jury that it could not sentence appellant to death based merely upon the facts it utilized to find the elements of first-degree murder, or the elements of the special circumstance, the instruction effectively served to tell the jury that it must find something to distinguish appellant from other first-degree murderers.

The trial court's erroneous refusal to give the requested instruction requires the reversal of appellant's death sentence. In a situation where the jury is assessing the circumstances of the crime to determine whether a death sentence is to be imposed, it is virtually impossible to determine with any degree of certainty that the jury did not assess a death sentence by finding no more culpability than that required to find the appellant guilty of first-degree murder with a special circumstance. If the trial court had properly channeled the jury's consideration at the penalty phase, the balance between the aggravating and mitigating circumstances would have been significantly altered. The failure to give appellant's requested instruction may well have been dispositive with respect to the jury's decision to sentence appellant to death. Without a doubt, the State cannot show that the error had no effect on the jury's weighing process. *Chapman*, 386 U.S at 24.

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XXIX

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S OTHER PROPOSED PENALTY PHASE INSTRUCTIONS

A. Refusing the Proposed Instructions Violated Substantial Constitutional Rights

The trial court refused a number of specially tailored instructions which appellant requested and which would have addressed various aspects of the penalty determination. A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. *People v. Saille*, 54 Cal.3d 1103, 1119 (1991); *People v. Hall*, 28 Cal.3d 143, 158-59 (1980); *People v. Sears*, 2 Cal.3d 180, 190 (1970); *see Penry v. Lynaugh*, 492 U.S. 302 (1989); *see also Penry v. Johnson*, 532 U.S. 782, 797 (2001). The special instructions addressed herein were neither cumulative nor argumentative, and none of the requested instructions contained incorrect statements of law. *See People v. Mickey*, 54 Cal.3d 612, 697 (1991). They were offered to address particular aspects of appellant's theory of the case, and were thus appropriate. *See, e.g., People v. Kraft*, 23 Cal.4th 978, 1068 (2000); *People v. Andrian*, 135 Cal.App.3d 335, 338 (1982).

Moreover, the instructions were required so that the jury could adequately consider appellant's case in mitigation. A trial court is under an affirmative duty to give instructions on a defendant's theory of defense where it is obvious that the defendant is relying upon such a defense, or if there is substantial evidence to support it. *People v. Stewart*, 16 Cal.3d 133, 140 (1976); *see also People v. Bottger*, 142 Cal.App.3d 974, 979.

Appellant acknowledges that instructions such as the ones proposed by appellant have routinely been rejected by this Court as duplicative of

CALJIC 8.85, factor (k), and / or of the definition of "mitigation" in CALJIC 8.88. *See e.g., People v. Stansbury*, 4 Cal.4th 1066 (1992) (factor k adequate); *People v. Champion*, 9 Cal.4th 879 (1995) (same); *People v. Cunningham*, 25 Cal.4th 926 (2001) (CALJIC 8.88 definition of "mitigation"adequate) *People v. Welch*, 20 Cal.4th 701 (1999) (same). However, this Court's routine rejection of such instructions must be reconsidered in light of the circumstances of appellant's case.

The trial court's refusal to give appellant's requested instructions violated his right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and his right to the presumption of innocence, the requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law. U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In addition, the errors violated appellant's right to trial by a properly instructed jury (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

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B. The Trial Court Erred in Refusing Appellant's Instruction That One Mitigating Factor Alone Could Serve as a Basis for Life Without the Possibility of Parole

The trial court rejected Defendant's Requested Instruction No. 7, which would have instructed the jury that "[a]ny one mitigating factor, standing alone, may support a decision that death is not the appropriate punishment in this case." CT 935. The trial court also refused to give Defendant's Requested Instruction No. 20, which was similar. CT 948.[67] The court's refusal to give these instructions was error. The instructions were non-argumentative and not cumulative with respect to the instructions on mitigation provided to the jury. Moreover, even if somewhat duplicative, the instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage. They clarified the concepts set forth more generally and less clearly in the version of CALJIC 8.85 and 8.88 given in this case. Most important, they made explicit the fact that any single factor in mitigation could provide a sufficient reason for imposing a sentence of less than death.

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." *People v. Brown*, 40 Cal.3d 512, 540 (1985), *reversed on other grounds in California v. Brown*, 479 U.S. 538 (1987). The jury must be given that freedom, because the penalty determination is a "moral

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[67]This instruction read as follows: "Since you, as jurors, decide what weight is to be given the evidence in aggravation and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without the possibility of parole is the appropriate punishment." CT 948 (Defendant's Requested Instruction No. 20).

assessment of [the] facts as they reflect on whether defendant should be put to death." *People* v. *Easley*, 34 Cal. 3d 858, 880 (1983); *People* v. *Haskett*, 30 Cal.3d. 841, 863 (1982). Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." *People v. Edelbacher*, 47 Cal.3d 983, 1035 (1989).

People v. Sanders, 11 Cal.4th 475 (1995), noted with approval an instruction that:

> 'expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor could outweigh all other factors*.'

Id. at 557, *quoting People v. Cooper*, 53 Cal.3d 771, 845 (1991) (emphasis added). This Court indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process. . . ." *Sanders,* 11 Cal.4th at 557; *see also People v. Anderson*, 25 Cal.4th 543, 599-600 (2001) (approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death). Here, the trial court should have instructed the jury that any one of the relevant compelling mitigating factors could be deemed sufficient to justify a life sentence. Instead, the trial court instructed the jury to weigh the aggravating and mitigating circumstances without any guidance regarding how to weigh them. Without this guidance, it is likely that one or more jurors did not realize that a single mitigating factor could outweigh all the aggravating evidence. Defendant's Requested Instructions No. 7 and No. 20 were

accurate statements of law which pinpointed a crucial principle of mitigation; they were non-argumentative, essential to appellant's defense, and should have been given. *Sears*, 2 Cal.3d at 190.

C. The Trial Court Erred in Refusing to Give Appellant's Proposed Instructions Regarding the Scope of Mitigation

The trial court refused to give Defendant's Requested Instructions Nos. 4A, 7, 8, 9, 12 and 24, each of which elaborated on the meaning of the term "mitigating factor." CT 931-32, 936, 937, 952. All of these instructions clarified for the jury what the scope of mitigation was in the case. For example, Defendant's Requested Instruction No. 4A was drafted to inform the jury in detail about all the evidence it could consider in mitigation and aggravation, mirroring the standard CALJIC 8.85 instruction except that it explicitly informed the jury that it should consider the mitigation evidence the defense introduced at trial, so the instruction told the jury that it should consider. CT 921.[68]

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[68]The instruction read as follows:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) the presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) the presence of absence of any prior felony conviction, other than the crimes for which the defendant had been tried in the present proceedings.

(d) The effect of the defendant's upbringing, childhood and family life.

(e) The effect of parental narcotic addiction.

(f) The effect of having no biological father ever

(continued...)

Defendant's Requested Instruction No. 7 told the jury that it should not consider mitigation limited to specific factors, and that the jury could consider anything mitigating that was shown by the evidence. CT 935.[69] Defendant's Requested Instruction No. 8 stated that the jury could consider any fact about the offense or the defendant which "in fairness, sympathy or compassion" could be considered to reduce appellant's culpability. CT 936 [70]. Defendant's Requested Instructions No. 9 and No. 10 told the jury that anything could be mitigating, including appellant's background, and taken into account when deciding to impose a sentence of life without the

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[68](...continued)
present in the home.

(g) The relationship between the defendant and his mother, siblings, children, wife, relatives and significant others.

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

CT 932.

[69]The language of the instruction was as follows: "You should not limit you consideration of mitigating circumstances to specific factors. You also may consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty." CT 935 (Defendant's Requested Instruction No. 7).

[70]The language of the instruction was as follows: "A mitigating circumstance is a fact about the offense or about which the defendant which in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or justifies a sentence of less than death, although it does not justify or excuse the offense." CT 936 (Defendant's Requested Instruction No. 8).

possibility of parole. CT 937 (Defendant's Requested Instruction No. 9)[71]; CT 938 (Defendant's Requested Instruction No. 10)[72]. Defendant's Requested Instruction No. 11 also told the jury that it should consider anything mitigation, and that the mitigating factors which the jury had been told about were only examples, so that the jury should not limit its consideration to the listed factors. CT 939. Defendant's Requested Instruction No. 12 told the jury that if the mitigating evidence gives rise to compassion or sympathy, the jury could reject death just based on this sympathy or compassion. CT 940. Defendant's Requested Instruction No. 24 told the jury that appellant's background could only be mitigating. CT 952.[73]

As stated above, the defendant is entitled, upon request, to instructions which relate particular facts to a legal issue or pinpoint the crux of the defendant's case. Pinpoint instructions "are required to be given upon request when there is evidence supportive of the theory, but they are

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[71]The instruction read as follows: "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole. CT 937 (Defendant's Requested Instruction No. 9).

[72]The instruction read as follows: "Any aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime." CT 938 (Defendant's Requested Instruction No. 10).

[73]The instruction read as follows: "The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence. CT 952 (Defendant's Requested Instruction No. 24).

not required to be given sua sponte." *Saille*, 54 Cal.3d at 1119 (1991). Appellant requested the pinpoint instructions here at issue and the trial court was obliged to deliver them. *Id.* at 1119; *see People* v. *Webster*, 54 Cal.3d 411, 443 (1991). Even when the other instructions given are legally sufficient, the defendant is still entitled to instructions which plainly state his theory of defense such as those requested here. *See People* v. *Castillo*, 16 Cal.4th 1009, 1020-21 (1997) (Brown, J., concurring opinion).

This point was forcefully stated in *People v. Cook*, 148 Cal. 334, 347 (1905), where this Court declared:

> The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly, but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.

Cook also found that two other instructions requested by the defendant should have been given because, although the instructions given on the same point were "entirely correct and proper," they "contained only an implication of the proposition which the defendant had a right to have stated to the jury in direct terms." *Id.* at 347-48.

Here, appellant had the right to have the jury given illustrative examples of the types of evidence that could be considered as factors in mitigation beyond those specified by statute. The proposed instructions at issue here would have focused the jury's attention on particular theories of mitigation on which the defense was relying. It also clarified that the evidence appellant introduced could only be mitigating. The instructions therefore clarified and illustrated in a non-argumentative manner the

application of the general principle to appellant's case. Had the instruction been given, it would have guarded against the possibility that the jury did not understand the breadth of the evidence which it could consider as mitigating. In prior opinions of this Court, similar language has been cited with approval as insuring that the jury fully understood the concept of mitigation. *See People v. Hunter*, 49 Cal.3d 957, 988 (1989). Appellant was also entitled to instructions which told the jury that mitigating factors are unlimited, and includes anything about the defendant or the case, or the defendant's background. *People v. Robbins*, 45 Cal.3d 867, 886 (1988) (approving an instruction detailing the kinds of mitigation the jury could consider); *see also People v. Kelly*, 51 Cal.3d 931, 969 n.12 (199) (same). These instructions clarified, also in a non argumentative manner, the scope of mitigation. They also would have assured that the jury did not fail to understand just how broad mitigation evidence could be.

The instructions appellant proposed were especially important in light of the trial court's failure to give instructions explaining that the jury could dispense mercy in a decision not to impose death. Appellant argues above (*see* Argument XXVII, *supra*) that it was error not to give an instruction telling the jury that it could consider mercy. Given the jury was not told that it could consider mercy, it was especially important that an instruction be given which informed the jury that it could consider all aspects of the defense case, even those which did not generate sympathy for the defendant.

The trial court rejected these instruction on the grounds that they were argumentative, citing *People v. Gordon*, 50 Cal.3d 1223 (1990) for the proposition. RT 3792. In *Gordon*, this Court held that a defendant is not entitled to instructions which invites a jury to draw inferences favorable to

one of the parties from specified items of evidence. *Id.* at 1276. Appellant's instruction did not do that. In particular, appellant's instruction 4A (CT 932), cited above, was a proposed instruction informing the jury about all evidence which the jury must consider, mitigating and aggravating. As such, it did not separate out only the mitigation for the jury's consideration. Moreover, the standard CALJIC 8.85, does specifically point out the prosecution's aggravation evidence, *i.e.*, the circumstances of the crime, appellant's prior violent acts and his prior felonies. *See* CALJIC 8.85. In that light, appellant request was nothing more than a request for balanced instructions. *See People v. Moore*, 43 Cal.2d 517, 526-29 (1954) (emphasizing the need for balanced instructions).

D. The Trial Court Erred in Failing to Give an Instruction Telling the Jury not to Consider Monetary Cost or Deterrence

Trial counsel requested an instruction telling the jury that "[i]n deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life." CT 942 (Defendant's Requested Instruction No. 14). This instruction was refused. CT 942. In *People v. Thompson*, 45 Cal.3d 86, 132 (1988), this Court held that it would not be error to give an instruction "to forestall consideration of deterrence or cost . . . " Accordingly, such an instruction should be given upon request. *See People v. Bacigalupo*, 1 Cal.4th 103, 145-46 (1991). In fact in *People v. Welch*, 20 Cal.4th 701, 766 (1999) this Court held that instructing the jury not to consider the deterrent effect of the

death penalty or the monetary cost of executing a prisoner versus maintaining him in prison for life without possibility of parole "may be appropriate in some cases . . . " It is clear that a jury may not consider cost or deterrence in its sentencing decision. Consideration of cost or deterrence would violate the Eighth and Fourteenth Amendments by allowing the jury to consider non-statutory aggravation. *See Clemons v. Mississippi,* 494 US 738 (1990); *People v. Williams*, 45 Cal.3d 1268, 1324 (1988). By promoting a reliable, non-arbitrary, and individualized sentencing determination and by protecting against jury consideration of matters which are constitutionally irrelevant, constitutionally protected, arbitrary, or discriminatory, this instruction protects appellant's federal constitutional rights to be free from cruel and unusual punishment, and to due process and equal protection. *See, e.g., Penry*, 492 U.S. at 318; *Clemons v. Mississippi,* 494 U.S. 738 (1990); *McCleskey v. Kemp,* 481 U,S. 279 (1987). Requested Defense Instruction No. 14 was an accurate statement of law; it was non-argumentative, and it should have been given. *Sears*, 2 Cal.3d at 190.

E. The Errors Require Reversal

The requested instructions delineated above should have been given. The failure to give any one of the instructions discussed above constitutes reversible error. This Court has routinely held that the pattern CALJIC instructions are sufficient. As regards appellant's request for an instruction pinpointing his mitigation evidence, it is patently not true that the pattern instructions were sufficient. Moreover, where the death penalty is involved, and there is a heightened need for reliability, accurately crafted instructions regarding mitigation should be given upon request to assure a constitutionally acceptable sentence. It remains the law that if the death

penalty is to be imposed at all, the statute must permit the sentencer to take into account all evidence the defense offers in support of his argument that death is not appropriate. *Woodson v. North Carolina,* 428 U.S. 280, 304-05 (1976). This Court has also said that California has an independent interest in the reliability of its death sentence. *People v. Chadd*, 28 Cal.3d 739, 751-53 (1981). Thus, the United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). This Court cannot say that it is certain that the jury considered all of appellant's evidence, as it was required to do so, when the only instruction given was a "one size fits all" mitigation instruction.

The trial court's refusal to give the requested instructions addressed herein violated appellant's federal constitutional rights and reversal is required unless the prosecution can establish beyond a reasonable doubt that the error was harmless. *Chapman*, 386 U.S. at 24. The state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman*. *People v. Ashmus*, 54 Cal.3d 932, 965 (1991). Under any standard of review, reversal is required. The case for death was far from overwhelming. This is shown by the fact that the jury deliberated as to penalty for approximately 10 days. CT 2055-97. Appellant presented substantial evidence in mitigation including evidence that, as a child, he had been abandoned by his father, and was subjected to severe neglect and that he had a wife and sons and daughters and that his family loved him and did not want him to be executed. Much of the evidence was evidence that asked the jury to act mercifully and spare appellant's life for the sake of

others. Had the jury properly understood its power to dispense mercy, there is a reasonable likelihood that the jury would not have given appellant the death penalty. Because there was a substantial "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty" (*Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) appellant's sentence is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

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XXX

THE TRIAL COURT ERRED IN REREADING GUILT PHASE INSTRUCTIONS EMPHASIZING FACT-FINDING AT THE PENALTY PHASE WITHOUT INSTRUCTIONS EMPHASIZING THE JURY'S MORAL DECISION

A. The Trial Court Reread Multiple Guilt Phase Instructions At the Penalty Phase, but Refused a Defense Instruction On the Jury's Normative Role

In the discussion of penalty phase instructions, the trial court proposed reading a number of instructions which had previously been read at the guilt phase. Defense counsel objected:

> Your honor [. . .] with respect to 1.03, 1.02, 2.00, 2.11, 2.22, 2.21.1, 2.21.2, 2.22, 2.27, 2.90, 2.60, I would object to all those instructions being given. I further object to any further instructions that the court would give the jury which are not specific as to the penalty phase.

RT 4853. Defense counsel explained that detailed penalty phase instructions that simply duplicated guilt phase instructions would confuse the jury about the penalty phase process:

> . . . I just think that the more instructions the jury will be given that have been read previously will give the jury the impression that this is more of a fact finding process penalty phase as opposed to the fact finding process that is necessary in the guilt phase.

RT 4853. Trial counsel agreed that there was some fact-finding necessary in the penalty phase, but insisted that the jurors' task at the penalty phase was significantly different from finding facts:

> To a certain degree there is a fact finding process in the penalty phase, no question about it, but it's not the same type of a fact finding process by which you then determine whether evidence has been proven beyond a reasonable doubt

as it relates to penalty, not as it relates to some other offense, uncharged offense in the penalty phase.

CT 4853-54. Relying on the use note to CALJIC 8.84.1[74] and *People v. Babbitt*, 45 Cal.3d 660, 718 n.26, the trial court overruled counsel's objection, stating that he intended to reread all the instructions as recommended in the use note. RT 4854-55.

As part of the same discussion, trial counsel asked that the following instruction be read: "Your duty in this phase of the case is different from your duty in the first part of the trial where you were required to determine facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also – *and most important – to render an individualized, moral determination* about the penalty appropriate for the particular defendant – that is whether he should live or die." CT 925 (Defendant's Proposed Instruction No. 1) (emphasis added). The trial court refused this instruction. CT 925.

At the penalty phase, the jury was instructed with a number of instructions emphasizing fact-finding. For instance, the jury was instructed

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[74]The use note to CALJIC 8.84.1 provides: "The instruction has been adopted by the committee as a response to *People v. Babbitt*, 45 Cal.3d 660, 248 Cal.Rptr. 69, 755 P.2d 253 (1988), cert. den. 488 U.S. 1034, 109 S.Ct. 849, 102 L.Ed.2d 981, and in particular footnote number 26, 'to avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply.' This instruction is to be used in lieu of CALJIC 1.00 at the penalty trial. It should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88. Or recommended procedure may be more cumbersome than the suggestion advanced in footnote number 26, but the committee believes it is less likely to result in confusion for the jury." CALJIC 8.84.1 (1994 Rev) (5th Ed. 1988).

with CALJIC 8.84.1 which provided in part: "You must determine what *the facts are from the evidence* received during the entire trial unless you are instructed otherwise." CT 1111; RT 4926-27 (emphasis added). The jury was also instructed with CALJIC 8.85 which told the jury that "in determining which penalty is to be imposed you shall . . . *consider the evidence*." CT 1125; RT 4935-37 (emphasis added). The jury was also read instructions emphasizing the manner in which it should use the evidence to determine the facts. For instance, the jury was instructed with CALJIC 2.00 informing them that: "[e]vidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a *fact*. CT 1115-16; RT 4930-31 (emphasis added). They were also instructed with CALJIC 2.27 which told the jury that it could rely on the testimony of a single witness "for proof of a *fact*." CT 1122; RT 4933-34 (emphasis added).

The trial court's rereading the guilt phase instructions at the penalty phase over defense counsel's objection, without also informing the jury of its moral task in determining whether appellant should live or die (as appellant's trial counsel requested), was error. A jury's role in a death penalty case is in many respects normative. The rereading of the guilt phase instructions, without also reading the proposed defense instruction, reminding that the jury's task is also moral and normative, improperly misled the jury into believing that its only or primary role was to find facts, when, in fact, the fact-finding a limited role in a penalty phase. The error requires reversal.

The trial court's decision to deny appellant's request that guilt phase instructions not be reread, together with its refusal to read appellant's requested instruction on the jury's moral task, violated his right to present a

defense because it led the jury to fail to give due weight to appellant's migitation evidence (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15 *Coleman v. Calderon*, 210 F.3d 1047, 1050-51 (9th Cir. 2000); *Chambers v. Mississippi*, 410 U.S. 284 (1973)). It also denied his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and his right to the presumption of innocence, requirement of proof beyond a reasonable doubt and fair trial secured by due process of law (U.S. Const., amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., amends. VI & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. Without the Proposed Defense Instruction, Rereading Guilt-Phase Instructions Emphasizing a Fact-Finding Role Was Error

The guilt phase and penalty phase tasks of a jury are different. Guilt phase jurors are expected to find facts and apply the law to the facts without injecting their personal feelings or sense of justice. *See* CALJIC 1. Penalty phase jurors, by contrast, are expected not only to find facts, but also to bring their own values into play. They, as both the United States Supreme Court and this Court have recognized, represent the "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *People v. Thompson*, 50 Cal.3d 134, 185 (1990). The jury is charged with the "truly

awesome responsibility of decreeing death for a fellow human." *McGautha v. California*, 402 U.S. 183, 208 (1971). In exercising that responsibility, they can and, indeed, they should express their own sense of mercy. *California v. Brown*, 479 U.S. 538, 562-63 (1987) (Blackmun, J., dissenting); *Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) ("The [mercy] plea is made directly to the jury as only they may impose the death sentence."); *People v. Andrews*, 49 Cal.3d 200, 237 (1989) (Mosk, J., dissenting). Each juror must also express his or her own sense of sympathy, compassion, and morality. *People v. Easley*, 34 Cal.3d 858, 875-76 (1983) (sympathy); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opn. of Stewart, Powell, and Stevens, JJ.) (compassion); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (morality); *Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., concurring) ("[T]he question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime."); *People v. Haskett*, 30 Cal.3d 841, 863 (1982) (a penalty phase jury "decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death").

Hence, while the jurors are not to be influenced by prejudice (*see* CALJIC 8.84.1) or mere emotion (*Brown*, 479 U.S. at 543), the death penalty decision may include "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304 (opn. of Stewart, Powell, and Stevens, JJ.). The death penalty decision necessarily involves subjective and discretionary elements not present when a jury decides the question of guilt. *Caldwell*, 472 U.S. at 333; *Lowenfield v. Phelps*, 484 U.S. 231, 254-55 (1988) (Marshall, J., dissenting) ("The capital sentencing jury is asked to make a

moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a subjective judgment.").

Appellant has argued below (*see* Argument XXXV, *infra*) that the federal Constitution requires that a penalty phase jury must find the factors in aggravation unanimously beyond a reasonable doubt, and must find beyond a reasonable doubt that the defendant deserves to die. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington,* ___ U.S. ___, 124 S.Ct. 2531 (2004). However, under current California law, a penalty phase jury operates under a much different set of rules that a guilt phase jury does. A guilt phase jury determines just the facts, whereas a penalty phase jury determines the presence or absence of various "factors." Under this Court's jurisprudence, determining whether a certain factor exists at penalty is not similar to determining whether there is evidence to support an "element" of a crime, which the jury must do at guilt phase. *See People v. Murtishaw*, 29 Cal.3d 733, 771 n.34 (1981) (penalty jury's verdict does not resolve a question of fact). When a jury acts as fact-finder at guilt phase, instructions aid it in determining what evidence is sufficient to prove a fact. Under current California law, a penalty jury, however, is given no guidance on how to determine whether a particular factor exists, and it is given no guidance on how the juror should use the factor – or whether the juror should use it at all. For example, jury instructions do not tell the penalty phase jury what facts will establish that the defendant committed the crime "under the influence of extreme mental or emotional disturbance," (Cal. Pen. Code § 190.3(d)) or that the defendant "acted under extreme duress or under the substantial domination of another person." Cal. Pen. Code § 190.3(g).

Further, the factors presented to the jury are not "labeled" as either aggravating or mitigating. Some factors cannot be aggravating; however, some factors can be either aggravating or mitigating. *See People v. Hamilton*, 48 Cal.3d 1142, 1184 (1988). Whether a factor is aggravating or mitigating depends upon the judgment of the juror. The jury does not need to agree on this.

Finally, each juror may assign whatever weight he or she deems appropriate to each factor. *See People v. Noguera*, 4 Cal.4th 599, 639 (1992) (Approving an instruction reading: "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale. You are free to assign whatever weight you deem appropriate to each and all of the various factors upon which you have been instructed."); *Weeks v. Angelone,* 528 U.S. 225, 232 n.2 (2000) (approving an instruction reading: "The weight which you accord a particular mitigating circumstance is a matter of your judgment."). Moreover, in the end, even after the weighing, a juror still can decide to spare a defendant no matter how much he or she believes aggravation outweighs mitigation. *People v. Bonillas*, 48 Cal.3d 757, 793 (1989).

Because the jury's task is normative, in addition to factual, the Eighth Amendment and Fourteenth Amendment were implicated by penalty phase instructions in this case which emphasized the jury's fact-finding function, without also informing the jury that it must make normative judgements. If appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, its role as the voice of the "conscience of the community," (*Witherspoon*, 391 U.S. at 519 (1968)) charged with the moral responsibility of determining whether appellant should live or die.

It was particularly important in this case that the jury understood that its role was to make a value judgment. Nearly all of appellant's evidence in this case was a plea for sympathy and mercy. If appellant's jury did not have a proper sense of its obligation to exercise a moral judgment, it is unlikely that it would properly evaluate appellant's mitigation case. Appellant's proposed instruction explicitly informing the jury of its normative role would have provided needed balance to the instructions emphasizing fact-finding. *See People v. Moore*, 43 Cal.2d 517, 526-29 (1954) (emphasizing the need for balanced instructions).

The trial court appears to have believed that it was bound by the use note in CALJIC 8.84.1, which recommended that the instructions applicable guilt phase instructions be reread at penalty. *See* RT 4854-55. This is not the case. The CALJIC 8.84.1 use note was written in response to this Court's decision in *Babbitt*, 45 Cal.3d at 718 n.26, in which the Court recommended that the Court expressly inform the jury as to which "of the previously given instructions continue to apply." However, this Court has not required that a trial court proceed along the lines of its recommendation or use the procedure outlined in CALJIC 8.84.1. As this Court has held in *People v. Steele*, 27 Cal.4th 1230, 1255-56 (2002), a trial court may without error fail explicitly to instruct the jury with instructions from the guilt phase, so long as the jury was told it could consider applicable instructions from the guilt phase. As such, this Court's precedents do not require that the jury be re-instructed with all the guilt phase instructions.

C. The Error Was Prejudicial

Jury instructions provide essential guidance to the jury. *See Carter v. Kentucky*, 450 US 288, 302 (1981); *Bollenbach v. United States*, 326 US 607, 612 (1946); *People v. Thompkins*, 195 Cal.App.3d 244, 250 (1987).

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter*, 450 U.S. at 302. In construing the effect of an ambiguous instruction this Court must consider "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way'" that violates the federal Constitution. *Boyde v. California*, 494 US 370, 380 (1990); *see also Carriger v. Lewis*, 971 F.2d 329, 334 (9th Cir. 1992). To show a "'reasonable probability'" it is not necessary to prove that the jury "'more probably than not'" relied on the improper theory. Hence, in statistical terms, a reasonable probability is a "'significant'"--but something less--than fifty percent likelihood. *See People v. Howard*, 190 Cal.App.3d 41, 48 (1987).

In this case, the decision about whether appellant should live or die was close. The jury deliberated extensively at the penalty phase. The deliberations lasted approximately ten days. RT 4948, 4949, 4951, 4961-63, 4967-71, 4979-82; *see* Statement of the Case, *supra*. It is clear that they were confused by part (k) of the CALJIC 8.85 because mid-way through deliberations, the jury asked for additional instruction on the meaning of the word "extenuate" as it "applies to factor (k) of our instructions." CT 1022; RT 4952. The word "extenuate" is part of the instruction which informs the jury that it must consider evidence which "extenuates" the gravity of the crime. *See* CALJIC 8.85. The question from the jury about how it should consider the facts about the crime at the penalty phase suggests that the jurors could have benefitted from clarification about the different role crime facts play at penalty versus the role they play at guilt.

It is also clear that at least one of the jurors was concerned with matters that related to the overall value judgment the jury was required to make. This is apparent from the guilt phase deliberations where the jurors

were being questioned about possible misconduct. One of the jurors, Juror No. 6752 (also referred to on the record as Juror No. 36) mentioned that another juror was concerned with things that seemed, to her, irrelevant. According to Juror No. 6752, "(the second unnamed juror) seems to want to keep bringing in personal knowledge of life in the projects, the attitudes of black people. She has definite feelings about a lot of those things." According to Juror 6752, this unnamed juror's concerns caused considerable friction in the jury room. Her concerns make the deliberations "very volatiley" [sic.]. RT 4351, *see* 4290. This concern about life in the projects and attitudes toward African Americans could only concern a jury in guilt phase deliberations in so far as it related to the evidence or related to the facts which the jury was required to determine.

However, the penalty phase was an entirely different matter. The unnamed juror was clearly concerned about fairness and the context in which the crime in this case occurred. This juror's worry about the difficulty of life in the projects as an African American, or about society's and law enforcement attitudes toward African Americans were not only a legitimate concern for that juror in deciding whether appellant should live or die, these things could have been, if the juror so decided, the core of a decision that mitigation outweighed aggravation. Equally, such a worry could have been the focus of a decision to dispense mercy and sentence appellant to life without the possibility of parole, despite the fact that aggravation outweighed mitigation. Because moral concerns clearly concerned this jury, it was error to read instructions on the jury's fact-finding role without also giving them one emphasizing the jury's normative and moral function.

Other instructional errors compounded the error in rereading the guilt instructions. Appellant has argued elsewhere (*see* Argument XXVII, *supra*) that the omission of appellant's requested instructions on the role of mercy in determining the appropriate sentence was error because without such instructions, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). He also argued that the trial court should have given definitions of mitigation and factor (k) evidence tailored to his case. *See* Argument XXIX, *supra*. In light of the failure of the standard instructions to apprize the jury correctly of its ability to dispense mercy and of the proper role of mitigation, the reading of guilt phase instructions which made the juror's task seem solely a "fact-finding mission," was more harmful.

Clearly, then, at least one juror was inclined to make moral considerations, quite apart from the circumstances of the crime, a central part of his or her decision about whether appellant should live or die. However, because the jury instructions at penalty phase overemphasized the jury's fact finding role and did not adequately explain to the jurors that they must make a normative judgement about the evidence, there is a significant probability that at least one juror did not factor such concerns into a decision about which punishment was appropriate. Under such circumstances, the instructions emphasizing the jury's act-finding task, without the requested instruction reminding the jury of its normative task, risked "that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty" *Lockett*, 438 U.S. at 605. Had the jury been properly instructed, therefore, it is reasonably likely that the jury

would not have sentenced appellant to death. *Boyde*, 494 U.S. at 380. As such, his sentence must be reversed.

* * * * *

XXXI

FOLLOWING THE PROSECUTION'S IMPROPER REMARK THAT THE "ENTIRE" CASE WOULD BE RETRIED IF THE JURY WAS NOT UNANIMOUS, THE TRIAL COURT'S FAILURE TO TELL THE DELIBERATING JURY TO IGNORE THE REMARK WAS REVERSIBLE ERROR

A. Introduction

In this case, the prosecution made it a prominent theme of both guilt and penalty that justice for the victims required a unanimous verdict. This theme culminated in the statement in his closing argument at the penalty phase that, if the jury was not unanimous, then the "entire case" would have to be retried. Once the penalty jury had deliberated for more than four days without coming to a unanimous verdict, trial counsel requested that the jury be instructed to ignore the prosecution's remarks about the "entire case" being retried should they be unable to agree. Trial counsel asked that the court clarify that if there was no unanimity, then only the penalty phase case would have to be retried. The trial court denied the request for the instruction. The denial of the defense request for a clarifying instruction was error.

Because of the failure to instruct as the defense requested, the jury failed to give due weight to the jury's evidence (*see Coleman v. Calderon*, 210 F.3d 1047, 1050-51 (9th Cir. 2000)) and the denial of the instruction violated appellant's right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. I, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. I, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and his right to the presumption of innocence, requirement of proof

beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 1, 7, 15. 16 & 17; *Estelle v. Williams*, 425 U.S. 501, 503 (1976).) In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const. amends. VI & XIV; Cal. Const. art. I, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Sedeno,* 10 Cal.3d 703, 720), and violated federal due process by arbitrarily depriving him of his state right to a trial judge who safeguards the rights of the accused, and a right to requested instructions supported by the evidence U.S. Const. amend. XIV; *Hicks v. Oklahoma* 447 U.S. 343, 346 (1980); *Vitek v. Jones,* 445 U.S. 480, 488 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

B. The Prosecution Told the Jurors That the "Entire Thing" Would Have to Be Retried if They Were Not Unanimous

In his closing argument at the penalty phase, the prosecutor stated that, if the jury was not unanimous about whether appellant should live or die, the "entire thing" would have to be done over again. He told the jury in connection with its penalty decision: "You'll deliberate and your decision must be unanimous. If you are not unanimous, it's a hung jury. A mistrial will be declared on the penalty portion and the *entire thing* has to be done all over again. I encourage you and I implore you to come to some verdict, either life without parole or death." RT 4861 (emphasis added). The trial court interrupted and admonished the jury: "Let me interrupt you, Mr. Arnold. Ladies and gentlemen, his comment about what will happen if there is a mistrial, you are to completely disregard that. That is not a factor in your decision making, all right, as if you didn't hear it. Disregard it. RT 4862.

At the time of the prosecution's remarks, the defense did not ask for additional instructions or admonitions. However, once the jury had deliberated for a number of days, the defense became concerned that the jury had not in fact followed the trial court's admonition not to concern themselves with the consequences of not being able to come to a verdict. After about four days of penalty deliberation with no verdict, defense counsel requested that the trial court give an additional clarifying instruction informing the jury that it should ignore the prosecution's remarks about not coming to a verdict. RT 4964. Trial counsel was concerned that although the court told the jury to ignore the prosecution's remark about the mistrial, it had not in fact done so. Citing the fact that the jury had deliberated for so long without unanimity, trial counsel asked for an instruction informing the jury that, if they were unable to reach a verdict, then only the penalty phase would be retried:

> Your honor, when Mr. Arnold gave his argument, if you will recall that he made a comment to the jury. It is on page 4861 of the transcript:
>
> "You will deliberate, and your decision must be unanimous. If you are not unanimous, it is a hung jury. A mistrial will be declared on the penalty portion, and the entire thing has to be done all over again."
>
> The court then admonished the jury to disregard the comment. The concern is whether or not the jury understands -- even though the court has admonished them, we just want to ensure they understand that it is not the whole trial that has to be redone, just the penalty phase.

RT 4263-64. Stating that he thought that his previous admonition was sufficient, and that he thought the jury was just being "systematic," the trial court refused the defense request for an instruction. RT 4965. The jury

continued to deliberate an additional six days before returning a death verdict. *See* Statement of Case, *supra*.

C. Given the Prosecution's Improper Remark, the Judge's Failure to Admonish the Jury Was Reversible Error

The prosecution's remark in his arguments to the jury that if it failed to reach a verdict the "whole thing" would have to be retried was clearly improper.[75] The remark to the jury that if it failed to reach a verdict and the "whole thing" would have to be tried again was a misstatement of the law because it suggested to the jury that if it did come to a unanimous penalty agreement that appellant's guilt would have to be retried and as a result he could be set free. *See Coleman*, 210 F.3d at, 1050-51 (error to suggest to jury that the only way it could be assured the defendant would not be released would be to sentence him to death); *Hamilton v. Vasquez*, 17 F.3d 1149, 1161-62 (9th Cir. 1994) (same).

Although at the time of the remark, the trial court correctly admonished the jury to ignore what the prosecution said (*see People v. Kimble*, 44 Cal.3d 480, 511-16 (1988)) the trial court's instruction was not sufficient to assure that the jury in fact deliberated with the understanding that any possibility it would hang was irrelevant to the "deliberation of any issue before it." *People v. Rich*, 45 Cal.3d 1036, 1115 (1988), *citing Kimble*, 44 Cal.3d at 511-16. In the context of the other improper arguments the prosecution made connecting the notion of a "unanimous

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[75]Appellant does not here claim that appellant's conviction and sentence must be reversed because of the prosecution's misconduct in making the remarks discussed in this argument. Appellant's trial counsel failed to object to the remarks and failed to ask for an admonition. *People v. Green*, 27 Cal.3d 1, 35 n.19 (1980).

jury" with "justice," and "finality" for the victims and their families, the trial court's admonition was inadequate. These improper remarks connecting unanimity with justice for the suffering of the family and friends of the victims, made it likely that the jury did not attend to the court's instruction that it should not consider the consequences of a hung jury. Thus, there is a significant probability that the jury sentenced appellant to die, when it otherwise would not have, simply because it feared that appellant might go free because the guilt phase would have to be tried if they failed to agree.

The prosecution connected the notions of "justice for the victims" with a "unanimous jury" from the very beginning. In its opening remarks in guilt phase, the prosecution stated that the idea of a jury trial was for "justice to be served," which, according to the prosecution, could only happen if there were to be a verdict. A hung jury, according to the prosecution, was a mistrial and "a waste of time." He asked the jury to strive for a verdict. RT 4059. The prosecution's argument was improper. A hung jury is not necessarily a "waste of time," and "justice" does not in fact require a unanimous verdict. A jury is by no means required to reach a verdict. The jury's responsibility in appellant's case was to come to a verdict only if it was able to. *See People v. Harris*, 28 Cal.3d 935, 964 n. 10 (1981) (approving an instruction telling the jury to consider the evidence and come to a verdict if able to do so). If the jury conscientiously weighs the evidence and is unable to come to a verdict, that is justice, irrespective of whether a mistrial has to be declared.

Nevertheless, the prosecutor continued to emphasize the importance of a unanimous verdict. For example, later in its argument, the prosecution complimented the jury on its courage to sit on appellant's case, and

connected such courage with the courage to return a verdict. The prosecutor stated: "It takes courage to be a juror, especially in a case like this. And I asked you at the beginning that justice can only be served with a verdict." RT 4140. The prosecution reiterated and elaborated on the notion that justice required a unanimous jury in its opening statement in the penalty phase of appellant's trial. It did so by explicitly connecting the jury's unanimous verdict with the needs of the victims. More specifically, the prosecutor told the jury that the people affected by the crime, that is, the Compton Police Department and the parents of the victims, needed a unanimous jury because they needed finality and closure: "[W]e can't have justice unless there is a unanimous verdict, but perhaps as important the Compton Police Department, *they need finality. They need closure. The parents of the two dead officers need finality and they need closure, and that cannot occur unless there is some verdict.* RT 4451-52 (emphasis added).

Justice is in no way connected to the "needs" of the victims for "finality," or their needs for anything else for that matter; nevertheless, the prosecution returned to this equation of "justice for the victims" with "unanimity" again in its final remarks to the jury. It was then that the prosecution made the misleading remark that the jury must be unanimous because if it was not then "the entire thing" would have to be tried again. Even after the trial court told the jury to ignore that remark, the prosecution continued with the theme that "justice," and particularly justice "for the victims," required "unanimity." The prosecution, therefore, implored the jury to come to a verdict for the sake of justice and for the sake of the victims: "I encourage you to be unanimous and come to a verdict so justice

can be done. The family and the Compton Police Department can have finality." RT 4862.

Given the prosecution's improper suggestions that justice required unanimity and, more importantly, its equation of unanimity with finality and justice for the victims' families and friends, the trial court clearly had an obligation to clarify for the jury that it should not be concerned in any manner about the consequences of a hung jury. The trial judge is "a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts ...." *People v. Carlucci*, 23 Cal.3d 249, 256 (1979). "The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice." *People v. Ponce*, 44 Cal.App.4th 1380, 1387 (1996) (internal citations and quotation marks omitted). Even without a request, the trial judge has ". . . the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." *Id.* at 1387. This includes the obligation to properly instruct the jury when the prosecution has misled and misinformed the jury with its remarks. *See United States v. Brown*, 327 F3d 867, 872-73 (9th Cir. 2003) (reversible error to not admonish the jurors to disregard the prosecutor's misleading propensity arguments). In the context of this case, given the prosecution's "retry the entire thing" remark, the trial court had an obligation to ensure that the jury affirmatively knew that should it be unable to come to unanimous decision about appellant's sentence, only the penalty phase would be retried. Since the jury had been told that by finding appellant guilty, it had done "justice" for the victims' families, it would be much more likely to sentence appellant

to death, irrespective of what it thought about the evidence, simply because it did not want to see its guilty verdicts undone.

As noted, the jury clearly did not have an obligation to return a verdict; it only had an obligation to return a verdict if upon weighing the evidence it was *able* to unanimously agree to a verdict. However, the jurors in appellant's case did not know this because they had been told by the prosecution that justice, and in particular justice for the victims, required unanimity. After four days of deliberation, it was readily apparent that the jury was struggling with a unanimous verdict, and that it indeed might find it impossible for all twelve members to agree on a verdict. Once it became apparent that the jury was struggling with coming to a verdict, and might be unable to unanimously agree that appellant should live or die, the trial court had an obligation to assure the jury that even if it was unable to come to a verdict, there was no danger that its previous guilt verdict would be undone. In the absence of such a corrective instruction, there was substantial danger that the jury, afraid that the guilt verdict would be undone, would come to a unanimous verdict when it otherwise would not.

Even if the trial judge did not have an affirmative *sua sponte* duty to correct the false implications of the prosecution's misstatements, surely he had a duty to so instruct the jury once he had been requested to do so by trial counsel. As this Court stated in *People v. Bolton*, 23 Cal.3d 208, 215-16 n.5 (1979) ". . . when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." Here, because there was the danger that the jury would sentence appellant to death simply because it believed that if it did

not appellant might go free, the trial court had an obligation to give the requested instruction.

The error in failing to give the instruction was reversible. Because the trial court's refusal to give the instruction violated appellant's federal constitutional rights, reversal is required unless the prosecution can establish beyond a reasonable doubt that the error was harmless. *Chapman,* 386 U.S. at 24. Further, as pointed out above, the state law "miscarriage of justice" standard for errors affecting the penalty phase of a capital trial is effectively the same as the federal test for reversible error under *Chapman. People v. Ashmus*, 54 Cal.3d 932, 965 (1991). In any case, the trial court's failure to give the instruction as requested requires reversal of the death sentence. In this case, the jury was closely divided on the issue of the death sentence as is shown by the fact that it took the jury ten days to complete deliberations. *See* Statement of case, *supra.* Moreover, as noted above, the prosecution improperly emphasized that the victims in this case needed unanimity for "justice" to be done. This argument left the jury with the impression that it must come to a unanimous verdict whether or not the evidence persuaded it that appellant deserved to die. The prosecution's remark suggesting that if the jury did not come to an unanimous verdict, there was a chance that the appellant would go free reenforced the jury's impression that it must come to a unanimous verdict irrespective of the evidence. As such, the prosecution cannot show that the failure to correct the prosecution's improper remark was harmless beyond a reasonable doubt and appellant's death sentence must be reversed.

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XXXII

INSTRUCTING THE JURY PURSUANT TO CALJIC 8.85 WITHOUT MODIFICATION VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. Without Appellant's Proposed Modifications, CALJIC 8.85 Was Constitutionally Flawed

At the conclusion of the penalty phase, the trial court instructed the jury pursuant to CALJIC 8.85. CT 1125-26; RT 4935-37. The defense proposed a number of modifications to be read in conjunction with this instruction, all of which were rejected by the trial court. As discussed below, this instruction is constitutionally flawed without the proposed defense modifications. This Court has previously rejected the basic contentions raised in this argument (*see, e.g., People v. Farnam*, 28 Cal.4th 107, 191-92 (2002)), but has not adequately addressed the underlying reasoning presented by appellant. This Court should reconsider its previous rulings in light of the arguments made herein.

B. The Trial Court's Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable and Evenhanded Administration of Capital Punishment

The defense proposed that the trial court instruct the jury that some of the mitigating factors he offered, in particular the evidence relating to appellant's background, were relevant solely as mitigating factors. CT 952 (Defendant's Requested Instruction No. 24) ("The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence."). This instruction was refused by the trial court.

CT 952. The defense also proposed a general instruction informing the jury which of the statutory factors could be mitigating or aggravating CT 929-30 (Defendant's Requested Instruction No. 4).[76] Counsel also proposed an instruction which told the jury that aggravating factors could also be mitigating. CT 933 (Defendant's Requested Instruction No. 5)[77]. The

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[76]Defendant's Requested Instruction No. 4 reads as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. . . You shall weigh, consider, take into account and be guided by the following aggravating or mitigating factors, if applicable:
>
> (a) As either an aggravating or mitigating factor: The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) As either an aggravating or mitigating factor: The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) As either an aggravating or mitigating factor: The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

CT 929-30.

[77]Defendant's Requested Instruction No. 5 reads as follows:

> The factors which I have just listed are the only factors that can be considered by you as aggravating factors.
>
> However, you may find one or more of these factors to be mitigating factors. You are not required to find that any of these factors are aggravating. It is up to you to determine whether they are mitigating or aggravating.
>
> The absence of a mitigating factor is not, and cannot be considered by you as, an aggravating factor.

(continued...)

defense also proposed an instruction telling the jury that the absence of a statutory mitigating factor is not an aggravating factor. CT 943 (Defendant's Requested Instruction No. 15).[78] The defense proposed several instructions pointing out to the jury that no additional factors, other than those with which the jury had been instructed, could be used as aggravation, or for deciding that death was the appropriate punishment. CT 944 (Defendant's Requested Instruction No. 16).[79] The defense also proposed that the jury be instructed that the absence of statutory aggravation could be used as mitigation. CT 945 (Defendant's Requested Instruction

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[77](...continued)
CT 933.

[78]Defendant's Requested Instruction No. 15 reads: "Only those factors which are applicable on the evidence adduced at trial are to be taken into account in the penalty determination. All factors may not be relevant and a factor which is not relevant to the evidence in a particular case should be disregarded. The absence of a statutory mitigating factor does not constitute an aggravating factor." CT 943.

[79]Defendant's Requested Instruction No. 16 reads: "The factors in the above list which you determine to be aggravating circumstances are the only ones the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case." CT 944.

No. 17)[80]; CT 946 (Defendant's Requested Instruction No. 18)[81]. These instructions were also refused by the trial court. CT 929, 933. 943-46.

Without the proposed modifications, the penalty phase instructions failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. This Court has concluded that each of the factors introduced by a prefatory "whether or not"–factors (d), (e), (f), (g), (h), and (j)–are relevant solely as possible mitigators. *See People v. Hamilton*, 48 Cal.3d 1142, 1184 (1988); *People v. Edelbacher*, 47 Cal.3d 983, 1034 (1989); *People v. Lucero*, 44 Cal.3d 1006, 1031 n.15 (1988); *People v. Melton,* 44 Cal.3d 713, 769-70 (1988); *People v. Davenport*, 41 Cal.3d 247, 288-89 (1985). The jury, however, was left free to conclude that a negative answer regarding the existence of any of these "whether or not" sentencing factors could actually be considered an aggravating circumstance.

This Court has recognized that "the absence of mitigation would not automatically render the crime more offensive than any other murder of the same general character." *Davenport*, 41 Cal.3d at 289. Thus, transforming the absence of mitigating factors into aggravating factors is improper and yields irrational results. Appellant acknowledges that the trial court did not specifically instruct the jury, and the prosecution did not specifically argue,

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[80]Defendant's Requested Instruction No. 17 reads: "The absence of any significant violent criminal activity by the defendant other than the crimes for which he has been tried in the present proceeding is a mitigating factor." CT 945.

[81]Defendant's Requested Instruction No. 18 reads: "The absence of any violent felony convictions prior to the crimes for which the defendant has been tried in the present proceedings is a mitigating factor." CT 946.

that the absence of mitigating factors constituted aggravating factors. By the same token, the trial court did not instruct the jury that a finding that factors (d), (e), (f), (g), (h), and (j), did not exist could not be considered to be on the aggravation side of the scale. *See* Cal. Pen. Code § 190.3(a)-(j). Simply instructing the jury pursuant to CALJIC 8.85, which does not inform the jury that the nonexistence of a mitigating factor cannot be used as an aggravating factor, precludes the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. *See Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

By instructing the jury with the unmodified version of CALJIC 8.85, the court ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, non-existent factors. It would be doing so in the belief that the trial court had identified them as potential aggravating factors supporting a death sentence. The fact that the jury may have considered the absence of mitigating factors to be aggravating factors infringed the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

The impact on the sentencing calculus of a defendant's failure to present mitigating evidence relating to factors (d), (e), (f), (g), (h), or (j) invariably differs from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC 8.85. *See* Cal. Pen. Code § 190.3(a)-(j). In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if

evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is not presented, the factor drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of CALJIC 8.85 as giving aggravating relevance to a "not" answer and accordingly treat each failure to present evidence of an enumerated mitigating factor as establishing an aggravating factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances (and different aggravation) because of differing constructions of CALJIC 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California*, 512 U.S. 967, 973 (1994), *quoting Gregg v. Georgia*, 428 U. S. 135, 189 (1976) (opn. of Stewart, Powell and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Accordingly, the trial court, by reciting the standard CALJIC 8.85 without additionally instructing the jury as proposed by the defense that the exclusively mitigating factors could not be used as aggravating factors, violated appellant's Eighth and Fourteenth Amendment rights.

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C. The Trial Court's Failure to Delete Inapplicable Statutory Mitigating Factors Precluded a Fair and Reliable Capital-Sentencing Determination

1. The Trial Court Should Have Deleted the Factors Enumerated in Penal Code Section 190.3, Subdivisions (e), (f) and (j) from CALJIC 8.85 Before Instructing the Jury

CALJIC 8.85 is typical of a pattern jury instruction in that it is designed to cover all of the statutory factors set forth in Penal Code section 190.3 that may apply to any given capital case. Although the defense requested an instruction in which the jury was instructed only with the statutory mitigating factors included, the trial court refused this instruction. CT 931-32 (Defendant's Requested Instruction 4A).[82] Instead, the trial

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[82]Defense Requested Instruction 4A reads as follows:

In determining which penalty is to be imposed on the defendant, you shall consider all of which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) The effect of the defendant's upbringing, childhood and family life.

(e) The effect of parental narcotic addiction.

(f) The effect of having no biological father ever

(continued...)

court instructed the jury pursuant to CALJIC 8.85 without deleting from its terms the statutory mitigating factors for which there was no supporting evidence. *See* CT 1126; RT 4935-37. The failure to delete the inapplicable mitigating factors rendered the instruction constitutionally deficient.

The instruction itself tells the jury that it should "consider, take into account and be guided by the following factors, if applicable[] . . ." CT 2120. There is no issue that three of the listed factors–(e), (f), and (j)–were not applicable to the instant case. However, by not deleting these factors from the jury instruction, the court made circumstances for which there was no evidentiary support a part of the weighing process undertaken by the jury in determining whether appellant lived or died. Further, since there was no evidentiary support for these factors, they would naturally have been weighed against appellant. The result of the failure to delete these factors from the instruction rendered factors that would have been considered mitigating if there had been supporting evidence, e.g., the victim consented to the homicidal act, aggravating by virtue of the fact that they were absent from the case. This is the natural interpretation a jury would draw when a prosecutor takes the time to point out that there is no evidence supporting a

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[82](...continued)
present in the home.

(g) The relationship between the defendant and his mother, siblings, children, wife, relatives and significant others.

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

CT 931-32.

factor; such an argument makes what is in essence a non-factor with which the jury should not be concerned a factor in aggravation because of the lack of evidence to support it. This type of argument essentially tells the jury that the legislature considered factors such as these to be mitigating, but "see, they don't exist here and this defendant has fewer mitigating circumstances than other defendants that the legislature thought about when passing this statute." This distorts the legislative intent in passing Penal Code section 190.3 and renders the jury's death sentence unconstitutionally unreliable. Cal. Pen. Code § 190.3.

The shift in focus that occurred by leaving inapplicable factors in the jury instruction also diminished the impact on the weighing process of the mitigating evidence that was presented by appellant. By being permitted to shift the focus to the potential mitigating evidence that was not presented, the prosecution was able to dilute the mitigating evidence that appellant did present. The dilution of appellant's mitigating evidence precluded full consideration of that mitigating evidence. Thus, the trial court's failure to tailor CALJIC 8.85 to this case by deleting the inapplicable sentencing factors created a barrier to full consideration of appellant's mitigating evidence and deprived appellant of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

2. Use of the Phrase "if Applicable" in CALJIC 8.85 Does Not Cure the Constitutional Defect

Appellant is mindful that CALJIC 8.85 directs the jury to consider the enumerated factors only "if applicable." On its face, this could be read to lead the jury to a deliberative process in which the jurors consider a

factor, decide it is not applicable, and then discard it from the weighing process entirely. While appellant continues to maintain that the more likely scenario is the one he discusses in "C.1," *supra*, he acknowledges that there is some support for an argument that the phrase "if applicable" saves the constitutionality of the instruction.

Ultimately, the reason that the phrase "if applicable" does not save the instruction from being unconstitutional is that the instruction was not given in isolation, but was given in conjunction with CALJIC 8.88. CT 1136-37; RT 4942-43. Thus, one must consider both of these instructions together to understand how a jury would interpret the phrase "if applicable" in CALJIC 8.85. When one does that, the meaning of the "if applicable" phrase in CALJIC 8.85 becomes confusing at best, and the construction that upholds its constitutionality becomes less likely.

There are two places in CALJIC 8.88 that relate back to the "if applicable" phrase in CALJIC 8.85. The first instance occurs in the second paragraph of the instruction, which directs the jury to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." CALJIC 8.88. The "applicable factors" upon which the jury has been instructed are all of the factors in Penal Code section 190.3, even though some of them may be inapplicable to the case at bar. One could argue that the phrase "applicable factors" could be taken to mean the factors the jury has found applicable, but that would be an incorrect reading of the phrase. If that is what the instruction was meant to say, it would direct the jury to be guided by the factors the jurors determined to be applicable to the case; a fairly simple direction to provide to the jury. The fact is that the phrase, in a common-sense reading, tells the jury to consider to be applicable all of the circumstances upon which the

jury has been instructed, *i.e.*, all of the circumstances contained in Penal Code section 190.3.

The second phrase of import for purposes of this contention is a phrase contained in the fourth paragraph of CALJIC 8.88. In that paragraph, the jury is instructed that it should "assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." This instruction certainly refers directly back to CALJIC 8.85 since that is the instruction that tells the jury the factors to be considered in determining the appropriate sentence. There can be no saving construction placed on this directive when it is considered in conjunction with CALJIC 8.85. This instruction gives the jury free reign to place what is in essence a negative moral value on the fact that some mitigating circumstances do not exist.

In short, the phrase "if applicable," does not save the failure to delete inapplicable mitigating circumstances from CALJIC 8.85 before giving that instruction to a jury. In this case, since that failure had a negative impact on appellant's penalty phase determination, the death sentence must be reversed.

D. The Trial Court's Failure to Instruct the Jury That It Could Not Consider Aggravating Factors Not Enumerated in the Statute Further Violated Appellant's Right to a Fair and Reliable Capital-Sentencing Determination

The death penalty scheme under which appellant was prosecuted contemplated that the jury would only consider the factors set forth in Penal Code section 190.3 when determining whether appellant was to live or die. This Court recognized this principle when it noted that the purpose of passing Penal Code section 190.3 was to restrict the sentencer to making its decision based solely upon consideration of those factors. See *People v.*

Boyd, 38 Cal.3d 762, 772-76 (1985). The instructions, however, did not specifically tell the jury that they should only consider as aggravating factors those circumstances enumerated in Penal Code section 190.3. CT 2120-22; RT 8129-31. Although appellant proposed that the instruction be modified with the addition of language informing the jury that the listed factors were "the only aggravating factors that can be considered" (CT 933 (Defendant's Proposed Instruction No. 5)), the Court refused the instruction. CT 933. Without appellant's proposed modification, the instructions allowed the jury to consider evidence for any aggravating purpose it wanted, whether enumerated in the statute or not.

The introductory paragraph of CALJIC 8.85 given at appellant's trial stated: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable." CT 1126; RT 4935-37. Accordingly, the trial court instructed the jury to consider all the evidence and merely be guided by the statutory aggravating and mitigating factors. The trial court gave the jury no indication that the list of statutory factors was exhaustive and that the jury was to consider the evidence only if it could be channeled into one of the statutory factors. To the contrary, the instruction left the door open for the jury to consider the evidence for any purpose, whether it could be channeled into the statutory aggravating factors or not.

The use of evidence by the jury to assess a death sentence based on unspecified factors is the type of evil the this Court in *Boyd* cautioned trial courts to avoid. The trial court here did not avoid this error, consequently the jury instruction given pursuant to CALJIC 8.85 failed to channel and

guide the jury's discretion and permitted the arbitrary and capricious imposition of the death penalty, in violation of the Eighth and Fourteenth Amendments. *See Harris v. Alabama*, 513 U.S. 504, 511 (1995).

E. Factor (I) is Vague

In *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (plur. opn.) the United States Supreme Court recognized the importance of treating defendant's youth as a mitigating factor. Yet this Court treats age as both an aggravator and a mitigator, so that the jury is permitted to use youth as a reason to impose the death penalty.

If this Court continues to treat age as both a mitigator and an aggravator, then the age factor is unconstitutionally vague and over-broad because it has become an "all purpose sentencing aggravator." According to this Court, the age sentencing factor is "a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." *People v. Lucky*, 45 Cal.3d 259, 302 (1988). The "metonym" definition of the age factor has since been used to approve a variety of different applications of "age-related" considerations. *People v. Babbitt*, 45 Cal.3d 660, 716 (1988) (prosecutor argued that a 31-year-old defendant should have known better and was mature); *People v. Belmontes*, 45 Cal.3d 744, 805-06 (1988) (prosecutor argued that the defendant's age, 19, "goes both ways" and is not necessarily mitigating since the young are usually "idealistic" and "altruistic" whereas the old have a "hardening"); *People v. McLain*, 46 Cal.3d 97, 111 (1988) (prosecutor argued defendant, in his forties, had failed to take advantage of various opportunities and shown a disinclination to reform); *People v. Brown*, 46 Cal.3d 432, 456-57 (1988) (prosecutor

argued age, 34, "old enough to know better"); *People v. Bonin*, 46 Cal.3d 659, 705 (1988) (prosecutor argued defendant, 32, "had all the chances he could have" and that the age factor was aggravating); *People v. Adcox*, 47 Cal.3d 207, 271 (1988) (prosecutor invited the jury to consider defendant's age, 20, as either aggravation or mitigation); *People v. Hernandez*, 47 Cal.3d 315, 361 (1988) (prosecutor argued that whether defendant's age, 18, was aggravating or mitigating depended on a philosophical, religious view); *People v. Burton*, 48 Cal.3d 843, 865 (1989) (prosecutor argued that defendant's age, 19, was not necessarily mitigating since he was "going on 30 or 40 in terms of his experience on the side of criminal activity."). These cases demonstrate the problematic nature of the age factor in California sentencing. Seemingly, it can be manipulated into an aggravating factor in any case, as prosecutors have argued, that, if the defendant was older at the time of the crime, that fact alone is aggravating, and yet, in cases where the defendant was only 18 or 19, argued that youth was not mitigating for a variety of creative reasons.

Consequently, appellant urges this Court to reconsider the *Lucky* definition of the age factor as an invitation to consider "any age-related matter suggested by the evidence, common experience, or morality." *Lucky*, 45 Cal.3d at 302. Such a definition does nothing to supply guidance for the jury, the trial judge or the parties, invites capriciousness and arbitrariness, and renders this factor unconstitutionally vague. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). This Court's holding to the contrary should be reconsidered. *See People v. Edwards*, 54 Cal.3d 787, 844 (1991).

F. Conclusion

The instructions embodied by CALJIC 8.85 are constitutionally flawed. The instruction's failure to inform the jurors that they could not

consider the absence of mitigating evidence to be an aggravating factor and that they could not consider non-statutory aggravating factors rendered the decision-making process unreliable. U.S. Const. amends. VIII & XIV. In addition, the inclusion of the terms "extreme" and "substantial" in factors (d) and (g) improperly limited the jury's consideration of mitigating evidence. *See* Cal. Pen. Code § 190.3(d) & (g). Because CALJIC 8.85 fails to comply with constitutional requirements, appellant's death sentence should be reversed.

* * * * *

XXXIII

READING CALJIC 8.87 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. Introduction

The jury in this case was instructed with CALJIC 8.87:

> Evidence has been introduced for the purpose of showing that the defendant REGIS DEON THOMAS has committed the following *criminal act*: battery on a peace officer which involved the *express or implied use of force or violence*. Before a juror may consider any of such *criminal act* as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant REGIS DEON THOMAS did in fact commit such criminal act. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that *such criminal activity occurred*, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

CT 1128; RT 4938-39 (emphasis added).

This instruction improperly decided against appellant the issue of whether or not his actions constituted a crime of violence within Penal Code section 190.3, factor (b), and deprived him of a jury determination of whether or not this evidence was properly to be considered as aggravation. Cal. Pen. Code 190.3(b). The law is clear that before prosecution evidence may be considered in aggravation under factor (b), the jurors must find beyond a reasonable doubt that the defendant's conduct constituted commission of an actual crime. *People v. Phillips*, 41 Cal.3d 29, 65-72 (1985); *People v. Robertson,* 33 Cal.3d 21, 53-55 (1982). Thus, the jury must find not only that the defendant committed a particular act and that it involved the express or implied threat to use force or violence (Cal. Pen.

Code § 190.3(b)), but also that the conduct "*violate[d] a penal statute.*" *People v. Wright*, 52 Cal.3d 367, 425 (1990) (emphasis in original). Moreover, the trial court impermissibly increased the weight of the evidence by escalating the defined level of force from an "implied threat" to an "actual threat" or "implied use of force or violence." The instruction also skewed the jury's deliberations improperly in favor of the prosecution. For all these reasons, the instruction violated appellant's right to due process of law (U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17) and compromised the reliability of the penalty verdict in violation of Eighth Amendment and due process standards. U.S. Const. amends. VIII & XIV. As such, appellant's sentence must be reversed.

B. The Instruction Created Mandatory Presumptions

The prosecution must prove beyond a reasonable doubt criminal activity offered as aggravation under Penal Code section 190.3, factor (b). *People v. Brown*, 31 Cal.4th 518, 570-71 (2004). By thrice using the term "such criminal acts" (or "activity"), the instruction plainly implied that the enumerated acts were in fact crimes and that the jurors did not have to decide that question. This implication was especially strong because the immediately-preceding special instruction regarding factor (c) evidence by stark contrast used the language "alleged crimes" (RT 4935-36; CT 1125-26) – even though factor (c) applies to actual convictions.[83]

The *only* question the jurors were told to decide, beyond a reasonable doubt, was whether "the defendant, Regis Deon Thomas, did in fact *commit* such criminal acts." *See* CT 1128. Thus, the second sentence of the instruction focused the jurors on deciding whether appellant had

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[83]After appellant's trial, CALJIC 8.87 was revised to entirely eliminate use of the word "such" as a modifier to "criminal acts" or "criminal activity." *See* CALJIC 8.87 (6th ed. 1996).

"committed" the acts in question without also requiring that they find beyond a reasonable doubt that those acts were in fact criminal ones. Rather, once the jury found that appellant had committed those acts, they were to presume that they were "criminal acts" or "criminal activity" and apply the aggravating factor against appellant. *See Francis*, 471 U.S. at 314 ("A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts."); *see also People v. Figueroa*, 41 Cal.3d 714, 734 (1986) (instruction that promissory notes were "securities" under the relevant law was tantamount to a directed verdict on that offense); *People v. Vanegas*, 115 Cal.App.4th 592, 598-602 (2004) (instruction requiring the jury to find "dangerousness to human life" upon proof of violation of basic speed law is unconstitutional). This "foreclosed independent jury consideration" of all of the required elements of the aggravating factor. *Carella*, 491 U.S. at 266. "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of doing so by eliminating other relevant considerations if the jury finds one fact to be true.'" *Figueroa*, 41 Cal.3d at 724, *quoting United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969). That was the precise situation here.

Moreover, before the evidence can be considered in aggravation, under the plain language of factor (b), the jury must also find that the acts involved force or violence. This is a question of fact rather than law: "[W]hether a particular instance of criminal activity 'involved ... the express or implied threat to use force or violence' (Cal. Pen. Code § 190.3(b)) can only be determined by looking to the facts of the particular case." *People v. Mason*, 52 Cal.3d 909, 955 (1991). Accordingly, the jury must determine both that a particular act occurred and whether the act involved the requisite

force or violence. *See Figueroa*, 41 Cal.3d at 734 (factual determinations are for the jury to decide).

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. *Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993). Here, however, in violation of that right the instruction created a mandatory presumption that the evidence constituted an actual threat or implied use of force or violence. The second sentence of CALJIC 8.87 focused the jury on deciding whether appellant had committed criminal acts without requiring that it also find beyond a reasonable doubt that the criminal acts involved the use, or the threat, of force or violence. Rather, once the jurors found the underlying facts to be true, they were to presume that it constituted an implied use or actual threat of force or violence and apply the aggravating factor against appellant. This is an unconstitutional mandatory presumption. *See Francis*, 471 U.S. at 314; *Figueroa*, 41 Cal.3d at 724. This foreclosed any independent consideration of the required elements of the aggravating factor. *Carella*, 492 U.S. at 266.

Insofar as the instruction informed the jury that it should assume that the act involved a threat or implied use of force, the instruction precluded any defense on that grounds. This is not an insignificant defense. There have been instances where this Court has sometimes found actions not admissible under section 190.3(b) as not involving a threat or implied use of violence. *See People v. Boyd*, 38 Cal. 3d 762, 776 (1985) (non-violent escape attempts are not admissible under section 190.3, factor (b)). Yet here, the instruction directed the jury to infer the implied use or the threat of force or violence once the criminal activity was proved. Accordingly, the instruction improperly removed the factual issue of appellant's actual or

implied threat of force from the jury's consideration in violation of appellant's statutory and due process rights. *See Figueroa,* 41 Cal.3d at 725-26; *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979).

C. The Instruction Improperly Escalated the Seriousness of the Incident by Defining the Incident as an Actual, Express Threat or Implied Use of Force or Violence

In addition to creating an unconstitutional mandatory presumption, CALJIC 8.87 erroneously told the jury that the evidence was an actual threat or an implied use of force or violence, which goes far beyond anything that this Court has sanctioned. *See* the italicized language in the instruction quoted, *supra*. The instruction mistakenly defined the criminal acts as involving the "implied use" of force or violence, rather than the "implied threat" of such use. *See* Cal. Pen. Code § 190.3(b); *People v. Tuilaepa*, 4 Cal.4th 569, 589 (1992). By failing to inform the jury about implied threats, the instruction improperly escalated the level of force or violence attached to the evidence of criminal activity presented by the prosecution.

There is an enormous difference between an express or implied threat. An actual threat "must express an intention of being carried out." *People v. Bolin*, 18 Cal.4th 297, 339 (1998). An implied threat is far less immediate. An implied threat is less dangerousness than an express threat. Moreover, an implied threat of force or violence is less aggravating than the use of force or violence. A person may retreat or decide not to follow through on a threat; threats do not necessarily lead to violence.

The jury here was not given the option, provided in section 190.3, subdivision (b), of considering appellant's conduct as simply carrying an implied threat of the use of force or violence. Cal. Pen. Code § 190.3(b). Instead, the trial court's instruction required the jury to consider the alleged criminal acts to be actual threats, or implied use, of force or violence,

making them more serious than the evidence warranted. For example, in this case, the evidence showed that appellant ran away from and struggled with some officers who sought to detain him (RT 4472, 4485-88), but that there was no use of a gun, although appellant had apparently been in possession of one. RT 4482-84, 4489-90. The improper instruction meant that the jury *had* to consider the action as involving the used of force, rather than what it was, *i.e.*, an incident involving both the use of force and an implied use of force. This was important in appellant's case since it was the fact that appellant did not use a gun, even though he had, one that could have made the incident less aggravating in this case -- yet, because of the instruction the jury was not permitted to consider this. Because the instruction misinformed the jury on the statutory requirements of section 190.3, subdivision (b), to appellant's detriment, it violated his rights under state law, and violated his due process right to be sentenced under California's statutory guidelines. *Hicks*, 447 U.S. at 346.

D. The Instruction is Unconstitutional Because Skews the Verdict in Favor of the Prosecution

Appellant argues below that California's death penalty statute is unconstitutional because it failed to require the jury to unanimously find the aggravating factors, including evidence admitted under factor (b). *See* Argument XXXV, *infra*. However, assuming for the sake of argument that the jury was not required to agree unanimously on whether appellant had committed the unadjudicated crime charged, CALJIC 8.87 nonetheless violates appellant's constitutional rights. Paragraph 3 of CALJIC 8.87 specifically tells the jury that it is "not necessary for all jurors to agree" as to other unadjudicated crimes. *See* CALJIC 8.87, *quoted supra*. This clause states the law as interpreted by the California Supreme Court. *People v. Caro*, 46 Cal.3d 1035, 1057 (1988). The situation vis a vis

unanimity is similar with mitigation in that this Court has held in *People v. Breaux*, 1 Cal.4th 281, 314 (1991), that there is no requirement that the jury be unanimous on factors in mitigation. However, *Breaux* precludes the defendant from obtaining a specific non-unanimity instruction as to mitigation. *Id.* at 314. Indeed appellant requested an instruction that the jury did not need to be unanimous on which facts were mitigating. CT 953 (Defendant's Requested Instruction No. 25). This instruction was refused. CT 953. Appellant has elsewhere argued that failure to give this instruction was reversible error. *See* Argument XXXIV, *infra*. However, assuming that appellant was not entitled to such an instruction, given that the defense may not have an instruction that the jury does not have to be unanimous on factors in mitigation, the prosecution should not be permitted to obtain such an instruction in the specific context of other crimes aggravation. As this Court has elsewhere held: "There should be absolute impartiality as between the People and the defendant in the matter of instructions. . . ." *People v. Moore*, 43 Cal.2d 517, 526-27 (1954); *accord Reagan v. United States*, 157 U.S. 301, 310 (1895) ("The court should be impartial between the government and the defendant.").

A lack of parity between the defense and the prosecution skews the proceeding toward death, thus promoting random and arbitrary imposition of death in violation of the federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. U.S. Const. amends. VIII & XIV; *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (possibility of random implementation of the death penalty offends constitution); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (capital sentencing statute must protect against random or arbitrary imposition of the death penalty). As such, the instruction violates appellant's due process rights.

E. The Error Requires Reversal of the Death Judgment

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required without a showing of harm. *See Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing). Similarly, this Court has determined that any substantial error in the penalty phase of a capital trial must be deemed prejudicial. *Robertson*, 33 Cal.3d at 54. Even if the error is not reversible per se because the error here violated Due Process and Eighth Amendment standards, it requires reversal unless it can be shown to be harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Because the prosecution cannot show that the error was harmless beyond a reasonable doubt, the judgment of death must be reversed.

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XXXIV

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC 8.88 WITHOUT PROPOSED DEFENSE MODIFICATIONS VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. Appellant asked to Modify CALJIC 8.88

At the penalty-phase jury charge, the trial court instructed the jury CALJIC 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a

> judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

CT 1136-37; RT 4942-43.

The defense proposed numerous modifications to this instruction, all of which were rejected by the trial court. Without the proposed modifications, this instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the California Constitution. U.S. Const. amends. V, VI, VIII & XIV; Cal. Const. art. 1, §§ 1, 7, 15, 16 & 17. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances.

The trial court's refusal to give appellant's requested instructions also violated his right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, 410 U.S. 284 (1973)), his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, 447 U.S. 625, 638 (1980)), and the requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Estelle v. Williams,* 425 U.S. 501, 503 (1976). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S.

Const. amends. V & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky*, 450 U.S. 288, 302 (1981); *Duncan v. Louisiana*, 391 U.S. 145 (1968)); and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const. amend. XIV; *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991)).

Appellant recognizes that similar arguments have been rejected by this Court in the past. *See, e.g., People v. Berryman*, 6 Cal.4th 1048, 1099-100 (1993); *People v. Duncan*, 53 Cal.3d 955, 978 (1991); *People v. McPeters*, 2 Cal.4th 1148, 1193-94 (1992). However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

B. In Failing to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC 8.88 Improperly Reduced the Prosecution's Burden of Proof

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." Cal. Pen. Code §190.3.[84] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. *See Boyde v. California*, 494 U.S. 370, 377

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[84]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. *See People v. Brown*, 40 Cal.3d 512, 544 n.17 (1985).

(1990). The defense proposed an instruction which would emphasize the requirement of section 190.3:

> In determining whether or not the aggravating circumstances are so substantial in comparison to the mitigating circumstances, you must not simply count up the number of circumstances and decide whether there are more than one than the other. The existence of a single mitigating circumstance could be found by you to outweigh any number of aggravating circumstances. If you find that the existence of a mitigating circumstance alone outweighs any number of aggravating circumstances, you *shall* return a verdict of confinement in the state prison for life without the possibility of parole.

CT 938 (Defendant's Requested Instruction No. 31) (emphasis added).

The instruction, which emphasizes that the sentence of life without the possibility of parole is mandatory, was refused by the trial court. CT 938. This mandatory language, however, is not included in CALJIC 8.88. Instead, the instruction only addresses directly the imposition of the death penalty, and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it dos not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the

instruction violates the Fourteenth Amendment. *See Hicks*, 447 U.S. at 346-47.

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (emphasis in original).

This Court has found the formulation in CALJIC 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." *Duncan*, 53 Cal.3d at 978. This Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition. Moreover the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. *See, e.g., People v. Moore*, 43 Cal.2d 517, 526-29 (1954) ; *People v. Costello*, 21 Cal.2d 760 (1943); *People v. Kelley*, 113 Cal.App.3d 1005, 1013-14 (1980); *People v. Mata*, 133 Cal.App.2d 18, 21 (1955); *see also People v. Rice*, 59 Cal.App.3d 998, 1004 (1976) (instructions required on "every aspect" of case, and should avoid emphasizing either party's theory); *Reagan v. United States* 157 U.S. 301, 310 (1895).[85]

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[85]There are due process underpinnings to these holdings. In *Wardius v. Oregon*, 412 U.S. 470, 473 n.6 (1973), the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the

(continued...)

People v. Moore, 43 Cal.2d 517 (1954), is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law . . ., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

Id. at 526-27 (internal quotation marks omitted).

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the

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[85](...continued)
Fourteenth Amendment. *See also Washington v. Texas*, 388 U.S. 14, 22 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court*, 54 Cal.3d 356, 372-77 (1991); *cf.* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180-92 (1960). Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" . . . there "must be a two-way street" as between the prosecution and the defense. *Wardius*, 412 U.S. at 474. Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. *See People v. Glenn*, 229 Cal.App.3d 1461 (1991); *United States v. Lesina*, 833 F.2d 156, 158 (9th Cir. 1987). The denial of this fundamental principle to appellant in the instant case deprived him of due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Hicks*, 447 U.S. at 346. Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as–if not more–entitled as noncapital defendants to the protections the law affords in relation to prosecution-slanted instructions. Indeed, there is no government interest, much less a compelling one, served by denying capital defendants such protection. U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. *See Zemina v. Solem*, 438 F.Supp. 455, 469-70 (D.S.D. 1977), *aff'd and adopted, Zemin v. Solem,* 573 F.2d 1027, 1028 (8th Cir. 1978); *see also Cool v. United States*, 409 U.S. 100 (1972) (disapproving instruction placing unauthorized burden on defense). Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman,* 386 U.S. at 24, reversal is required.

C. In Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC 8.88 Improperly Reduced the Prosecution's Burden of Proof

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" *People v. Jackson*, 13 Cal.4th 1164, 1243-44 (1996), *quoting People v. Johnson*, 3 Cal.4th 1183, 1250, (1992). Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. *See Duncan*, 53 Cal.3d at 979; *Brown*, 40 Cal.3d at 538-41 (holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation).

The defense in this case requested a number of special instructions elaborating the weighing process. The defense requested that the jury be instructed that "[a] jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." CT 941 (Defense Requested Instruction No. 13). The defense requested that the jury be instructed that it could "spare the defendant's life for any reason [it] deem[ed] appropriate and satisfactory. CT 949 (Defendant's Requested Instruction No. 21). The defense also requested that the jury be instructed: "You need not find any mitigating circumstances in order to return a sentence of life imprisonment without possibility of parole. A life sentence my be returned regardless of the evidence." CT 950 (Defense Requested Instruction No. 22. The trial court refused to give these instructions. CT 941, 950.

The jurors in this case, therefore, were never informed that they did not have to even impose the death penalty. To the contrary, the language of

CALJIC 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was *ipso facto* the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole, even if they concluded that the circumstances in aggravation outweighed those in mitigation – and even if they found no mitigation whatever. As framed, then, CALJIC 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. *See People v. Peak*, 66 Cal.App.2d 894, 909 (1944). This is improper under California law.

Under *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), there is no Eighth Amendment defect in a statute that permits the death penalty where only one aggravating factor and no mitigating factors are found. However, the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, it deprived appellant of due process of law (*see Hicks*, 447 U.S. at 346; *see also Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments. *See Furman* v. *Georgia*, 408 U.S. 238 (1972).

D. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof

Under the standard CALJIC instructions, the question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." CT 1136-37; RT 4942-43. The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State*, 224 S.E.2d 386 (Ga. 1976), the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." *Id.* at 391; *see Zant v. Stephens*, 462 U.S. 862, 867 n.5 (1983). Of the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance"; "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is

> highly subjective. [Footnote.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a 'murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions,' is unconstitutional and, thereby, unenforceable.

Arnold, 224 S.E.2d at 392 (alternation in original).[86]

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrant death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980). These words do not provide meaningful guidance to a sentencing jury attempting to determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

E. By Failing to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment, CALJIC 8.88 Improperly Reduced the Prosecution's Burden

As noted above, CALJIC 8.88 informed the jury that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CT 1136-37; RT 4942-43. Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death

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[86]The United States Supreme Court has specifically praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. *See Gregg* v. *Georgia*, 428 U.S. 153, 202 (1976) .

constitutes the appropriate, and not merely a warranted, punishment. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The defense proposed several instructions to correct the deficiencies of CALJIC 8.88. The defense proposed that the trial court read the following: "Your duty in this phase is different from your duty in the first part of the trial where you were to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also – and most important – to *render an individualized, moral determination about the penalty appropriate* for the particular defendant – that is, whether he should live or die." CT 925 (Defense Requested Instruction No. 1) (emphasis added). The defense also proposed an instruction telling the jury that even if it found substantial aggravating factors but found that death was not "appropriate," then it should fix the punishment at life without the possibility of parole. CT 959 (Defendant's Requested Instruction No. 32)[87]; *see* CT 957 (Defendant's Requested Instruction No. 30) ("Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is *appropriate*." (emphasis added)). Appellant's counsel also proposed a concluding instruction that would have told the jury that its task was to determine

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[87]The exact language of the instruction was: "We the jury in the above-entitled matter, find that the aggravating factors are substantial in comparison to the mitigating factors, but death is not the appropriate penalty, and therefore we fix the punishment at life in prison without the possibility of parole." CT 959.

In his proposed definition of "aggravation," appellant also made it clear that the job of the jury was to determine whether the "death penalty would be an *appropriate*" punishment in this case." CT 944 (Defense Requested Instruction No. 16); *see also* CT 947 (Defense Requested Instruction No. 19), describing jury's task as determining whether death is the "appropriate" penalty.) This instruction was also rejected. CT 944. It was also error to reject these instructions.

which penalty is justified and "appropriate." CT 962 (Defendant's Requested Instruction No. 33). These were refused by the trial court. CT 925, 959. Without the proposed additions, CALJIC 8.88 does not adequately convey the notion that death must be the appropriate, not merely the warranted punishment; it thus violates the Eighth and Fourteenth Amendments.

To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[88] Clearly, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty.[89] The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before

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[88]"Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something; (b) to authorize (the doing of something)." Webster's Unabridged Dictionary, p. 2062 (2d ed. 1966). In contrast, "appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; . . . ." *Id.* at p. 91. "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (*id.* at 91), while the verb "warrant" is synonymous with broader terms such as "justify, . . . authorize, . . . support." *Id.* at p. 2062.

[89]The trial court instructed that "[i]n weighing the various circumstances you determine under the relevant evidence *which penalty is justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." CT 1136-37; RT 4942-43; CALJIC 8.88 (emphasis added).

death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

F. The Trial Court's Failure At Defense Request to Instruct on the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances Resulted in an Unfair, Unreliable and Constitutionally Inadequate Sentencing Determination

The defense proposed several instructions clarifying that the defense did not bear any burden of proof regarding the mitigating circumstances and explaining that the jury was not required to unanimously find that evidence was mitigating. CT 939 (Defense Requested Instruction No. 11) ("Mitigation does not need to be proven beyond a reasonable doubt; a juror may find a mitigating circumstance if there is any evidence to support it no matter how weak"); CT 953 (Defense Requested Instruction No. 25) ("There is no requirement that all jurors unanimously agree on any matter offered in mitigation."); CT 954 (Defense Requested Instruction No. 26) ("A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a migitating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established."); CT 955 (Defense Requested Instruction No. 27) ("A mitigating circumstance need not be proved beyond a reasonable doubt nor even by a preponderance of the evidence, and each juror may find a mitigating circumstance to exist if there is any evidence to support it.") All these instructions were refused by the trial court. CT 939, 953-55.

By failing to provide an instruction on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors, that a mitigating circumstance may be found if there is any evidence to support it, and that the jury was not

required unanimously to agree on the existence of mitigation), the trial court impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. *See Mills v. Maryland*, 486 U.S. 367, 374 (1988); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson*, 428 U.S. at 304. "There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." *Boyde*, 494 U.S. at 380. Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." *Lashley v. Armountrout*, 957 F.2d 1495, 1501 (8th Cir. 1992). However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. *See* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 10 (1993).

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit

instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. *See McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990). Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. *Id.* at 442-42; *see also Mills*, 486 U.S. at 374. Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Fourteenth and Eighth Amendments as well as his corresponding rights under article 1, sections 7, 17, and 24 of the California Constitution. U.S. Const. amends. VIII & XIV; Cal. Const. art 1, §§ 7, 17 & 24.

G. Conclusion

Although the defense sought in numerous way to clarify the parameters of the jury's duty in its penalty phase deliberations, the trial court declined to do so. The trial court violated appellant's federal

constitutional rights by instructing the jury solely in accordance with CALJIC 8.88. Appellant's death sentence must be reversed.

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XXXV

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

A. Introduction

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. *See Smith v. Murray*, 477 U.S. 527, 534 (1986) (holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review). Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial

interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. Cal. Pen. Code § 190.2.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few individuals for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

B. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which

> the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

People v. Edelbacher, 47 Cal.3d 983, 1023 (1989). In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 878 (1983).

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." *People v. Bacigalupo*, 6 Cal.4th 457, 468 (1993).

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 27 special circumstances[90] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. Former Cal. Pen. Code § 190.2 (West 1993). These special

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[90]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982). The number of special circumstances has continued to grow and is now thirty-two.

circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" *See* 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" (emphasis added).

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. Cal. Pen. Code § 190.2. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *People v. Dillon*, 34 Cal.3d 441, 483-84 (1984). This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. *See People v. Hillhouse*, 27 Cal.4th 469, 500-01 (2002); *People v. Morales*, 48 Cal.3d 527, 557-58 (1989); *see Morales v. Woodford*, 388 F.3d 1159 (9th Cir. 2004) (McKeown, J., dissenting). These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section

190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. Cal. Pen. Code §§ 189 & 190.2. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. Stephen Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).[91] It is quite clear that these theoretically possible non-capital first degree murders represent a small subset of the universe of first degree murders. *Id.* at 1324-26. Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In

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[91]The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," *i.e.*, a premeditated murder not falling under one of section 190.2's many special circumstance provisions. Shatz and Rivkind, *supra*, 72 N.Y.U.L. Rev. at 1325. This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, *i.e.*, a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. *Id.* at 1325.

People v. Stanley, 10 Cal.4th 764, 842-43 (1995), this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris*, 465 U.S. 37, 53 (1984). Not so. In *Harris*, the issue before the Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at 52 n.13.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[92]

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[92]In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

C. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments

Appellant's jury was instructed pursuant to section 190.3, subdivision (a) that "[t]he circumstances of the crimes of which defendant has been convicted in the present proceeding and the facts surrounding any special circumstance found to be true" were factors to be considered in the death selection process. CT 1125; RT 4935. No limiting construction to this factor was given.

1. Factor (a) Is Overbroad

California Penal Code Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having repeatedly found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. *People v. Dyer*, 45 Cal.3d 26, 78 (1988); *People v. Adcox*, 47 Cal.3d 207, 270 (1988); *see People v. Siripongs*, 45 Cal.3d 548, 581 n.11 (1988) (jury not to consider the bare *fact* that defendant has suffered a murder conviction, but instead the *circumstances* surrounding it). Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support

aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[93] or having had a "hatred of religion,"[94] or threatened witnesses after his arrest,[95] or disposed of the victim's body in a manner that precluded its recovery[96].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California*, 512 U.S. 967, 987-88 (1994)), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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 been permitted to argue as a "circumstances of the crime" aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted

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[93]*People v. Walker*, 47 Cal.3d 605, 639 n.10 (1988).

[94]*People v. Nicolaus*, 54 Cal.3d 551, 581-82 (1991).

[95]*People v. Hardy*, 2 Cal.4th 86, 204 (1992).

[96]*People v. Bittaker*, 48 Cal.3d 1046, 1110 (1989).

multiple wounds[97] or that the defendant killed with a single execution-style wound.[98]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[99] or that the defendant killed the victim without any motive at all.[100]

c. That the defendant killed the victim in cold blood[101] or that the defendant killed the victim during a savage frenzy.[102]

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[97]*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).

[98]*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).

[99]*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).

[100]*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).

[101]*See, e.g., People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[102]*See, e.g., People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. That the defendant engaged in a cover-up to conceal his crime[103] or that the defendant did not engage in a cover-up and so must have been proud of it.[104]

e. That the defendant made the victim endure the terror of anticipating a violent death[105] or that the defendant killed instantly without any warning.[106]

f. That the victim had children[107] or that the victim had not yet had a chance to have children.[108]

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[103]*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).

[104]*See, e.g., People v. Adcox*, No. S004558, RT 4607 (defendant freely informed 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).

[105]*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.

[106]*See, e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[107]*See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[108]*See, e.g., People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

g. That the victim struggled prior to death[109] or that the victim did not struggle.[110]

h. That the defendant had a prior relationship with the victim[111] or that the victim was a complete stranger to the defendant.[112]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them 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 factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[113]

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[109]*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).

[110]*See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[111]*See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d 648, 717 (same).

[112]*See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[113]*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

(continued...)

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[114]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[115]

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground

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[113](...continued)
5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, 41 Cal.3d 29, 63, 711 P.2d 423, 444 (1985) (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").

[114]*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).

[115]*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).

that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[116]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[117]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to 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.[118]

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[116]*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).

[117]*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).

[118]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. *See* section C.1. of this argument, *infra*.

There remains another reason factor (a) is unconstitutionally broad. California law permits the inclusion of "victim impact" evidence as "evidence of the harm caused by the defendant's actions is admissible at the penalty phase under section 190.3, factor (a), as one of the 'circumstances of the crime.'" *People v. Edwards*, 54 Cal.3d 787, 835-36 (1991); *People v. Zapien*, 4 Cal.4th 929, 992 (1993). This Court has since *Edwards* permitted an expansive reading of what counts as admissible victim impact evidence. *See, e.g., Edwards*, 54 Cal.3d at 835-36 (Photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them); *People v. Wash*, 6 Cal.4th 215, 267 (1993) (Evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime). Adding the unspecified *Edwards* view of the "circumstances of the crime" into the already problematic and overbroad sentencing scheme creates even more improper vagueness. In practice, section 190.3's broad "circumstances of the crime" provision 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 principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (discussing the holding in *Godfrey v. Georgia*, 446 U.S. 420 (1980)).

2. Factor (a) Improperly Permitted the Jurors to Consider the Same Fact in Aggravation Multiple Times

The instruction by its terms permitted the jury to consider many circumstances of the crime more than once in aggravation.[119] For example,

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[119]The defense proposed that CALJIC 8.85 be modified to include an instruction that the jury could not use in sentencing any fact already used in (continued...)

in this case, the finding that two of the victims were police officers served as the basis for a special circumstance in connection with each murder. Factor (a) then permitted this fact to be considered a second time as an aggravating circumstance justifying the death penalty. In addition, the jury found true a "multiple murder" special circumstance, which effectively permitted the jury to consider the facts of the murders again for a third time. CT 983. The failure of the trial court to limit the jury's use of these facts in any way, such as by prohibiting double-counting, allowed the jury to consider the same fact multiple times in violation of appellant's right to due process and equal protection. By allowing such double-counting, the "circumstances of the crime" aggravating factor licensed indiscriminate imposition of the death penalty upon no other basis than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply those facts, to warrant the imposition of the death penalty." *Maynard*, 486 U.S. at 363.

D. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death

In addition to the constitutional infirmities described above, California's death penalty statute is also unconstitutional because there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that

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[119](...continued)
finding appellant guilty. CT 934 (Defendant's Requested Instruction No. 6). Appellant argues that failure to give this instruction as requested was error. *See* Argument XXVIII, *supra*.

aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

3. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's interpretations of California's statute. In *People v. Fairbank*, 16 Cal.4th 1223, 1255 (1997), this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004).

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478. In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. *Ring*, 536 U.S. at 593. The Court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona*, 497 U.S. 639 (1990)) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. *Id.* at 598. The Court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Most recently, in *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." *Blakely*, 124 S.Ct. at 2535. The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. *Id.* at 2535. The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *Id.* at 2543. In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is

that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 2537 (emphasis in original). As explained below, California's death penalty scheme, does not comport with the principles set forth in *Apprendi*, *Ring* and *Blakely*, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[120] Only

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[120]*See* Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11 § 4209(d)(1)(a) (West 1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (West 1993); Ill. Ann. Stat. ch. 38 para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d) (f) (g) (West 1957); Miss. Code Ann. § 99-19-103 (West 1993); *State v. Stewart*, 197 Neb. 497, 519, 250 N.W.2d 849, 863 (Neb. 1977); *State v. Simants*, 197 Neb. 549, 555, 250 N.W.2d 881, 888-90 (Neb. 1977); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (West 1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (West 1988); Tenn. Code Ann. § 39-13-204(f) (West 1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre*, 572 P.2d 1338, 1348 (Utah 1977); Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (West 1992). Washington has a related

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California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. *Fairbank*, 16 Cal.4th at 1255; *see also People v. Hawthorne*, 4 Cal.4th 43, 79 (1992) (penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification".)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[121] As set forth in California's

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[120](...continued)
requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4) (West 1990). And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. Ariz. Rev. Stat. Ann. § 13-703 (West 1989); Conn. Gen. Stat. Ann. § 53a-46a) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (Az. 2003).

[121]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an

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"principal sentencing instruction" (*People v. Farnam*, 28 Cal.4th 107, 192 (2002)), which was read to appellant's jury (CT 1136-37; RT 4942-43),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" CALJIC 8.88 (emphasis added).

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[122] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[123]

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[121](...continued)
individualized, normative determination about the penalty appropriate for the particular defendant. . . ." *People v. Brown*, 46 Cal.3d 432, 448 (1988).

[122]In *Johnson v. State*, 118 Nev. 787, 59 P.3d 450 (Nev. 2002), the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" *Id.* at 801, 59 P.3d at 460.

[123]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. *People v. Allen*, 42 Cal.3d 1222, 1276-77(1986).

In *People v. Anderson*, 25 Cal.4th 543, 589 n.14 (2001), this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (*see* Cal. Pen. Code § 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow*, 30 Cal.4th 43 (2003), and *People v. Prieto*, 30 Cal.4th 226 (2003): "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." *Prieto*, 30 Cal.4th at 263. This holding is based on a truncated view of California law. As 190, subdivision (a),[124] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and defendant Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected this argument:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."

Ring, 536 U.S. at 604.

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[124]Section 190, subdivision (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by 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." Cal. Pen. Code § 190(a).

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *Ring*, 536 U.S. at 604. Section 190, subdivision (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOPP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." Cal. Pen. Code §§ 190.1, 190.2, 190.3, 190.4 & 190.5.

Neither LWOPP nor death can actually be imposed unless the jury finds a special circumstance. Cal. Pen. Code § 190.2. Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. Cal. Pen. Code § 190.3; CALJIC 8.88. It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. *See People v. Hernandez*, 30 Cal.4th 835, 864 (2003) (financial gain special circumstance (Cal. Pen. Code § 190.2(a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction).

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[125] while California's

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[125]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining (continued...)

statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[126] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 604. In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." *Blakely*, 124 S.Ct. at 2551 (emphasis in original). The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

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[125](...continued)
whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 12-703(E).

[126]Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." *Snow*, 30 Cal.4th at 126 n.32, *citing Anderson*, 25 Cal.4th at 589 n.14. This Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126 n.32.

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. Finally, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, this Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a

defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." *Prieto*, 30 Cal.4th at 263 (emphasis added). This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. *See People v. Duncan*, 53 Cal.3d 955, 977-78 (1991).

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. *See State v. Ring*, 204 Ariz. 534, 562, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); *accord*, *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *Johnson v. State*, 59 P.3d 450 (Nev. 2002); *see also* Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1126-27 (2003) (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for

leniency since both findings are essential predicates for a sentence of death).

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring* and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. *Blakely*, 124 S.Ct. at 2538. Thus, under *Apprendi*, *Ring* and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.

In *People v. Griffin*, 33 Cal.4th 536 (2004), this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 437 (2001), for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead

an "expression of ... moral condemnation"]. *Griffin*, 33 Cal.4th at 595. In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

Leatherman, 532 U.S. at 429. This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.* at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely*, are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without the possibility of parole. (2) What is the maximum sentence that could be

imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. *Prieto*, 30 Cal.4th at 263. In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

Ring, 536 U.S. at 606, *quoting with approval Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting).

No greater interest is ever at stake than in the penalty phase of a capital case. *Monge v. California*, 524 U.S. 721, 732 (1998) ("the death

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penalty is unique in both its severity and its finality").[127] As the high court stated in *Ring*, 536 U.S. at 608-09:

> Capital defendants, no less than non-capital defendants, we conclude, 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.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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[127]The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (455 U.S. 745, 755 (1982)) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" *Monge*, 524 U.S. at 732 (emphasis added).

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." *People v. Taylor*, 52 Cal.3d 719, 749 (1990); *accord*, *People v. Bolin*, 18 Cal.4th 297, 335-36 (1998). Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it clear that the practice violates the Sixth, Eighth and Fourteenth Amendments.[128] It violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever

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[128]*See, e.g., Griffin v. United States*, 502 U.S. 46, 51 (1991) (historical practice given great weight in constitutionality determination); *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1855) (due process determination informed by historical settled usages).

found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, __ U.S. ___, 124 S.Ct. 2531 (2004).

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." *Brown v. Louisiana*, 447 U.S. 323, 334 (1980).[129] Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge,* 524 U.S. at 732;[130] *accord, Johnson v.*

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[129]In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[130]The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have

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Mississippi, 486 U.S. 578, 584 (1988)), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *See, e.g.,* Cal. Pen. Code §§ 1158, 1158a. Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*see Monge*, 524 U.S. at 732; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)), and certainly no less (*Ring*, 536 U.S. at 609).[131]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[132] To apply the requirement to findings carrying a maximum punishment of one year in the

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[130](...continued)
recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." *Monge*, 524 U.S. at 731-32.

[131]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k).

[132]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." Cal. Const. art 1, § 16; *see People v. Wheeler*, 22 Cal.3d 258, 265 (1978) (confirming the inviolability of the unanimity requirement in criminal trials).

county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina*, 11 Cal.4th 694, 763-64 (1995)) would by its inequity violate the Equal Protection Clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States*, 526 U.S. 813, 815-16 (1999), the U.S. Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

Richardson, 526 U.S. at 819 (emphasis added).

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of

alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. *Hawthorne*, 4 Cal.4th at 79; *People v. Hayes*, 52 Cal.3d 577, 643 (1990). However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Jury in a Capital Case Must Be Instructed That It May Impose a Sentence of Death Only If It Is Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at

stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958).

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. *In re Winship,* 397 U.S. 358, 364 (1970). In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner*, 430 U.S. 349, 358 (1977); *see also Presnell v. Georgia*, 439 U.S. 14 (1978). Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. *Winship*, 397 U.S. at 363-64; *see Addington v. Texas*, 441 U.S. 418, 423 (1979). The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the

private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982); *see also Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser*, 375 U.S. at 525) how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. *See Winship*, 397 U.S. at 364 (adjudication of juvenile delinquency); *People v. Feagley*, 14 Cal.3d 338 (1975) (commitment as mentally disordered sex offender); *People v. Burnick,* 14 Cal.3d 306 (1975) (same); *People v. Thomas*, 19 Cal.3d 630 (1977) (commitment as narcotic addict); *Conservatorship of Roulet*, 23 Cal.3d 219 (1979) (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that

> historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Santosky*, 455 U.S. at 763. Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363.

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). No greater interest is ever at stake. *See Monge*, 524 U.S. at 732 ("the death penalty is unique in its

severity and its finality"). In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-24, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" *Monge*, 524 U.S. at 732 (emphasis added). The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. *See Griffin*, 33 Cal.4th at 595; *People v. Rodriguez*, 42 Cal.3d 730, 779 (1986). Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its

> understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

State v. Rizzo, 266 Conn. 171, 238 n.37, 833 A.2d 363, 408 n.37 (2003).

In sum, the need for reliability is especially compelling in capital cases. *Beck*, 447 U.S. at 637-38. No greater interest is ever at stake. *Monge*, 524 U.S. at 732. Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. The Finding That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Sentence Must Be Proved by At Least a Preponderance of the Evidence

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find

"proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. *See, e.g., Griffin*, 502 U.S. at 51 (historical practice given great weight in constitutionality determination); *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) at 276-77 (due process determination informed by historical settled usages).

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Cal. Evid. Code § 520. There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1991).

Accordingly, appellant respectfully suggests that *Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating

factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. *Hicks*, 447 U.S. at 346; *Fetterly*, 997 F.2d at 1300.

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments and is reversible per se. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. *Hayes*, 52 Cal.3d at 643. However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. 242, 260 (1976)) – the "height of arbitrariness" (*Mills v. Maryland*, 486 U.S. 367, 374 (1988)) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even if a Burden of Proof is Not Required, the Trial Court Erred in Failing to Instruct the Jury to That Effect

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[133] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a mis-allocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth and Fourteenth Amendments because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

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[133]*See, e.g., People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. *California v. Brown*, 479 U.S. 538, 543 (1987); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*Fairbank*, 16 Cal.4th at 1255), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." *See Townsend v. Sain,* 372 U.S. 293, 313-16 (1963). Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. *People v. Fauber*, 2 Cal.4th 792, 859 (1992). Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. *In re Sturm*, 11 Cal.3d 258, 269 (1974). The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons

therefor." *Id.* at 269; *see also People v. Martin*, 42 Cal.3d 437, 449-50 (1986) (statement of reasons essential to meaningful appellate review).[134] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. Cal. Pen. Code § 1170(c). Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. *Harmelin*, 501 U.S. at 994. Since providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (*see generally Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990)), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. *Mills*, 486 U.S. at 383 n.15. The fact that the decision to impose death is "normative" (*Hayes*, 52 Cal.3d at 643) and "moral" (*Hawthorne*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

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[134]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. *See* Cal. Code of Regs., tit. 15 § 2280 et seq.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[135]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all

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[135]*See* Ala. Code §§13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. §13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White*, 395 A.2d 1082, 1090 (Del. 1978); Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. §17-10-30(c) (Harrison 1990); Idaho Code §19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27 § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21 § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" *Barclay v. Florida*, 463 U.S. 939, 954 (1976) (plur. opn.), *alterations in original, quoting Proffitt*, 428 U.S. at 251 (opn. of Stewart, Powell, and Stevens, JJ.).

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Harris*, 465 U.S. at 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a

capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the Court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at 52 n.13.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, 408 U.S. 238 (1972). *See* section A of this Argument, *supra*. Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (*see* section C of this Argument, *supra*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (*see* section B of this Argument, *supra*). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to pass constitutional muster.

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. *See Gregg*, 428 U.S. at 206. A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The United States Supreme Court regularly considers other cases in

resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 821, 830-31 (1988); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." Ga. Stat. Ann. § 27-2537(c). The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." *Gregg,* 428 U.S. at 198 (1976). Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." *Proffitt*, 428 U.S. at 259. Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[136]

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[136]*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) (West 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 03 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. § 39-13-206(c)(1)(D) (1993); Va. Code Ann.

(continued...)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, *i.e.*, inter-case proportionality review. *See People v. Fierro*, 1 Cal.4th 173, 253 (1991). The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. *See, e.g., People v. Marshall*, 50 Cal.3d 907, 946-47 (1990).

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned

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[136](...continued)
§ 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); *also see State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 79 Ill.2d 508, 773, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 275 Ind. 338, 355, 417 N.E.2d 889, 899 (Ind. 1981); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977) (comparison with other capital prosecutions where death has and has not been imposed); *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (Ariz. 1976); *Collins v. State,* 261 Ark. 195, 221, 548 S.W.2d 106, 121 (Ark. 1977).

in *Furman* in violation of the Eighth and Fourteenth Amendments. *Gregg*, 428 U.S. at 192, *citing Furman*, 408 U.S. at 313 (White, J., concurring). The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Even If Permissible, Alleged Criminal Activity Cannot Serve as Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

a. All Aggravating Factors Must Be Found Unanimously and Beyond a Reasonable Doubt

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. Cal. Pen. Code § 190.3(b); *see, e.g., Johnson v. Mississippi*, 486 U.S. 578 (1988); *State v. Bobo,* 727 S.W.2d 945 (Tenn. 1987). The United States Supreme Court's recent decisions in *Blakely*, *Ring* and *Apprendi* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged

criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury.

Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme. Evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase, and before the fact-finder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. *See* CALJIC 8.87, *quoted supra*. Thus members of appellant's jury were permitted individually to rely on this aggravating factor if he or she deemed it found, even if no other jury found the aggravator, as long as all the jurors agreed on the ultimate punishment. Because, as noted above, this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. *See Johnson v. Louisiana*, 406 U.S. 356, 388-89 (1972) (Douglas, J., dissenting); *Ballew v. Georgia,* 435 U.S. 223 (1978); *Brown v. Louisiana*, 447 U.S. 323 (1980).

b. Factor (b) is Vague and Open-Ended

Factor (b), as written and as it has been interpreted by this Court, is an open-ended and vague aggravating factor that fosters arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" *Parker v. Dugger*, 498 U.S. 308, 321 (1991), *quoting Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

This Court has interpreted the section in such an overly broad fashion that it cannot withstand constitutional scrutiny. Although the Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants (*see Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring); *Eddings*, 455 U.S. at 117-18 (O'Connor, J., concurring); *Lockett*, 438 U.S. at 605-06), this Court has turned this mandate on its head, singling out capital defendants for *less* procedural protection than that afforded other criminal defendants. For example, the Court has ruled that, in order to consider evidence under subsection (b), it is not necessary for all twelve jurors unanimously to agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt. Cal. Pen. Code § 190.2(b); *People v. Caro*, 46 Cal.3d 1035, 1057 (1988). It has held that the jury may consider criminal violence which has occurred "'at any time in the defendant's life,'" without regard to the statute of limitations or the defendant's age. *People v. Heishman,* 45 Cal.3d 147, 192 (1988); *People v. Johnson*, 3 Cal.4th 1183, 1244 (1992); *People v. Lucky*, 45 Cal.3d 259, 295 (1988). Also, this Court has held that the trial court is not required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes. *People v. Hardy*, 2 Cal.4th 86, 204, 205-07(1992). Moreover, this Court has repeatedly held that, under factor (b), evidence of a defendant's other violent criminal activity permits the prosecution to include evidence of the surrounding circumstances, even if they include nonviolent criminal or noncriminal behavior. *See, e.g., People v. Bradford*, 15 Cal.4th 1229, 1377-78 (1997); *People v. Ashmus*, 54 Cal.3d 932, 985 (1991); *People v. Benson*, 52 Cal.3d 754, 788 (1990); *People v. Karis*, 46 Cal.3d 612, 640 (1988).

Appellant's case presents a perfect illustration of how broadly factor (b) sweeps under this Court's interpretation of the factor. In this case, the defense objected to the prosecution putting evidence on of a gun being tossed before appellant got into a scuffle with officers from the housing authority. It also objected to evidence of offensive language being used by appellant during the incident. The trial court admitted this evidence. RT 4436-38. The gun evidence was not admissible itself as factor (b) evidence. Because appellant did not have the gun during the incident, and had merely possessed the gun at some point, the gun tossing could not have been a part of a threat or an implied threat as required by factor (b). *See People v. Cox*, 30 Cal.4th 916, 973 (2003) ("mere possession of guns" does not constitute a crime of violence under factor (b)). However, under this Court's precedents the evidence was admissible as part of the "context" of the crime. *See People v. Welch*, 20 Cal.4th 701, 726 (1999). So, too, the evidence of the offensive language was admissible to show the context of the event. This illustrates appellant's point that this Court has so broadly interpreted factor (b) that any crime, or even any bad act such as swearing, can serve as an aggravator. Appellant's conviction must be reversed by the erroneous admission of the gun and offensive language evidence in aggravation, as the admission of this evidence violated the Eighth and Fourteenth Amendments and was not harmless beyond a reasonable doubt.

This Court has also ruled that unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but felony convictions, even for violent crimes, rendered after the capital homicide are not admissible. *People v. Morales*, 48 Cal.3d 527, 567 (1989). This is irrational in addition to contributing to the over-breadth of the factor. The Court has ruled that a threat of violence is admissible if, by happenstance, the words are uttered in a state that has

made such threat a criminal offense. *People v. Pensinger*, 52 Cal.3d 1210, 1258-61 (1991). Juvenile conduct is admissible under this subsection (*People v. Burton*, 48 Cal.3d 843, 862 (1989)); as is an offense dismissed pursuant to a plea bargain (*People v. Lewis*, 25 Cal.4th 610, 659 (2001)). In sum, this Court has indeed treated death differently – lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

c. The Use of the Same Jury for the Penalty Phase Adjudication of Other Crimes Is Unconstitutional

In addition, the use of the same jury for the penalty phase adjudication of other crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt. Under the California capital sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. *People v. Davenport*, 41 Cal.3d 247, 280 (1985); *People v. Phillips*, 41 Cal.3d 29, 71-72 (1985). As to such offense, the defendant is entitled to the presumption of innocence (*see Johnson*, 486 U.S. at 585) and the jurors must give the same level of deliberation and impartiality as would have been required of them in a separate criminal trial, for when a state provides for capital sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury to be impartial.[137] *See Groppi v. Wisconsin*, 400 U.S. 505, 508-09 (1971) (where state procedures

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[137]The Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in format and in existence of the protections afforded a defendant. *See Caspari v. Bohlen,* 510 U.S. 383, 393 (1994); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Bullington v. Missouri*, 451 U.S. 430, 446 (1981). Hence, due process protections apply to a capital sentencing proceeding. *See, e.g., Gardner*, 430 U.S. at 358.

deprive a defendant of an impartial jury, the subsequent conviction cannot stand); *Donovan v. Davis*, 558 F.2d 201, 202 (4th Cir. 1977); *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961).

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of appellant's guilt of the previously unadjudicated offenses were the same jurors who had just convicted appellant of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether unrelated violent crimes have been proved beyond a reasonable doubt. *See People v. Frierson*, 39 Cal.3d 803, 821-22 (1985) (Bird, C.J., concurring). Even if only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. *See United States v. Aguon*, 813 F.2d 1413, 1421 (9th Cir. 1987), *modified* 851 F.2d 1158 (1988) (en banc) ("the presence of even a single partial juror violates a defendant's right under the Sixth Amendment to trial by an impartial jury").

A finding of guilt by such a biased fact-finder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." *Virgin Islands v. Parrott*, 551 F.2d 553, 554 (3rd Cir. 1977) (per curiam) (jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case).

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. *Pointer v. United*

States, 151 U.S. 396, 408-09 (1984); *Lewis v. United States*, 146 U.S. 370, 375 (1982). The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). In this case, counsel for appellant understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices without forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury and a reliable and non-arbitrary penalty determination.

Also, because California does not allow the use of unadjudicated offenses in non-capital sentencing, the use of this evidence in a capital proceeding violates appellant's equal protection rights under the state and federal Constitutions; and it violates appellant's state and federal rights to due process because the State applies its law in an irrational and unfair manner. U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Hicks*, 447 U.S. at 346; *Fetterly*, 997 F.2d at 1300.[138]

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[138]Appellant has elsewhere argued that even assuming that section 190.3, subdivision (b), withstands constitutional scrutiny, CALJIC 8.87, the instruction pertaining to this subdivision is itself constitutionally flawed. *See* Argument XXXIII, *supra.*

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (*see* factors (d) and (g)) and "substantial" (*see* factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Mills v. Maryland*, 486 U.S. 367, 374 (1988); *Lockett v. Ohio*, 438 U.S. 586 (1978). CALJIC 8.85 provides, pursuant to California Penal Code section 190.3, that a jury may consider certain factors to be mitigating only if it also finds the factors to be "extreme" or "substantial." More specifically, the jury in this case was instructed that it could consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," and "[w]hether or not the defendant acted under extreme duress or under the substantial domination of another person." CT 1125-26; RT 4935-37.

These modifiers impermissibly raised the threshold for the consideration of mitigating evidence and risked misleading the jury into believing that evidence of emotional disturbance or duress that was not extreme, or evidence of domination that was not substantial, could not be considered in mitigation. Adjectives such as "extreme" and "substantial" in the list of mitigating factors rule out the possibility that lesser degrees of the disturbance, duress, or domination can be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Stringer* v. *Black*, 503 U.S. 222 (1992); *Mills*, 486 U.S. at 374; *Lockett v. Ohio*, 438 U.S. 586 (1978). Such wording also renders these factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. *Maynard*, 486 U.S. at

361-64; *Godfrey*, 446 U.S. at 433. The jury's consideration of these vague factors, in turn, introduces impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Appellant recognizes that there are a plethora of cases holding that the word "extreme" need not be deleted from this type of instruction (*see, e.g., Blystone v. Pennsylvania*, 494 U.S. 299, 308 (1990) (no substantial explanation); *People v. Benson*, 52 Cal.3d 754, 803-04 (1990)), as well as cases holding that the language of factors (d) and (h) is not impermissibly restrictive. *See, e.g., People v. Riel,* 22 Cal.4th 1153, 1225 (2000). However, these holdings are based on the assumption that jurors will utilize the "catchall" instruction provided by factor (k) of CALJIC 8.85 to consider evidence that may not be "extreme" or "substantial."

The "catchall" provision of factor (k) does not serve to cure the defect. First, factor (k) makes no reference whatsoever to mental or emotional disturbance or duress and, in light of the more specific language of factors (d) and (g), factor (k) would not be understood by any reasonable juror as superseding those factors. In addition, by its terms, factor (k) refers only to "any *other* circumstances" not previously listed in CALJIC 8.85, and no reasonable juror would therefore understand it to include factors already included in the instruction.

E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability 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*, 524 U.S. at 731-32. Despite this directive California's death penalty scheme

provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." *People v. Olivas,* 17 Cal.3d 236, 251 (1976) (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." *Commonwealth v. O'Neal*, 367 Mass 440, 449, 327 N.E.2d 662, 670 (1975).

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." *Westbrook v. Milahy*, 2 Cal.3d 765, 784-85 (1970). A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *Olivas,* 17 Cal.3d at 251; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and

non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[139] as in *Snow*,[140] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *See, e.g.,* Cal. Pen. Code §§ 1158, 1158a. When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42(e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Part (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances

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[139]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" *Prieto*, 30 Cal.4th at 275 (emphasis added).

[140]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" *Snow*, 30 Cal.4th at 126 n.3 (emphasis added).

apply. *See* sections C.1-C.5, *supra*. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. Unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. *See* section C.6, *supra*. These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. *See People v. Allen*, 42 Cal.3d 1222, 1286-88. In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." *Allen*, 42 Cal. 3d at 1286. But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987). Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular

offenses (*Coker v. Georgia*, 433 U.S. 584 (1977)) or offenders (*Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002)).

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. *See* Cal. Pen. Code § 190.4; *People v. Rodriguez*, 42 Cal.3d 730, 792-94 (1986).

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the non-capital determinate sentencing law ("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." *Allen*, 42 Cal.3d at 1287 (emphasis added). The idea that the disparity between life and death is a "narrow" one violates common sense and decades of pronouncements by the United States Supreme Court: "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*, 477 U.S. at 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*, 428 U.S. at 305 (opn. of Stewart, Powell and Stephens, J.J.); *see also Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); *Kinsella v. United States*, 361 U.S. 234, 255-56 (1960) (Harlan, J., concurring and dissenting, joined by Frankfurter, J.); *Gregg*, 428 U.S. at 187 (opn. of Stewart, Powell, and Stevens, J.J.); *Gardner*, 430 U.S. at 357-58; *Lockett*, 438 U.S. at 605 (plur. opn..); *Beck*, 447 U.S. at

637; *Zant,* 462 U.S. at 884-85; *Turner v. Murray*, 476 U.S. 28, 34 (1986) (plurality. opinion), *quoting California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Harmelin*, 501 U.S. at 994; *Monge*, 524 U.S. at 732. The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. *Allen,* 42 Cal.3d at 1287. The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. *Compare* Cal. Pen. Code § 190.3(a) - (j) *with* Cal. Rules of Court, rules 4.421 & 4.423. One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. *Bush v. Gore*, 531 U.S. 98, ___,121 S.Ct. 525, 530 (2000). In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. *Charfauros v. Board of Elections*, 249 F.3d 941, 951 (9th Cir. 2001).

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate

treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. *See, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002).

F. The Failure to Instruct the Jury on the Presumption of Life Violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution

In noncapital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. *See Estelle v. Williams* 425 U.S. 501, 503 (1976). Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984); *cf. Delo v. Lashley*, 507 U.S. 272 (1993). The court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias*, 13 Cal.4th 92 (1996), this Court held that such a presumption of life is not necessary when a person's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as the state's law properly limits death eligibility. *Id.* at 190. However,

California's capital-sentencing statute fails to narrow adequately the class of murders that are death eligible. *See* Stephan Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283 (1997). Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to require written findings regarding aggravating factors, and fails to require intercase proportionality review. Accordingly, a presumption of life instruction is constitutionally required at the penalty phase, and reversal of the penalty judgment is required.

G. The Use in Aggravation of Prior Felonies, But Not Subsequent Felonies Is Arbitrary and Capricious

In *Mississippi v. Johnson*, 486 U.S. 578 (1988), the United States Supreme Court held that a sentencing scheme cannot be predicated on "mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Id.* at 585. Yet this "caprice" precisely describes the California scheme of allowing unlimited use of even nonviolent prior felony convictions. This Court has repeatedly and recently held that violent felony convictions entered subsequent to the capital homicide are not admissible under factor (c). *See, e.g., Morales*, 48 Cal.3d at 567 (Lucas, C.J.); *People v. Balderas*, 41 Cal.3d 144, 201-03 (1985). Yet, as Chief Justice Lucas himself recognized in his dissent in *Balderas*: "In my view, to deprive the trier of fact of relevant information regarding defendant's background defeats the overriding statutory purpose of assuring that the penalty in capital cases is carefully tailored to both the offense and the offender. Why should one who suffered, for example, a plethora of felony convictions following commission of his murder be treated identically, for capital sentencing purposes, to the offender who led a

blameless life following such an offense?" *Balderas*, 41 Cal.3d at 208 (Lucas, C.J. dissenting).

The Court, however, continues to adhere to *Balderas*, even in cases where the subsequent conviction is for the crime of murder. *See People v. Malone*, 47 Cal.3d 1, 47 (1988). The Court has thereby created a system which is not only capricious within the meaning of the Eighth Amendment, but irrational and arbitrary within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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XXXVI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

Minister of Justice v. Burns, 1 S.C.R. 283 [2001 SCC 7], ¶ 91 (2001). The California death penalty scheme 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 imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment and Fourteenth determination of evolving standards of decency, appellant

raises this claim under the Eighth Amendment as well. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting); *see also Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

B. International Law

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." ICCPR art. VI, § 1.

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. U.S. Const. art. VI, § 1, cl. 2. Consequently, this Court is bound by the ICCPR.[141] The United States Court of Appeals for the Eleventh Circuit has 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. *United States*

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[141]The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. *See* 138 Cong. Rec. S4784, § III(1). These qualifications do not preclude appellant's reliance on the treaty because, *inter alia*, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985); (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* Stefan A. Riesenfeld & Frederick M. Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 Chi.-Kent L. Rev. 571, 608 (1991)); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (*see* John Quigley, *Human Rights Defenses in U.S. Courts*, 20 Hum. Rts. Q. 555, 581-82 (1998)).

v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000); *but see Beazley v. Johnson*, 242 F.3d 248, 267-68 (5th Cir. 2001).

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. ICCPR art. VII. Appellant recognizes that this Court previously has rejected international law claims directed at the death penalty in California. *People v. Hillhouse*, 27 Cal.4th 469, 511 (2002); *People v. Ghent*, 43 Cal.3d 739, 778-79 (1987). 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 Duarte-Acero*, 208 F.3d at 1284; *McKenzie v. Day*, 57 F.3d 1461, 1487 (9th Cir. 1995) (Norris, J., dissenting). Thus, appellant requests that the Court reconsider and, in the context of this case, find appellant's death sentence violates international law. *See Smith v. Murray*, 477 U.S. 527, 534 (1986) (holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review).

C. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. *See, e.g., Stanford*, 492 U.S. at 389 (1989) (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plur. opn.). Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of

September 2004) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.[142]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Framers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" *Miller v. United States*, 78 U.S. 268, 315 (1870) (Field, J., dissenting) (1870), *quoting* 1 Kent's Commentaries 1; *Hilton v. Guyot*, 159 U.S. 113, 163, 227 (1895); *Sabariego v. Maverick*, 124 U.S. 261, 291-92 (1888); *Martin v. Waddell's Lessee*, 41 U.S. 367, 409 (1842). Thus, for example, Congress' power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. *Miller*, 78 U.S. at 315-16 n.57 (Field, J., dissenting).

Due process and "cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their

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[142]Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. *See* Amnesty International's "List of Abolitionist and Retentionist Countries," at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.

authors." *Furman v. Georgia*, 408 U.S. 238, 420 (Powell, J., dissenting). The Eighth Amendment in particular must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). If the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. *See Atkins*, 536 U.S. at 316 n.21 (basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"); *Thompson*, 487 U.S. at 830 n.31 ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual").

Assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. *See Hilton v. Guyot*, 159 U.S. 113 (1895); *see also Jecker, Torre & Co. v. Montgomery*, 59 U.S. 110, 112 (1855) (municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies).

Categories of crimes that particularly warrant a close comparison with actual practices in other countries include the imposition of the death

penalty for felony-murders or other non-intentional killings, and single-victim homicides. For example, article VI, section 2 of the International Covenant on Civil and Political Rights, limits the death penalty to only "the most serious crimes."[143] ICCPR art. VI, § 2. Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. *Cf. Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002).

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside. Moreover, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

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[143]Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." Alex Kozinski and Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XXXVII

IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment at a time when appellant had been convicted of two counts of first degree murder and one count of second degree murder, and the special circumstances of attempted multiple murder and murder of a law enforcement officer had been found true. If this Court reduces or vacates any of the counts or special circumstances, the matter should be remanded for a new sentencing hearing to permit the jury to reconsider its death judgment. *See Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002) (court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal); *Sanders v. Woodford*, 373 F.3d 1054, 1060 (9th Cir. 2004) (same).

Section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." Cal. Pen. Code § 190.3(a).

A reduction or reversal of any the charges would clearly fall within the rubric of factors permissibly considered by appellant's jury in setting the penalty of death in this case. Both special circumstances were critical to the prosecution's call for the death penalty in this case. *Compare People v. Sanders*, 51 Cal.3d 471, 521 (1990) ("the prosecutor did not urge the jury to impose the death penalty merely because the crime could be categorized as

heinous or atrocious, or because of the sheer number of special circumstances) *and People v. Silva*, 45 Cal.3d 604, 635 (1988) ("we conclude a reasonable juror would not have been swayed by abstract concepts of 'heinous[, atrocious or cruel]' ... but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true").

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article 1, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death. U.S. Const. amend. VIII; Cal. Const. art. 1, § 17.

Moreover, in *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital sentencing procedures and concluded that specific findings the legislature made prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this State, jurors have two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances.[144] If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt. This Court

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[144]*See* Argument XXXV, *infra*, for a full discussion of the impact of *Ring* and *Apprendi* on the California death penalty scheme.

cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" *See Ring*, 536 U.S. at 584, *quoting Apprendi*, 530 U.S. at 483. Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

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XXXVIII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. *See Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1987) (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974) (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Greer v. Miller*, 483 U.S. 756, 764 (1987). Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *People v. Williams*, 22 Cal.App.3d 34, 58-59 (1971) (applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors).

The improper use of an anonymous jury, the improper removal of a juror for cause and the impermissible striking of prospective jurors based on racially motivated peremptory challenges should all result in reversal. In addition, numerous guilt phase evidentiary and instructional errors resulted in the admission of inflammatory and prejudicial evidence. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15; *Donnelly*, 416 U.S. at 643. Appellant's

conviction, therefore, must be reversed. *See Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) ("even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"); *see also Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction); *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) (reversing heroin convictions for cumulative error); *People v. Hill*, 17 Cal.4th 800, 844-45 (1998) (reversal based on cumulative prosecutorial misconduct); *People v. Holt*, 37 Cal.3d 436, 459 (1984) (reversing capital murder conviction for cumulative error).

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. *See People v. Hayes*, 52 Cal.3d 577, 644 (1990) (court considers guilt phase instructional error in assessing prejudice in the penalty phase). In this context, this Court has recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. *See People v. Hamilton*, 60 Cal.2d 105, 136-37 (1963); *see also People v. Brown*, 46 Cal.3d 432, 463 (error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the error affected the jury's verdict); *In re Marquez*, 1 Cal.4th 584, 605 (1992) (an error may be harmless at the guilt phase but prejudicial at the penalty phase).

Aside from the erroneous exclusion of a prospective juror, which is reversible per se, the errors committed at the penalty phase of appellant's trial include the introduction of improper victim impact evidence, prosecutorial misconduct and the use of improper prior unadjudicated conduct. There were also numerous instructional errors that undermined

the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (reversal required in absence of showing that the error was harmless or had no effect on the jury's verdict); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (error may have affected the jury's decision to impose death); *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (penalty reversed because Court could not say that the error had no effect on the verdict).

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

* * * * *

CONCLUSION

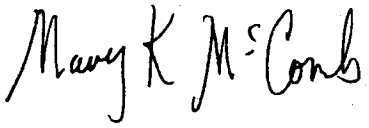
For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: JANUARY 13, 2004.

Respectfully submitted,

MICHAEL J. HERSEK

State Public Defender



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CAL. RULES OF COURT, RULE 36(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, REGIS DEON THOMAS, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 153,246 words in length.

Dated: January 13, 2005

Mary K. McComb

Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Regis Deon Thomas*** **Crim. No. S048337**
(Santa Clara County Superior Court No. BA075063)

I, undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814.

I served a copy of the following document(s):

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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.

Date: January 14, 2005

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