IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAYMOND JOHNSON, Defendant and Appellant.	Supreme Court No. S070250 (Superior Court No. 39376)

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

The Honorable Richard M. Murphy, Judge Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This matter is appealable as a final judgment of conviction and is authorized by California Penal Code § 1239, subdivision (a).[1]

STATEMENT OF THE CASE

On December 10, 1996, an Information was filed against Appellant, Michael Raymond Johnson, alleging five counts. Count 1 alleged that on July 17, 1996, appellant committed the crime of murder, in violation of California Penal Code § 187, subdivision (a); it was further alleged that the

[1] Unless otherwise noted, all statutory references herein are to the California Codes. Additionally, the Clerk's Transcript shall be designated by "C.T.", the Clerk's 2nd Supplemental Transcript by "C.S.T.", and the Reporters Transcript by "R.T."

offense was a serious felony within the meaning of California Penal Code § 1192.7, subdivision (c)(1); it was further alleged that the offense was committed against a police officer who was engaged in the performance of his duties, within the meaning of California Penal Code § 190.2, subdivision (a)(7); it was further alleged that the offense was committed while appellant was engaged in the commission of a kidnapping, within the meaning of California Penal Code § 190.2, subdivision (a)(17)(ii); it was further alleged that in the commission of the offense, with the intent to inflict, appellant inflicted great bodily injury, within the meaning of California Penal Code § 1203.075. Count 2 alleged that on July 17, 1996, appellant committed the crime of attempted murder, in violation of California Penal Code §§ 664/187, subdivision (a); it was further alleged that the offense was a serious felony within the meaning of California Penal Code § 1192.7, subdivision (c)(1). Count 3 alleged that on July 17, 1996, appellant committed the crime of kidnapping, in violation of California Penal Code § 207, subdivision (a); it was further alleged that the offense was a serious felony within the meaning of California Penal Code § 1192.7, subdivision (c) (20). Count 4 alleged that on July 17, 1996, appellant committed the crime of spousal rape, in violation of California Penal Code § 262, subdivision (a)(1); it was further alleged that the offense was a serious felony within the meaning of California Penal Code § 1192.7; it was further alleged that the conduct of the offense fell within the meaning

of California Penal Code § 667.61, subdivision (a), in that the kidnap increased the risk of harm within the meaning of California Penal Code §§ 667.6(c)(2) and (d)(2), or that appellant personally used a firearm in the course of the rape and kidnap. Count 5 alleged that on July 17, 1996, appellant committed the crime of felon in possession of a firearm with five prior felonies, in violation of California Penal Code § 12021, subdivision (a)(1); the five prior felonies were federal conspiracy to distribute methylenedioxy amphetamine on May 17, 1973, second degree burglary in violation of California Penal Code § 459 on February 11, 1986, robbery with use of a firearm, in violation of California Penal Code §§ 211 and 12022.5, on March 11, 1987, assault with a deadly weapon, with use of a firearm, in violation of California Penal Code §§ 245, subdivision (a)(1) and 12022.5 on March 11, 1987, and second degree burglary, in violation of California Penal Code § 459, on October 19, 1987. It was further alleged as to Counts 1, 2, 3 and 4 that appellant personally used two separate firearms, within the meaning of California Penal Code §§ 1203.06 and 12022.5, and that this also caused the crimes to become serious felonies pursuant to California Penal Code § 1192.7, subdivision (c)(8). It was further alleged as to Counts 1, 2, 3 and 4 that appellant was convicted of two prior serious felonies within the meaning of California Penal Code § 667, subdivision (a), robbery and assault with a deadly weapon, on March 11, 1987. It was further alleged as to Counts 1, 2, 3, 4 and 5, that these

serious felony priors were within the meaning of California Penal Code §§ 667, subdivision (c), 667, subdivision (e)(1), 1170.12, subdivision (a) and 1170.12, subdivision (c)(1). It was further alleged as to Counts 1, 2 and 4, that the serious felony priors were prison priors within the meaning of California Penal Code § 667.5, subdivision (a). (3 C.T. 772-777.)

On November 5, 1997, jury selection began. (8 C.T. 2101-2105.) On December 8, 1997, the jury was selected. The jury was sworn to try the case on December 9, 1997, and the guilt phase began. (8 C.T. 2208, 2212.)

On January 21, 1998, the jury began deliberation on the guilt phase. (10 C.T. 2687.) On January 22, 1998, the jury returned verdicts of guilty as to all five counts, finding all special allegations true. (10 C.T. 2706-2708, 2709-2723.)

On January 24, 1997, the prosecution advised that it was seeking the death penalty against Mr. Johnson. (3 C.T. 784.)

On February 17, 1998, the penalty phase began. (12 C.T. 3104-3107.) On March 4, 1998, the jury began deliberation on the penalty. (13 C.T. 3249.) On March 11, 1998, the jury returned a verdict of death. (3 C.T. 3257-3258.)

On April 27, 1998, the trial court denied appellant Johnson's Motion for a New Trial and Motion for Modification of the Verdict to Life Without Possibility of Parole, and sentenced appellant as follows: to a judgment of death for Count 1; 25 years to life consecutive for Count 2 pursuant to

California Penal Code §§ 1170.12 and 667, subdivision (b), with 10 additional years for the personal gun use, both stayed, because the circumstances in Count 2 were considered as a component in denying the motion to reduce punishment; 25 years to life consecutive for Count 3, with 4 additional years for personal use of a firearm, both also stayed for the same reason as Count 2; 25 years to life consecutive for Count 4, with 4 additional years for personal use of a firearm, both also stayed for the same reason as Count 2; 25 years to life consecutive for Count 5, with 4 additional years for personal use of a firearm, both also stayed for the same reason as Count 2; an additional 5 years consecutive to Counts 2 through 5, pursuant to California Penal Code § 667, subdivision (a), also stayed. Appellant received 747 days credit for time served. (15 C.T. 3735-3756.)

A Notice of Automatic Appeal was filed on May 5, 1998. (15 C.T. 3757.)

STATEMENT OF FACTS

GUILT PHASE

Prosecution Evidence

Appellant, Michael Raymond Johnson, married Guillermina Alonzo in 1985. (36 R.T. 6756.) He did not know Alonzo very well prior to marrying her. Alonzo had a daughter named Doreyda from a previous relationship. (36 R.T. 6771.) Johnson left several months after the marriage. (36 R.T. 6772-6773.) Alonzo doesn't remember whether she

saw Johnson anytime between 1985 and 1995. However, in 1995 Johnson called asking her to sign some papers regarding his going to school. At this time, Johnson was working at a drug rehabilitation center. The two then began an intimate relationship. (36 R.T. 6774-6775; 38 R.T. 6977.)

Soon after beginning the relationship with Johnson, about three months before the events of July 17, 1996, Alonzo moved to her nephew's house at 122 North Encinal. (36 R.T. 6777-6779.) It was a very small house. There was one bedroom where Alonzo slept. Doreyda and Doreyda's boyfriend slept in the living room. Johnson had his own house, but came over to the Encinal house and began spending the night for the last two or three weeks before the July 17, 1996. (36 R.T. 6782-6783; 38 R.T. 6977-6980, 6996.)

Several days before July 17, 1996, Alonzo was in the shower. She was laughing. When she got out, Johnson accused her of being in the shower with Doreyda's boyfriend Francisco. He told her he was jealous of Francisco. Alonzo told Johnson he was crazy. There was no one in the shower with her. At this time Doreyda and Francisco were asleep in the living room. (38 R.T. 7002-7008.)

On Sunday morning July 14, 1996, she and Johnson went to have breakfast with Johnson's parents. (36 R.T. 6786.) Afterwards they returned to the house. They then went to make love in the hills. They took highway 33, to a place with a river, mountains and trees. Before they took

off their clothes, they got into an argument because Alonzo stated that she and Doreyda's father had gone to the same river. (36 R.T. 6787-6789.) Alonzo calmed Johnson down, and they made love. The next day, when Alonzo came home, Johnson had moved out. On Monday or Tuesday they spoke by phone. Johnson said he wanted to get divorced. He told her she wasn't good enough for him. He told her his family was very special, but she was nothing. (36 R.T. 6790-6795.) Alonzo asked Johnson why he left. Johnson said he thought he heard her talking in the shower with Francisco and he was jealous about that. Johnson told Alonzo he loved her and wanted to stay with her all day and all night. (38 R.T. 7024 7027.)

On July 17, 1996, in the afternoon, Johnson arrived at the home of Alonzo's employer, Mrs. Strauss. It was about a quarter to three. Alonzo was expecting a call from Ms. Strauss at 3:00 p.m. Alonzo asked Johnson what he was doing there. Johnson replied "Do you understand what a .45 is?" She did. (37 R.T. 6830-6832.) She believed Johnson had a pistol with him. (37 R.T. 6833-6834.)

Johnson told her he was going to take her to Wisconsin. Alonzo told him she didn't believe him. Alonzo told him she had to stay and work to support her daughter. (37 R.T. 6833-6834.) Johnson said they were going to Wisconsin but were going to rob a bank in Ojai first. He said they were going to rob a bank because they didn't have money. Alonzo told Johnson she couldn't go with him. (37 R.T. 6835-6836.)

Johnson told Alonzo, "I love you, I can't leave. I have to stay close to you." Johnson said he wanted to stay with her all the time. (38 R.T. 7026-7028.) Johnson was very agitated. The way he was speaking and the way he looked was different than Alonzo had ever seen before. On more than one occasion, he told her, "I have to stay with you every minute of every day." (38 R.T. 7031-7032.)

Johnson's face was red and he was talking very fast. (38 R.T. 6968.) Johnson wasn't acting normal. He told Alonzo he would take her by force. Johnson told her if she refused to go with him he would kill her and then kill himself. When they were in the guest house, Johnson threw a gun on top of the bed. It was a big pistol, very old. It was kind of black. He carried the pistol in the back of his shorts. (37 R.T. 6835-6838, 6853.)

Johnson said if Alonzo went with him, she wouldn't get hurt. Johnson told her he had another gun. She does not recall whether she saw it. Alonzo was not afraid for herself, but she was afraid that Johnson might hurt someone else. They stayed 15-20 minutes in the guest house. Johnson told Alonzo that he didn't want Doreyda's boyfriend in the house. He was jealous of the boyfriend. Alonzo had previously kicked Doreyda and her boyfriend out of the house because of Johnson's jealousy. (37 R.T. 6847-6850.)

Alonzo tried to talk Johnson into surrendering the guns, but he became angry and yelled. He was acting crazy. (37 R.T. 6854-6858.)

Alonzo called her daughter, Doreyda, and told her to leave the house with her boyfriend. (37 R.T. 6859-6860.) She spoke to Doreyda in Spanish. She told Doreyda that Johnson was carrying two "pistolas." Alonzo told Doreyda that she didn't want Doreyda and her boyfriend to get hurt, and so they had to leave. She also used the words, "he has two things." (37 R.T. 6860-6861.)

Shortly thereafter, Strauss called and told Alonzo that she was free to leave. To get Johnson to leave, Alonzo asked him to go for a ride. At this time she was not afraid[2], but did not feel she could walk away. (37 R.T. 6862-6865.)

Johnson's car was parked behind Alonzo's car. Johnson did not want Alonzo to drive separately, so they drove in Johnson's car. Johnson put the pistol in the back of his shorts. (37 R.T. 6865, 6867.) When they left the residence, they drove in Johnson's car to 122 North Encinal. Johnson indicated he also had a pistol in his vest pocket. Alonzo saw the outline of the pistol. (37 R.T. 6872-6873.) During the ride, they talked about a story Johnson was going to write when he got out of school called

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[2] Ventura County Sheriff's Sergeant Robert Garcia interviewed Alonzo on July 17, 1996, at approximately 8:38 p.m. He conducted a second interview at 8:00 a.m. on July 18, 1996. (38 R.T. 7083-7084.) Alonzo indicated that although Johnson did not point a gun at her, he showed her one of the guns and said, "Listen to me." Alonzo indicated she had to go with Johnson because he had a gun. She said she was, "so scared." (38 R.T. 7088-7094.)

"Crazy Love". It was a story where he thought they were both crazy. When joking, Alonzo would tell Johnson he should write a movie. Johnson stated that they were actually in the movie. He was saying, "We're in the movie now. The movie is happening now." (37 R.T. 6874- 6876; 38 R.T. 7043.) While he drove, Johnson was looking around as if they were being followed. In fact, they were not being followed. (38 R.T. 6969.)

When they arrived at 122 North Encinal, Johnson parked outside in the driveway. Johnson indicated he was jealous of Doreyda's boyfriend, that Doreyda and her boyfriend were still there, and that the boyfriend hadn't left yet. At that time, Alonzo did not feel she could have gotten away from Johnson. She and Johnson entered through the door in the driveway. Doreyda and her boyfriend were there when Alonzo and Johnson came into the house. Alonzo's sister's children were also in the house. Alonzo told Francisco and Doreyda that they had to leave. Johnson had his hands in his pockets. (37 R.T. 6877-6879.) Doreyda was crying. (38 R.T. 7047-7048.)

Alonzo told Johnson, let's go "cruising." They got in Johnson's car. Alonzo and Johnson went down Highway 33, where they had been on the previous Sunday. When they arrived at the river, Johnson tied up the puppy. (37 R.T. 6882-6889.) Johnson was looking everywhere. He wasn't paying attention to her. He said that someone was following him. (38 R.T. 7054.)

They took off their clothes. Alonzo was not afraid when she did so. Johnson did not make any threats to her. (38 R.T. 7051-7052.) Johnson put one gun under a pillow they had brought, and had the other in his hand. Alonzo was not afraid of this. Johnson kept looking behind him to see if someone was following him. Johnson moved the gun from hand to hand as he looked around. This did scare Alonzo. Johnson was unable to get an erection. (37 R.T. 6891, 6894- 6900; 38 R.T. 7058.) Johnson placed his penis on Alonzo's vagina, and may have penetrated.[3] Johnson did not ejaculate. During the time that Johnson was on top of her, attempting to have sex, Alonzo did not tell him to stop. After about 20 minutes, Alonzo told Johnson let's go. She said that mosquitoes were biting her. (38 R.T. 7060.)

As they were driving, they saw Doreyda Gomez and her boyfriend driving Alonzo's car. Johnson and Alonzo continued to the Encinal house. When they arrived they entered and Johnson ate some food in the refrigerator.

At some point Gomez called Alonzo and asked if she should call the police. Alonzo said yes. Alonzo referred to the guns Johnson was carrying

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[3] Alonzo denied at trial that there was any penetration, because Johnson was unable to get an erection. She was impeached by her Grand Jury testimony, where she indicated Johnson was able to penetrate her vagina "a little bit."

in Spanish. (37 R.T. 6922- 6927.)

Gomez called 911 at approximately 5:25 p.m. Jessica Prince, a Ventura County Sheriff's Department Emergency Operator, received the call. As she took information from Gomez, Prince typed information into her computer. Prince classified this call as a domestic disturbance. Domestic Disturbance is the highest priority, the quickest way to get deputies to respond. (32 R.T 6124, 6133.) Prince typed in that the man inside had two guns, and that he was planning on robbing a bank on Friday. Though Gomez reported that her mother was in danger; Ms. Prince did not type this information in. (32 R.T. 6124-6125.)

Prince sent the information she typed to her dispatch partner, Jeff Mercer. At approximately 5:28 p.m., Mercer broadcast a dispatch to units in the Ojai area. (32 R.T. 6113-6115, 6120.) Both the 911 call and the dispatch were tape recorded. (32 R.T. 6115.) While Mercer was dispatching, Prince placed a call to Alonzo at 122 North Encinal. (32 R.T. 6120-6121.) Prince was trying to determine whether the disturbance was a hostage situation. (32 R.T. 6127, 6149.)

To distract Johnson, Alonzo convinced him to take a shower. She got in the shower with Johnson. Johnson put the guns on the windowsill. The telephone rang. Johnson allowed Alonzo to answer it. This was Prince's call. She asked, "Mrs. Alonzo, do you need help". Alonzo responded "yes," and that she couldn't talk. She didn't want Johnson to

know she wanted him to surrender. (32 R.T. 6127, 6149; 37 R.T. 6931-6935.)

Johnson got out of the shower and asked Alonzo to whom she was talking. Alonzo said it was a wrong number. Johnson took the phone away and hung up. Alonzo told Johnson to go back into the shower because he had soap on him. Up to this point, Alonzo did not feel there was any time she could have gotten away from Johnson. (37 R.T. 6936-6938.)

Ventura Sheriff's Deputies Steven Sagely and Peter Aguirre, who were assigned to the Ojai area, received the dispatch. (33 R.T. 6161-6162, 6166.) The disturbing party was described as a tall white male, with glasses, wearing a Hawaiian shirt and shorts. (33 R.T. 6167, 6168.) Sagely and Aguirre were advised that there were two guns in the residence. They were not advised that the suspect, himself, was armed. (33 R.T. 6168.)

Aguirre was driving, and drove directly to the North Encinal residence. On route, they communicated with another unit occupied by Deputies David Sparks and James Fryhoff. (33 R.T. 6168-6169, 6301; 34 R.T. 6382.) Sparks and Fryhoff told Sagely and Aguirre they would provide back-up until the situation was stabilized. The two cars parked about a house away from 122 North Encinal, just to the South of it. (33 R.T. 6169, 6170.)

The four entered the property through a front gate. Sparks and Fryhoff went to the rear, or Southeast corner, of the residence, Sparks up

near the house, and Fryhoff behind a large oak tree. Sagely and Aguirre went to the front door at the Southwest corner. (33 R.T. 6171 , 6172, 6307-6309.)

Aguirre knocked on the door. Alonzo, still wrapped in a towel, first went to the side door and opened it. At this time, Johnson was still in the shower. When she saw no one there, she went to the front door. (37 R.T. 6938, 6942-6946.) Sagely and Sparks saw the side door open approximately 6 to 18 inches and then close quickly, Sagely made eye contact with Sparks, indicating that this was strange. (33 R.T 6175, 6176, 6310.)

Alonzo opened the front door, and stepped out on the porch to the left of Deputy Sagely. (33 R.T. 6180, 6182.) Sagely could not see inside the residence because the sun was glaring right down on the front door. It was very bright on the porch and really dark inside. Alonzo was crying and trying to speak in broken English. (33 R.T. 6181-6183.)

Deputy Aguirre spoke to Alonzo in Spanish. He asked her, "Mrs. Alonzo, where is Mr. Johnson". Sagely also asked Alonzo something to the effect of "well where is he?" Ms. Alonzo mentioned something about a bathroom or shower. She pointed over her shoulder with her thumb. Sagely did not take this as an invitation to enter, and did not think of entering at that time. (33 R.T. 6182-6185; 37 R.T. 6952-6953.) However, Sagely saw Aguirre in his peripheral vision go around behind him and

through the front door. As Aguirre was entering, Alonzo recalls she told the officers that Johnson had two pistols; Sagely recalls Alonzo mumble something about guns. (33 R.T. 6184, 6186; 37 R.T. 6952-6953.)

At around this time Fryhoff said to Sparks, "they're in, let's go in." Sparks reached for the side door. (33 R.T. 6314-6315.)

When Aguirre was ten to fifteen feet inside the house, Sagely heard Aguirre say: "Hey Mike." (33 R.T. 6188, 6244-6245.) Suddenly, there were three to five rapid gunshots. They sounded to Fryhoff like a cap gun going "pop, pop, pop, pop." Fryhoff does not recall whether there was any pause between the shots. Sagely tried to look into the residence, but couldn't see anything. He grabbed Alonzo's arm as one of the shots rang out, and said something like, "get out of the way." He then went around to the North side of the house. Fryhoff got on his radio and reported shots fired. He then retreated to a position behind the oak tree where he had been originally positioned. (33 R.T. 6188-6189, 6313-6315, 6317-6318; 34 R.T. 6396-6398; 37 R.T. 6955, 6956-6958.)

Sagely continued around the North side to see what Fryhoff and Sparks were doing; Alonzo was with him. He heard Fryhoff say, "shots fired, request Code 3 backup." Sparks and Fryhoff called out for Deputy Aguirre. Sagely asked where the "subject" was. Fryhoff or Sparks replied that they didn't see him. Sagely told Alonzo to get out of the area. (33 R.T. 6190-6192.)

Fryhoff drew his gun. He looked through the window of the house. At first, he saw nothing. Then Michael Johnson came into view. Johnson made eye contact with Fryhoff and then made a bee line towards the front door. Fryhoff yelled to Sparks, "he's going to the front; he's going to the front." Fryhoff ran to the front yelling out "Where's Pete"? Fryhoff stopped by a large oak tree, because he saw Johnson was already out in the front yard. (33 R.T. 6317-6320, 6325-6326; 34 R.T. 6401.)

As Fryhoff came around the corner of the tree, Johnson raised his arms and began shooting at Fryhoff. Johnson had at least one gun in his hands. He fired five to six shots. Fryhoff heard the bullets flying past him. Sparks saw little puffs of dirt popping up off the ground near Fryhoff. Fryhoff returned three shots from his Sigsauer P-220, .45 caliber semi-automatic hand gun. Fryhoff then crouched behind the tree. Sparks and Sagely were asking where the suspect was." Fryhoff said "I can't see him; I'm behind a big tree." After he finished saying that, he quickly peeked from behind the tree and saw Johnson lying down on the ground on his back with his hands in the air. (33 R.T. 6321-6324; 34 R.T. 6401-6403.)

Fryhoff yelled to the other Deputies "he's down". He approached Johnson, rolled him over onto his stomach and handcuffed him with his hands behind his back. He noticed Johnson had a gunshot wound to the left side of his chest. Although Fryhoff didn't notice it at the time, someone later told him Johnson was not dressed. There were two guns next to

Johnson on the grass, a black semi-automatic .32 caliber handgun and a nickel-plated or chrome Colt .45. (33 R.T. 6325-6326.)

Deputies Sagely and Sparks went to clear the house. Deputy Aguirre was lying between a partition and the north side wall, separating the bedroom from the dining room. He was lying on his back. Aguirre's gun was still in his holster, and his holster was snapped. There was blood on the walls, the floor and on a plant. (33 R.T. 6196-6197, 6325-6328; 34 R.T. 6404-6408.) Sparks and Sagely checked the rest of the house for suspects and then returned to Aguirre. (34 R.T. 6406-6407.) As other deputies arrived, Fryhoff went into the house to help with Deputy Aguirre. (33 R.T. 6325-6327.) They removed Aguirre's gun belt, his uniform shirt and the front plate of his bulletproof vest. (33 R.T. 6198, 6325-6328; 34 R.T. 6406-6410.)

Paramedics arrived and cleared the room. Sparks went outside and saw Johnson now on his stomach with his hands cuffed behind his back. Johnson was mumbling, but Sparks could not hear what he was saying. Sparks took his foot and moved away the semi-automatic handgun that was lying near Johnson. (33 R.T. 6328; 34 R.T. 6411-6413, 6419-6420.)

Dr. Ronald O'Halloran was the Ventura County Medical Examiner. On July 18, 1996, he performed an autopsy on Deputy Aguirre. Dr. O'Halloran first identified a gunshot wound going through Aguirre's left arm. There was no stippling to this wound. O'Halloran next identified

a gunshot wound entering Aguirre's left forehead area. The entry was above the left eyebrow. The exit was just above and behind the left ear. There was also no stippling associated with this wound. (39 R.T. 7162-7169.) O'Halloran identified a second gunshot wound to the head. The entry of this wound was the right side of the face near the eyebrow. The exit was the left sideburn area in front of the left ear. Dr. O'Halloran noticed stippling around the perimeter of this gunshot wound. (39 R.T. 7169-7170.)

Dr. O'Halloran participated with criminalist Jim Roberts and investigator Danny Miller of the District Attorney's Office in test firing the 45 caliber pistol to determine the approximate muzzle-to-skin distance of the gunshot wound that entered Mr. Aguirre's head on the right side. Based on Dr. O'Halloran's training and experience, his opinion with a reasonable degree of medical certainty was that the muzzle-to-skin distance was within the 6" to 24" range, and probably close to 12"." (39 R.T. 7171-7176.)

Returning to the first gunshot wound to the head, it, in and of itself, was a debilitating wound. It probably would have caused immediate loss of motor control and collapse to the ground. This wound, alone, could have caused Deputy Aguirre's death. The second gunshot wound to the right side of Aguirre's head, was also a debilitating wound. It too would have caused loss of consciousness and motor skills. This wound also, alone, could have caused death. Collectively, both wounds were the cause of

death. Johnson was alive at the time of both gunshot wounds because there was bleeding from the wounds. (39 R.T. 7175-7177.)

James Roberts, a Criminalist with the Ventura County Sheriff's Department, did an analysis on the Colt .45 and Barretta .32 found next to Johnson, and on Deputy Fryhoff's Sigsauer. (35 R.T. 6633, 6641-6643.) The three .45 caliber cartridges found in the living room area, the .45 cartridge found in the living room, the bullet found underneath the dining room floor and the bullet found in the comforter were fired from the Colt .45 found next to Johnson. (36 R.T. 6549-6552.) Roberts was able to identify the various cartridges, bullets, and bullet fragments in the yard as having been fired from Johnson's .32 and .45, and Fryhoff's .45. (36 R.T. 6545-6547.) The .32 and .45 caliber ammunition in the briefcase was similar to that which would have been fired by the .32 Barretta and Colt 45. (36 R.T. 6661-6663.)

Dr. Donald Patterson, a forensic psychiatrist, was asked by the Ventura County District Attorney's Office to interview Johnson at the Ventura County medical Center Emergency Room the evening of July 17, 1996. Johnson was hooked up to an I.V. and various machines recording blood pressure and heart beat. He indicated he was in pain and requested pain medication, but accepted that he could not receive any. Johnson did not appear to be manifesting a distress of pain. (39 R.T. 7115-7117.)

Patterson's interview began at approximately 10:00 p.m. and

concluded at approximately 11:15. It appeared to Patterson that Johnson was being treated for a gunshot wound. He was given an anesthetic injection. A tape of the interview was played. (39 R.T. 7118-7119, 7133-7134; 5 C.T. 1152-1198.)

During Patterson's interview, Johnson described how his relationship with Alonzo had "stirred things up," and that he had felt like he was in a movie earlier that day. He stated that he knew everything that happened earlier that day, because he had a "tape" in his head and could replay the events. However, he stated that his thought disorder left him without emotion or remorse as to the events. He stated that he knew what he was doing, that he was in a situation and just reacted. (5 C.T. 1168-1171.) He stated to Patterson that he had such strong emotions about wanting to be with Alonzo all of the time, and so had kidnapped her earlier that day. (5 C.T. 1190-1192.)

Defense Case

Dr. Martin Fackler, M.D., a renowned wound ballistics expert, reviewed the report of the autopsy done on Deputy Aguirre by Dr. O'Halloran. He reviewed an autopsy photograph, crime scene photographs, diagram of the crime scene and various police reports including witness statements. He had seen the photographs of the X-rays taken at the autopsy. He opined the wound sustained by Deputy Aguirre to the left forehead was a debilitating wound. The chances are overwhelming

that it would have been an immediately incapacitating wound, rendering loss of capacity for conscious movement of the extremities; had the person been standing or sitting he would have collapsed. Although not absolute, Dr. Fackler thinks that such a wound had a 95% chance of resulting in immediate unconsciousness. The chances of it being fatal would be well over 90%. The gunshot wound to the right forehead, again would be a debilitating wound. This would have had an even higher percentage of immediate unconsciousness because it was a deeper wound into the brain and included three lobes instead of two. It would also result in immediate loss of consciousness and, in and of itself, would be fatal. (40 R.T. 7287-7293, 7294-7297.)

It would be highly unlikely, in the range of 95 –98% against, that Deputy Aguirre would have been able to raise a hand in a defensive motion following either of the gunshot wounds to the head. (40 R.T. 7297-7298.)

Ventura County Sheriff employee Bob believed that training manuals, memoranda, directives, and bulletins regarding officer use of weapons, officer handling of mentally ill suspects, and officer response to domestic violence calls were used in training when Deputy Aguirre went through the Sheriff's Academy. (41 R.T. 7476-7483.)

John Thornton a Ph.D. a forensic scientist, specializing in interpreting blood spatters and blood stain distributions as part of crime-scene reconstruction, reviewed all investigative and autopsy reports,

photographs and transcripts, related to physical evidence. His purpose in reviewing the materials was to evaluate the physical evidence and to attempt, to the extent possible, to reconstruct the crime scene to establish what actually happened at the time the Deputy was shot. He generated a report detailing his findings and conclusions. (41 R.T. 7371-7379.)

Dr. Thornton did not believe it possible to determine with certitude the sequence of the shots. He favored the scenario that the shot to the arm was first. The blood spatter on the Deputy's hand could be from its proximity to the wound on the left arm, or from the Deputy coughing. He believed one of the head shots was while Deputy Aguirre was erect, and was certain the other occurred while Deputy Aguirre was close to the floor, but that his head was not on the floor. He believed that Aguirre was falling when the last shot was delivered, and the evidence was consistent with the shooter running by as he shot. He agreed with the prosecution experts that the gunshot causing the stippling wound to the right side of the head was from 12 to 18 inches. He disagreed with prosecution criminalist Schaeffer that the stippling wound could be concluded as the last shot. He thought it was possible; but serious consideration needed to be given to the wound to the left side as the last, based on bone distribution. (41 R.T. 7383-7385, 7390-7395, 7397-7398, 7411-7412.)

Rodney Gilliland, an Optometrist, performed an eye examination on Johnson on April 20, 1994. Johnson's uncorrected vision was 20/400.

That meant that Johnson could see at 20 feet, what someone with normal vision could see at 400 feet. (42 R.T. 7544-7545.) Essentially, for Johnson to get to 20/20 perfect vision, he would have to come within 13 inches of an object. At around 3 to 4 feet Johnson's vision would be 20/60 to 20/70. The farther away an object would be, the more blurry it would be. (42 R.T. 7546-7547.) Adverse lighting and movement could also negatively affect the vision of someone with 20/400 vision, while squinting would allow some improvement of eyesight. (42 R.T. 7547-7548, 7553, 7556.) However, at 44 inches away[4] from a uniformed Sheriff, Johnson would be able to see that the form before him was a human being; he would be able to make out the head of the person, be able to see the badge on his chest and his gun belt. (42 R.T. 7557-7561.)

Roger Clark was a former Lieutenant with the Los Angeles Sheriff's Department for more than 27 years. During the time he was watch commander at communications center, he developed an expertise in terms of notification of units involving felony suspect and rolling to "hot calls." (41 R.T. 7493-7496.) He was trained in the techniques of "exigent circumstances." (41 R.T. 7506-7509.)

Clark reviewed police reports about Johnson's case. He reviewed

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[4] The prosecution and defense stipulated that from Johnson's right eye to the tip of his fingers on his right hand was 32 inches.

trial transcript testimony of Alonzo, and Deputies Fryhoff, Sagely, and Sparks. He also was physically at the residence at 122 N. Encinal. Based on the facts he was able to render opinions about what a reasonable objective police officer might have thought from these facts; he could not, however, opine subjectively what deputy Aguirre or some other officer thought. (41 R.T. 7573.)

Based on a hypothetical, essentially setting forth the facts present as the police officers arrived at Encinal and leading up to the shooting, Clark opined a reasonable police officer would not believe that immediate entry was necessary to prevent a threat of eminent danger to him or others. Clark opined, "[t]here [was] no evidence of an emergency occurring inside the house;" there was absolutely nothing emanating from inside the house to indicate that there was a crime being committed or that someone was in danger, which would create the emergency of the officer to go in. Clark's opinion was further based on the fact that the victim or probable victim was out on the porch in the hands of the officers, and as best as can be determined, no one else was inside except the disturbing party. If there was any concern, the alleged victim simply could have been taken further from the residence. (41 R.T. 7578-7589.)

Prosecution Rebuttal

Sergeant Mike De Los had been an instructor of family disturbance classes, teaching the principles and skills an officer needs in order to safely

conduct a contact with a disturbing party to investigate abuse. During his several years as a patrol sergeant and field training officer, it would be common for him to make entries into homes on domestic violence or abuse calls. He was familiar with the standards expected of a reasonable peace officer in making domestic violence or abuse calls. (43 R.T. 7800-7808.)

De Los Santos was deputy Aguirre's instructor at the Sheriff's Academy in 1994. Among the classes he taught Aguirre were Family Disturbance, Pedestrian Contact and High-Risk Traffic Stops. (43 R.T. 7820-7821.) De Los Santos had a note on the syllabus stating, "never let your guard down and be aware of your surroundings." He taught the officers to get all information available from dispatch, including who called, their sex and approximate age, whether the caller was still present when the call was received, circumstances of the call, whether there was a weapon involved and other subjects present. (43 R.T. 7835-7836.) The officers were taught to park their car at a safe distance. They were taught that a domestic abuse or domestic violence call is a two-officer response. (43 R.T. 7837-7838.)

De Los Santos taught officers the need to maintain positions of cover. The officers were taught how a retreat without cover can be fatal. The officers were taught to note location of things like windows from which cover would have to be available. Officers were taught to listen for things like footsteps, voices, doors opening and closing. In terms of the

entry itself, officers were told to use a normal knock to avoid giving anyone extra time to formulate or arm themselves, or to heighten or escalate what is going on inside. After knocking, the officers are trained to stay away from the front door. (43 R.T. 7839-7841.)

Officers were taught to avoid the "fatal funnel", and the farther back an officer retreats from a position, the wider the funnel is. An officer stands to the side of the door to avoid someone shooting through the door. Noises such as footsteps, doors opening and closing and voices would tend to communicate to an officer the possibility of increased danger. The officers would listen to see if they could hear evidence of a dispute or whether there was a fight going on inside. If the officers knocked on the door and there was no response and they heard a dispute going on inside, officers were trained to make entry. If the door was opened, the officer was trained to walk in. The officer then would investigate whether or not domestic abuse or violence was occurring and to locate the individuals. (43 R.T. 7841-7843.)

Officers were advised regarding considerations of lighting. Officers were trained to avoid silhouette situations where the officer would be backlit making him an easy target. This would be compounded by the fact that the officer may not be able to see into the house and have no idea what awaits him. If this occurred, an officer would be trained to change the light difference by stepping into the house; therefore the officer would be at the

same light level which would allow the officer to see. The officer then was trained to observe all conditions in the house. Officers were taught to look for weapons. This would include ammunition, magazines which contain ammunition, or even an empty magazine. (43 R.T. 7844-7845.)

Officers were also advised to turn their police radios down to avoid the subjects inside knowing the officer is there. Officers were taught a concept called "contact and cover." One officer is the contact officer. He makes contact with the individual. The second officer is the cover officer. His sole responsibility at that point is to insure the safety of the contact officer. De Los Santos taught officers another concept called "block and cover." The cover officer would place his body physically between the threat and the contact officer. This is the single most significant principle in police work in De Los Santos' opinion. If the cover officer is back lit he cannot see. He therefore can't protect his fellow officer or the victim, and he can't protect himself. He would need to change that situation and need to step into the residence. The term "reasonable police officer" is different from the term "reasonable person." A reasonable police officer must take calculated risks to protect the public, himself and other officers. A reasonable police officer is expected to use his own body to block and cover his partner and any victim in a domestic violence case. Officers are taught to locate and physically separate the people involved. (43 R.T. 7846-7850.)

The officers were taught they may enter a residence to investigate. If a dispute is going on outside the house, officers are taught to take it inside because outside you can't control the escape or the movements of the people involved. The officer also avoids the problem of neighbors becoming involved or people reacting differently when they are contacted in front of their neighbors. Officers were taught to visually frisk the disputants to look for evidence of weapons. De Los Santos taught Peter Aguirre that a reasonable police officer responding to a domestic violence or abuse situation would believe that the two principles of block and cover and contact and cover were necessary to protect the lives of the victim, the other officers, himself and the suspect. (43 R.T. 7851-7852, 7854-7856.)

Having reviewed and considered the testimony of officers Sagely, Fryhoff and Sparks as to the facts and circumstances surrounding their responding to the dispatch, De Los Santos opined a reasonable police officer would believe he could enter the residence at the time Deputy Aguirre did. He also opined that a reasonable police officer would believe that immediate entry was necessary to protect Alonzo, Deputies Sagely, Fryhoff and Sparks, possibly the suspect, and Aguirre himself, "because Peter Aguirre cannot cover, block, protect himself or his partner or Ms. Alonzo without specifically knowing where the threat is coming from." (43 R.T. 7878-7881.)

PENALTY PHASE

Enedina Aguirre, Peter Aguirre's wife, was 14 when they met. They married in May of 1992. Peter and Enedina's daughter Gabriella, or Gabby, was born in September of 1992. Enedina learned that Peter had been killed when she returned home from shopping with Peter's sister.

Monica Elisarraraz, Enedina's younger sister, was counseled by Peter when, during her teenage years, she had problems with drugs and running away. Peter would come over and talk with her. She missed Peter, but she mostly missed seeing her sister happy. Enedina was not the same since Peter died. (48 R.T. 8650-8655.)

Leonard Mada had been Peter's best friend since they were 6 or 7 years old. Because Mada was a couple of years older than Peter, he was like a mentor to Peter. He was a very fun guy to be around. Mada was very proud that Peter became a Sheriff. (48 R.T. 8660-8662.)

Deputy Fryhoff was 27 years old. He had been a Sheriff's Deputy for seven years. He began his patrol duties in May 1994 and became Peter Aguirre's training officer in March of 1996. Fryhoff worked with Aguirre every day and developed a really close friendship. Pete was the most giving person on the face of the earth. He cared a great deal about his family, his wife and daughter. He was a very religious man. He had a good sense of humor. (48 R.T. 8672-8674.)

Fryhoff didn't sleep for almost two weeks, didn't eat any substantial

food for at least a month, and cried a lot. He had been to three counselors. The first two he couldn't tolerate after the first visit. The third he saw approximately ten times and then she started to irritate him to the point where he hated her more than anybody except for Johnson. It was about six weeks before Fryhoff returned to work. (48 R.T. 8685-8686.)

Deputy Sparks was a close friend of Deputy Aguirre's. He got to know Pete when he came to Ojai to work patrol. He partnered with him one or two dozen times. Pete was a great guy. He was a person you wouldn't have to worry about sharing your personal feelings with. He never said anything bad about anybody. He liked to talk about his family and his daughter who he loved very much. He bragged about her. He was a good officer. He treated people on the street fairly. Sparks misses Pete's compassion and kindness the most. (48 R.T. 8691-8694.)

After the shots, when Sparks went in the house and saw Pete lying on the ground he felt more helpless than he had ever felt before. He felt helpless, the same kind of helplessness he felt when Pete was shot. He talked to the Department psychologist, Dr. Nutter, but he didn't feel any better. There wasn't a day he didn't think about Pete Aguirre. (48 R.T. 8694-8699.)

Captain James Barrett was a twenty-five year Ventura County Sheriff employee. He was manager of the Ojai Valley Sheriff's Station, and Chief of Police for the City of Ojai when Deputy Aguirre was

murdered. Pete was a quiet, unassuming professional; a team player; a person you could count on. It completely changed the way he looked at the law enforcement business. Barrett felt very helpless, angry and sad. (48 R.T. 8706.)

Cody Murphy was a seventeen-year old skateboarder. Peter Aguirre and his partner would tell them where they could skate board. Aguirre had a passion for making things better for teenagers around Ojai. When he found out that Aguirre had been killed, it broke his heart. He and friends took some money from their skate boarding fund and bought some flowers and sent them to the station. He misses seeing Aguirre around town. It feels a lot emptier. (48 R.T. 8781-8785.)

Marie Aguirre was Peter Aguirre's mother. The last time she saw her son alive was on October 16, 1996, the day before he died. They were happiest when their family was in one environment, under one roof. (48 R.T. 8792-8793.)

She did not expect to outlive her son. Peter was the first child to get his Bachelor's Degree from college. He wanted to get a Ph.D. Peter and Dena had a small house, but they were rich because they had each other. When Gabby was born, it was the happiest she had ever seen him in his life. (48 R.T. 8793, 8799-8801.)

Mrs. Aguirre found out her son had been killed when she received a call from her husband who was at work. The way she copes with Peter's

loss is to work three jobs. She didn't want to go home. She didn't clean for a year. She didn't want to do anything at home. She went from one job to the next job to the next job and would get home late at night. Her husband reacted differently. He sat and stared at the walls, he walked around at night with no sleep. Mrs. Aguirre had to sleep, so she thought if she worked real hard she'd exhaust her body and then she could sleep at night and that's what she did. She felt guilty for neglecting her daughter, Jeanine. She still hasn't been there for her. She's grown up too fast coping for herself, working. (48 R.T. 8813-8815.)

A videotape of home movies of Peter Aguirre and his daughter was shown. (48 R.T. 8816.)

On November 17, 1993, Officer Terry Medina was on patrol as a police officer with the City of Ventura. He received a dispatch to an injury accident involving a pedestrian in the area of Empire and Preble. When he arrived, he saw a person he identified as Johnny Reeves being treated. Reeves was complaining of pain in his leg. He had swelling and abrasions on his right calf. Reeves described being the victim of a hit and run. (48 R.T. 8720-8729.)

Linda D'Ambra was a Sheriff's Department employee, whose duties included screening applicants for volunteer substance abuse positions. In that capacity she interviewed Johnson. This was in 1994. She wrote a report after meeting Johnson because of something he said. This was said

while she was interviewing Johnson for a substance volunteer position. Johnson told her that in November of 1994 his brother came to him after being beat up by some gang members. Johnson and his brother were drinking in his apartment. Johnson felt he wanted to get in his car and go look for the gang members. He had a six pack of beer with him. He rode around for awhile and then decided he was just going to hit the first gang member or somebody in gang member's clothes that he saw. He remembered bouncing off a few cars before he saw this person that looked like a gang member. He then proceeded to hit the person. He then drove off. He felt like he hit another car after that but he wasn't sure if anyone was in or not. After the incident, he decided to get rid of his truck and leave the State. At some point, he came back to Ventura County. He went to the police station and told police about it. This was about a year later. (47 R.T. 8733-8738.)

On December 18, 1986, Ms. Josephine James was parked at a McDonald's restaurant in the area of Overland and Venice in the Los Angeles, Culver City area. A man approached her with a gun and got in the passenger side. He pointed the gun at her and told her "lady you are going to take me for a ride". She refused and asked him to let her get out. He said "well get out." After she got out, she screamed for help. Then the man got out of the passenger side and got into the driver's side. She asked him to give her purse back. He threw the purse at her and drove off. She

ran screaming for help. She learned the man was Johnson and identified him in the Courtroom. (48 R.T. 8785-8787.)

Defense Case

Marcia Miller was a psychiatric social worker with the Ventura County Behavioral Health Department. She was part of a team, led by an M.D. trained in psychiatry. The team included a psychologist and case managers. Back in 1994 and 1995, the Diagnostic and Statistical Manual of Mental Disorders, sometimes called the DSM-III-R was used as part of the criteria in determining whether or not a person had a particular diagnosis of mental disorder. Ms. Miller used this in 1994 in performing an admission or psychiatric assessment of Johnson. (48 R.T. 8822, 8827-8831.)

In 1994, employment specialist Terry McCloud referred Johnson to the Alcohol and Drug Program. Ms. Miller had been trained and educated in diagnosing delusional disorders, schizophrenia, various thought disorders and mood and personality disorders. She was trained to detect the symptomology that may correspond to the criteria in the DSM-III-R. She arrived at a principal diagnosis that Johnson suffered from organic delusional disorder. Johnson appeared to have a prominent delusional belief system that probably had an organic etiology. (48 R.T. 8831-8834, 8837-8838.)

The rationale for this principal diagnosis is that Johnson presented with a prominent delusion that he belonged to a world of organic eaters

who had been forced to go underground to wage a defense against the vast majority of others – the "nonorganics" who attempted to poison the food, water and air by means of multimedia, TV, computers, etc., to brainwash the organics. Johnson spoke of beliefs that he had that were delusions that would be considered by most people to be non-rational belief systems. He talked about being in a fantasy world, which was distinctly different from the other world, believing that there was an underground of organic people who only eat organically grown foods. He believed that in the real world all substances are ingested by poison and are designed to establish mind control over him. He felt that people who inhabit the real world are agents of this effort; they were really doctors who want him to be controlled. He cited his parents as an example. He felt television, radios and computers were involved and that they were used in the implementation of brainwashing. He expressed concern to Ms. Miller that he may be a danger to other people. He indicated that other people had told him that he might have a mental disorder and he was concerned about his ability to control his impulses and that was why he was coming to Mental Health. He gave an example of criminal activity or conduct that Miller felt was an example of a delusional thought process. Johnson mentioned the incident where he drove a truck at someone who might belong to a gang in an attempt to eliminate him. He indicated the man was only slightly injured but did press charges against him. Johnson was feeling very paranoid about anyone who

might wear gang attire or look like a gang member. Johnson also stated he believed other people could read his mind. Johnson indicated that while in prison for three years, he did not use any substances but continued to be delusional. (48 R.T. 8839-8845.)

Dr. Lance, the psychiatrist, and Dr. Schrum, a team psychologist, signed off on Ms. Miller's diagnosis. (48 R.T. 8847-8848.) Dr. Lisa Kus, another team psychologist met with Johnson on August 29, 1994. She gave him some tests and gave him feedback on those tests. She asked Johnson to explain what he meant when he indicated in the testing materials that he had paranoid or bizarre experiences. When he explained them, Kus did not characterize them as delusions. Rather, she thought they were examples of flawed logic. In other words, it was not regular thinking. Johnson gave examples of his behavior associated with food. For example, if he were preparing a meal, if a family member as much as walked by while he was planning the meal, he would discard the whole thing and start over. Johnson indicated that these paranoid feelings greatly diminished the longer he abstained from drugs and alcohol. It had been reported around this time that Johnson had been sober for about five-and-a-half months. When Kus saw him he appeared to be sober. He was very much involved in the program to get rehabilitated. (48 R.T. 8919-8923.)

Johnson didn't want a medication evaluation with a psychiatrist to help reduce his discomfort. She was very cautious to explain to Johnson

that with his history of drug abuse she couldn't tell from the testing results if there was another mental illness going on in addition to what he was experiencing most likely from drug abuse. They talked about testing Johnson again in a year to compare the results. Kus told Johnson her diagnosis was the presence of delusional material, delusional thinking after a long history of drug abuse. Her ultimate diagnosis was called Organic Delusional Disorder. She placed the file on inactive status. (48 R.T. 8923-8925.)

Kus did not hear again from Johnson until late December 1994. Johnson called her and said he wanted to come in and talk. On January 3, 1995, Kus met with Johnson. At this meeting Kus very definitely believed Johnson exhibited symptoms of a psychotic disorder. She again diagnosed it as Organic Delusional Disorder. (48 R.T. 8926-8928.)

Kus set up an appointment for Johnson to obtain medication. She learned that Dr. Peace had prescribed Haldol, an anti-psychotic medication. It can be given to people who have problems with delusions, including schizophrenia. Kus learned later that Johnson was seen by another team psychiatrist, Dr. Lance. Dr. Lance did not prescribe medication and discontinued Johnson as a patient. Kus spoke with Johnson and was still of the opinion he was suffering from mental illness and still needed medication. Dr. Lance's decision not to medicate Johnson did not change Dr. Kus' opinion. In Dr. Kus' experience, people with delusional disorder

can function in society. When she tested Johnson, he tested as an intelligent person. In her experience, intelligent people can have delusional disorder. The fact that Johnson was able to go through the program at ADP and go to college did not change her opinion he was suffering from a mental illness. Delusional symptoms, paranoid symptoms, can often be very focal. They can be imperceptible to people who are around the person who is suffering unless the person is engaging in some overtly strange behavior such as cowering in fear or not eating at all because they think the food is poisoned. (48 R.T. 8939-8947.)

On January 11, 1995, Dr. Dale Peace was a psychiatrist with Ventura County Behavioral Health. He was filling in for Dr. Lance, who was on vacation. On that day, he evaluated Johnson. From reviewing the file, Peace learned Johnson had been previously diagnosed as suffering from Organic Delusion Disorder. During his 20 minute interview, Peace found Johnson "somewhat delusional. He prescribed Haldol for Johnson, an antipsychotic primarily used to alleviate psychosis, delusions and hallucinations. (49 R.T. 9064-9067.)

It was stipulated by the parties that after the shooting of July 17, 1996, Ventura County Sheriff's Deputy Robert Garcia searched Johnson's car and found an empty bottle of Haldol. (49 R.T. 9085.)

Dr. Charles Hinkin was a neuropsychologist at the U.C.L.A. School of Medicine. He was also a staff psychologist at the V.A. Hospital treating

veterans. (49 R.T. 9087.) Dr. Hinkin evaluated Johnson to determine whether he suffered from a brain disease. He spent about eight hours with Johnson, and twenty to thirty hours reviewing thousands of pages of material, including police reports, testimony and psychological material. (49 R.T. 9093-9094.)

Based on his review of Johnson, the psychological tests he administered to him, and his review of the materials he examined, Dr. Hinkin formed the opinion that Johnson suffered from paranoid schizophrenia. (49 R.T. 9094.)

Schizophrenia is a chronic, debilitating disease of the brain that affects a person's ability to distinguish fantasy from reality.

Schizophrenia can ebb and flow; the symptoms can be particularly pronounced, and then with good treatment there can be times of relative cessation, where the patient is able to function half decently. This is particularly true with paranoid schizophrenics. (49 R.T. 9107.)

Hinkin's opinion was that Johnson suffered from paranoid schizophrenia prior to July 17, 1996. His best estimate is that the disease kicked in when Johnson was about 32 years of age. This is when Johnson began developing a fantasy world of organic eaters, who had to go underground to avoid the nonorganics. The nonorganics poisoned the food, water and air, and attempted to gain mind control over him by means of multimedia, TV, and computers. For the twenty years since, Johnson

suffered from a number of delusional beliefs. For example, in the mid-1980's Johnson robbed a McDonalds's restaurant. He claimed he did so as a warrior for Krishna, to show people that eating meat was evil and killing sacred cows was evil. There were multiple other examples of Johnson's delusional beliefs, as well as examples of hallucinations. While Johnson hallucinated, delusions were his main psychotic symptom. (49 R.T. 9094-9095, 9113-9114, 9117-9118, 9114-9124.)

Dr. Hinkin was aware that Johnson had been diagnosed previously as having organic delusional disorder. What the team at the Ventura County mental health struggled with was whether the etiology of the delusional disorder was abuse of drugs or alcohol. Hinkin was aware that Marsha Miller had noted in her records to "Rule out delusions. Paranoid disorder unspecified." (49 R.T. 9129.)

Drugs and alcohol can exacerbate schizophrenia. (49 R.T. 9141.) Hinkin gave Johnson various psychological tests to determine the etiology of the delusional disorder. He determined it was not substance induced. Hinkin also gave Johnson five different tests, and looked at another test from 1974, to rule out that Johnson was malingering. These tests included the Minnesota Multiphasic Personality Inventory test and the Milan Clinical Multiaxial Inventory test. He also reviewed documentation from when Johnson was in state prison during the 1980's. Hinkin determined that Johnson had exhibited the same schizophrenic problems from 1974 to

the current time. (49 R.T. 9133-9140, 9153-9154; 50 R.T. 9162-9185.)

Hinkin's opinion was that the shooting and other offenses committed by Johnson on July 17, 1996, were the direct product of his schizophrenia. Johnson's reasoning and his capacity to conform his conduct to the requirements of law were impaired as a result of his mental disease or defect. (49 R.T. 9094-9096; 50 R.T. 9185.)

Diana Sandefur was an Addictions Treatment Specialist working with the Ventura County Behavioral, Health, Alcohol, and Drug programs. On March 14, 1994, she saw Michael Johnson and treated him through September 7, 1994. She would see Johnson two to three times a month. She would see him for an hour at a time and would talk about the nature and disease concepts of alcoholism and addiction. She would talk about education and ways to put external controls in their lives. When Johnson first came in, he was somewhat drawn and wrinkled and emaciated and he looked stressed out. He looked as if he had not been taking care of himself well. He had very poor teeth, very broken, missing and discolored. He would frequently cover his mouth partway to hide his teeth. (48 R.T. 8880-8884.)

Johnson's treatment plan included participation in Alcoholic's Anonymous, and appointments with her two to four times a month. She noticed an absolute change in Johnson after she gave him this treatment program. During the approximately six months she treated him, she never

saw him under the influence of anything. He appeared committed to trying to get better. She felt she established some kind of connection or bond with him. Johnson was always regular in appearing at meetings, there were no no-shows. He was straightforward and honest about his attempts to make changes and about how he felt about drinking, attending AA meetings, sponsorship and those sorts of things, and his physical appearance continuously got better. He was taking more care to his outward appearance. He rode his bicycle to meetings, even in the rain. (48 R.T. 8885-8888.) Johnson's physical appearance corresponded with sobriety. He was eager to do the work to get better. It was her understanding that he had completed the program with her and that was the reason that he stopped attending in September of 1994. (48 R.T. 8889-8891.)

William L. Clark served in the United States Army on two different occasions, 1963-1965 and 1965-1967. During the years 1966-1967 he served in Vietnam as a First Lieutenant. His duty assignment when he arrived was Executive Officer of Charlie Battery, 3rd Battalion, 82nd Brigade, assigned to the 196th Infantry Brigade. The 82nd Artillery supported three battalions of infantry. His battery was assigned any number of infantry units in the combat within their war zone, which was War Zone C. Infantrymen, platoons and battalions would go out on operation. Sometimes the 82nd Artillery would follow them into fire bases in the jungle's rice paddies and support their operations with artillery fire.

The operations sometimes lasted as few as a couple of days and as long as thirty days. (49 R.T. 9010.)

As an executive officer, Clark was second in command of the unit. He was responsible for the operations of the 175 man battery. Johnson was one of the soldiers under Clark's command. Johnson was a hard worker. He was part of the best gun section Clark had. He was a smart kid, who worked hard. Clark didn't have any problems with him. (49 R.T. 9014-9015.)

The conditions Johnson's battery faced in Vietnam were dismal. At base camp there were several mortar attacks and sniper attacks. During the first couple of months there was a great threat of being overrun by the enemy, because the battery was so vulnerable. The weather was probably the most miserable Clark had ever been in. The dry season was terribly hot and humid, and the wet season was constant rain. It was so bad that if you put a uniform away in a sack, within a week or two the mold and mildew and insects would eat holes in it. The workday varied from 12 to 14 hours to sometimes 24 hours. Fatigue was major problem with the officers. With the enlisted men the problem was weather, lack of sleep, fire missions and stress created by the environment. Fatigue, next to hostile fire, was a major contributor to mistakes and errors. The men were transported into the field by helicopters. These were heavy lift helicopters and the transportation was very hazardous. Helicopters are by their very nature dangerous

instruments. For every one hour of flight time there were eight hours of maintenance required. Every operation was dangerous. When you added to the danger of simply flying, the weather, the heavy lift requirements of the helicopters, the missions they were involved in, the fatigue of the pilots, the potential lack of security at the landing zones, this was probably the most dangerous period of time in that theater. In the field the men slept on the ground underneath the guns, underneath trees, wherever they could find a place to sleep, if they could sleep. They ate mostly C-rations, boxed and small canned rations. There were poisonous and nonpoisonous snakes, and biting insects. Enemy attack was a concern; there were no front lines out in the field. Every place you were was a front line. If the intelligence was correct then you were probably going to be safe. If the intelligence was not correct which it often wasn't, then you were in a lot more danger. Clark was wounded in a mortar attack at the base camp at Tehnin for which he received the Purple Heart. During their mortar attack, Johnson was in Gun Section 4. The targets of the mortar attacks were the artillery units. With the artillery out of the formula they had a lot better chance of taking the infantry out. (49 R.T. 9018-9025.)

Stephen Gibson was a twenty-three year veteran of the United States Army. During the time period from 1966 to 1967, he served in Vietnam with Lieutenant William Clark. He served as the battery fire direction officer, giving commands to the gun sections. Johnson was in one of the

gun sections. Johnson's unit took mortar fire within five or six days after in arrived at Tay Ninh. Gun sections would be deployed into the field by Chinook helicopters. Two soldiers were killed and two were wounded. (49 R.T. 9048-9051.) Gibson took home movies of the Tay Ninh base camp which were shown to the jury. (49 R.T. 9052-9057.)

William Waller served in the United States Army for 33 years. During the time period 1966 through 1967 he served in Vietnam as a Second Lieutenant with Charlie Battery, 196th Infantry Brigade. Johnson served in that unit as a cannoneer and an ammunition handler. He also served as a radio telephone operator or RTO. The function of the RTO was to accompany the forward observer team, which usually consisted of a lieutenant and sergeant; carrying the radio. Johnson made sure there were always fresh batteries for the radio and made sure the radio was properly calibrated before they went out on operations so the frequencies would come in correctly. He would carry the maps and assist the second lieutenant in all his duties. When the lieutenant needed the radio, Johnson would take commands from him and relay them over the radio or hand the lieutenant the handset depending on the situation. Johnson's portable radio console weighed between 9 and 12 pounds. (53 R.T. 9769-9772.)

That year was a bad year for combat. The unit was shelled after they'd been in-country only one week; a couple of people were killed. Waller had some RTO's shot out from under him. The 196th was a new

brigade and got a baptism under fire that was a little bit excessive. The RTO was a high value target for the enemy. Putting a radio with a big antenna on somebody's back is like painting a bull's eye. The North Vietnamese regulars and Vietcong knew that the radio was a link between the forward observers and the people with the airplanes and big guns, so the RTO's would be one of the first targets they would shoot at. They would try to kill the radio operator or bust up the radio. It was a very hazardous assignment. When the battalion was being trained to go to Vietnam, the RTO's were assigned. However, once they got to Vietnam the positions were so volatile and the RTO's were either cracking up or burning out, so they had to ask for volunteers. Lieutenant Waller went through several RTO's. Essentially the lieutenant would have to go back to the battery and ask if they had any "fresh meat." There would always be some young gun who would want to go out and see what it was like in the jungle. Normally they didn't last more than a month or two, they would get jittery and say I've had enough of this; I want to go back where it's safe. It was a very stressful job. Lt. Waller recalls specifically having Michael Johnson as his radio telephone operator on more than one occasion. (53 R.T. 9772-9776.)

Jane Siemon lived in Wisconsin in 1981. Johnson worked for her and her husband on their farm. At one point she served them some soup for lunch which was bad and Johnson said he felt like she was trying to poison him and he wasn't going to eat her cooking anymore. From that point on,

he did his own cooking. Primarily, he would make pancakes and carry those with him through the day. This became a common diet for him. This occurred for the 4-6 months he stayed with them until he left. Additionally, at some point Johnson said that they worked too hard on the farm and he thought if he ate less he wouldn't have to work as hard. He began to eat less and lost a lot of weight. He became quite thin. (51 R.T. 9394-9400.)

William Shilley was an instructor/professor of alcohol and drug studies at Oxnard College. He started working in this area in 1957 before there was any real training available. He teaches six different courses every semester covering pharmacology, basic counseling principles, group leadership principles, co-dependence and families living with alcoholics and drug addicts. Students who complete the program in about two years get a certificate of completion which makes them eligible for any of six or seven credentialing organizations in the State of California. (51 R.T. 9403-9405.) Johnson completed at least four semesters in the course. He probably had four classes his first semester and then diminished as he went along. But he did finish the course and in 1996 received a certificate of completion. Johnson was an excellent student. He was on the Dean's List for all four semesters. Shilley believes that Johnson did two internships, the first at Primary Purpose in the Detox Center, and the second in the Dual Diagnosis Center. (51 R.T. 9403-9409.)

Robert Holts worked at the Salvation Army Rehabilitation Program

from 1993 to the middle of 1997. During the 1995 to 1996 timeframe, he supervised Johnson who was a volunteer. Holts assigned Johnson a caseload of people to counsel and implement the rehabilitation program. Holts thought Johnson was a superior worker. He didn't receive any complaints with regards to Johnson's performance as a counselor while Holts was supervising. Johnson related well to the individuals he counseled and was an extremely good listener. Johnson had the highest graduation rate of all the drug and alcohol counselors. He was a valuable asset to the program at the Salvation Army. Holts believes this because the actual rehabilitation of the men that worked for Johnson was better than most. (51 R.T. 9425-9430.)

Aubrey Towler was a Detox Coordinator for Primary Purpose since 1992. Primary Purpose is a recovery home for alcoholics and drug addicts. He supervised Johnson. Johnson's position was a Detox Specialist. Towler and Johnson worked 8 hour shifts alone doing intakes, counseling and referral to long term treatment programs. Johnson's performance as a Detox Specialist was excellent. He was very dependable. Johnson appeared to be a very good listener with the clients. Johnson was scheduled to work the 3:00 p.m. to 11:00 p.m. shift on July 16, 1996. (51 R.T. 9431-9447.)

Warren Gauvin was a drug and alcohol counselor and housing specialist for Turning Point Foundation. Gauvin was in charge of Tiber

House, a sober living facility for mentally ill men. Except for a three-week period, Johnson lived at Tiber House for approximately one year prior to July 17, 1996. He was the house manager, receiving free rent in exchange for his services. He was the best house manager Tiber House ever had, dependable and a gentleman. He cared about the residents and went out of his way to help them. (50 R.T. 9296-9300.)

Renee Artman was a Ventura County Sheriff's Department Supervising Criminalist. As part of her job assignment she analyzed urine and blood samples. At some point she analyzed urine and blood samples taken from Johnson on July 17, 1996. No alcohol or drugs were detected. (51 R.T. 9450-9451.)

James Park was a Correctional Consultant who had testified as an expert witness in courts in California on the subject of whether a person would make a positive adjustment to confinement. Based on records Park reviewed of Johnson's custody in Ventura County Jail from July 17, 1996 to the present, his opinion was that Johnson would be a reasonably good prisoner – not perfect, that's not in his style, but he will be a good prisoner, a good worker and a contributor to the work program of the prison. (51 R.T. 9495-9502, 9518.)

Captain Linda Oksner served as the Ventura County Sheriff's Department representative for jail issues during the time Johnson had been in custody. From July 17, 1996 to the date of her testimony, February 24,

1998, Johnson had only two rule violations while in custody. One was for having too many newspapers in his cell, and the other was for using a "rat line -- a chain made of newspaper -- to have a newspaper passed to him from another cell. (50 R.T. 9282-9283, 9285-9289.)

Johnson was the eldest son of Wilma Johnson. Johnson was born premature. He had two younger brothers. They and Johnson's father were all in court when Ms. Johnson testified. Michael was born in Iowa and grew up in Illinois. As a young boy, he liked to do all the normal boy things, fish play ball. Johnson was about sixteen when he was suffered an accidental gunshot, suffering an abdomen wound and the loss of a little finger. (50 R.T. 9306-9311.)

Johnson enlisted in the army in 1965, shortly after he graduated from high school. Johnson was 18 when he enlisted. He spent his 19th birthday in Vietnam. Ms. Johnson kept Johnson's official army photo. (50 R.T. 9312-9315.)

When Johnson returned from Vietnam, his personality changed. He was more quiet and withdrawn. He would leave for long periods of time. He would subsequently show up homeless and destitute. During the years 1992 to 1993, Johnson lived with his parents. Johnson complained of having bad dreams when he ate pork. He made Ms. Johnson remove bacon from the refrigerator, telling her it was contaminating his food. (50 R.T. 9313-9316.)

Both Johnson's mother's side of the family and his father's side of the family suffered from alcoholism. (50 R.T. 9316.)

Ms. Johnson loved her son and would continue to maintain contact with him. (50 R.T. 9316, 9322.)

Prosecution Rebuttal

On July 17, 1996, Dr. Donald Patterson was retained by the District Attorney's Office and asked to conduct a forensic examination of Johnson while he was in the hospital being treated for his gunshot wound. Patterson's purpose was to determine the mental status of Johnson as close as possible to the time of the commission of the act. His taped interview of Johnson began roughly at 10:15 p.m. Johnson was on some type of supportive care, receiving intravenous fluids and being monitored as far as his heart function was concerned. There was still some bleeding in the bandages or dressings that had been applied to gunshot wounds in his lower chest and backside. He was lying on a gurney and remained on a gurney throughout the time Patterson saw him. Johnson indicated he was in some pain and made requests through the early part of the interview for some analgesic medication, but he was willing to accept the direction of the physician that he could not get medication for pain until certain procedures had been done in preparation for his undergoing an operation. (52 R.T. 9591-9600.)

Johnson was able to talk without any difficulty and showed no

evidence in his speech of any effect on his consciousness or that his state of consciousness was altered by any condition that he may have had from the pain or from any mental disorder. (52 R.T. 9600-9601.) Johnson did not appear delusional. He did not appear to be experiencing any hallucinations, either visual or auditory. He appeared to appreciate what was being done for him medically, and to be able to interact appropriately with the staff treating him. He did not appear to be paranoid, he did not appear to be fearful, did not express any hostility other than he was angry with the psychiatrist at the Ventura Mental Health Clinic, Dr. Lance. He expressed some questionable reactions to his father at some indefinite time prior to July 17. Johnson did not appear to be confused at all by questions Patterson asked him, or the content of their conversation. He did not appear to be non-responsive; he made sense when he spoke to Patterson. Patterson did not detect any loosening of association or incoherence. There was no evidence of a speech disorder. (52 R.T. 9601-9603.)

Patterson's initial conclusion after interviewing Johnson was that he was an antisocial personality disorder with explosive features, meaning impulsive sort-of breakthroughs. The disorder describes a person who is unable to resist certain violent or aggressive impulses. There is a diagnosis in the DSM-IV called Intermittent Explosive Disorder. (52 R.T. 9603-9607.) However, after reviewing Johnson's history, Patterson ruled out anti-social personality. Patterson noted that Johnson suffered a

considerable period of antisocial activity dating prior to age 18, and had continued difficulties with adjustments in society. (52 R.T. 9608-9609.)

Dr. Patterson reviewed the Ventura County mental health records and agreed with Dr. Kus, Marsha Miller, Dr. Lance and Dr. Peace, that organic delusional disorder was a valid diagnosis at that time based on a 20-year history of abusing substances – alcohol, marijuana, methamphetamine – and there was no other history that they considered – head injuries or similar – as a possible organic explanation for his delusions. However, Patterson's opinion is that Johnson was not suffering from organic delusional disorder on July 17, 1996. In all ways possible, he was able to conform his behavior if he so chose. (52 R.T. 9610-9617, 9664.)

In Patterson's opinion, Johnson was not a paranoid schizophrenic. Patterson did not believe Johnson's delusions were of the "bizarre" type, which would differentiate schizophrenia from organic delusional disorder. Non-bizarre delusions would be those that could happen, e.g., the paranoid belief that one is being poisoned, watched or followed. Bizarre delusions are those that cannot happen in real life, e.g., a belief that ones internal organs have been replaced with someone else's. The Schizophrenic is not in contact with reality in all spheres. Patterson did not see any disorganized behavior with Johnson. (52 R.T. 9617-9627, 9631-9633.)

Kay O'Gorman knew Johnson while they attended the Alcohol and

Drug Studies Counseling Training Program in Oxnard College from January of 1995 to about May of 1996. They also worked together in a Salvation Army Rehabilitation Center. She had a client that she was concerned about and sought Johnson's co-counseling abilities on that case. Johnson responded that "I have somebody in my life like that now and I need to stay away from her too." They were talking about a wife of the client that they were both familiar with. With respect to the woman in Johnson's life, she recalls him saying that being around her didn't do him any good. From time to time she discussed Johnson's prior drug usage. He told her he began using drugs in high school. He mentioned in passing the drug LSD. During the time they were at Oxnard College she recalls Johnson worked in the cafeteria. He cooked, served some food and sometimes worked at the cash register. He never complained about any of the food or any of his problems working with food. (53 R.T. 9789-9791.)

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO TEN PROSPECTIVE JURORS INCAPABLE OF BEING FAIR OR IMPARTIAL

Jury selection in appellant's case was a three stage process. First, the court screened 200 panelists[5] for hardship. (8 C.T. 2103-2104, 2117-2119; 19 R.T. 3286, 3371.) Those who were not excused for hardship[6] were asked to fill out a 33-page questionnaire, which covered such subjects as the juror's attitudes toward the death penalty, exposure to pretrial publicity, feelings about the burden of proof, a defendant's right to remain silent, substance abuse, law enforcement, mental health, and the Vietnam War. (19 R.T. 3204, 3328; see e.g., 1 C.T. 1-33.)

In the second stage of the jury selection process, the court and counsel interviewed each prospective juror individually and in sequestration, using the panelist's responses to the questionnaire to determine areas meriting further questioning. (19 R.T. 3381-3382.)

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[5] Appellant adopts the definitions of the jury pool venire, and panel that were used in *People v. Bell* (1989) 49 Cal.3d 502, 520 [262 Cal.Rptr. 1]:

> "The 'jury pool' is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A 'venire' is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a 'panel.' A 'panel' is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case."

[6] After the initial hardship screening, 122 persons remained in the panel. (8 C.T. 2103-2104, 2117-2119; 19 R.T. 3286, 3371.)

Pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1 [244 Cal.Rptr. 121], each interview ("*Hovey* examination") began with the court asking the prospective juror four questions that focused on the juror's ability to follow the law in a capital case, regardless of his or her personal beliefs regarding the death penalty. Counsel was then given the opportunity to explain the phases of a capital trial and to further explore the panelist's feelings about the death penalty as well as other areas of potential bias.[7] (See e.g., 20 R.T 3410-3430.) At the conclusion of this second phase of the selection process, 65 people remained as prospective jurors.[8] (8 C.T. 2128-2154, 2177-2199, 2203-2206.)

The third and final stage of jury selection involved general group voir dire of the remaining panel. Twelve people were randomly called to sit in the jury box, and were asked six (6) questions. (31 R.T. 5873.) When a seat was vacated due to a peremptory challenge or hardship excusal another name was drawn. (31 R.T. 5922.) This process continued until each side either accepted the jury as constituted or exhausted their allotted peremptory challenges-- 20 challenges for jurors and 3 for alternates per

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[7] These interviews were actually expanded versions of those required under *Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80 inasmuch as they covered more than death-qualification.

[8] During the individual voir dire, 39 persons were excused for cause, and 17 persons were excused for hardship. (8 C.T. 2128-2154, 2177-2199, 2203-2206.) During the third phase of the jury selection process, an additional 1 person was excused for cause. (8 C.T. 2206.)

side. (8 C.T. 2100; 31 R.T. 5868.)

The defense exercised all of its peremptory challenges for jurors and 1 of its challenges for alternates. The prosecution exercised 17 of its challenges for jurors and 1 of its challenges for alternates. (31 R.T. 5926-5999.) After exhausting his allotted peremptory challenges, appellant asked for one additional peremptory to use against a seated juror whom he had unsuccessfully challenged for cause based on her inability to be fair or impartial. (8 C.T. 2207; 31 R.T. 5991.) The court denied the request. (8 C.T. 2207; 31 R.T. 5993.)

A. The Voir Dire

1. Robert C.

Robert C. worked in the Ventura County garage and saw a number of Sheriff's Deputies on a regular basis. Mr. C. indicated he knew Deputy Sparks, Lt. Barrett, Sheriff Carpenter, Under Sheriff Richard Bryce, District Attorney Bradbury and Jesus Lemus. (18 C.T. 4535-4567.) On his juror questionnaire, Robert C. stated that he was in favor of the death penalty and that he believed in "an eye for an eye." (21 R.T. 3612-3613; 5 C.T. 4561, Q. 165.)[9] Affirming his belief, he stated that he believed if "you kill somebody you should be killed yourself." (20 R.T. 3612-3613.)

During *Hovey* examination, Robert C. made clear that his personal

[9] "Q" refers to the juror questionnaire with the number of the question following the abbreviation.

feelings in favor of the death penalty would make him inclined to vote for death should appellant be found guilty of murder with special circumstances. When directly asked if he would always vote for the death penalty and refuse to consider life imprisonment without parole, no matter what evidence was presented he said, "I've never been in that situation before. I've always felt that if a person was definitely guilty of murder that they should be subject to the same thing that they did to the person they killed. That they should die for what they did." (20 R.T. 3611.) Further, he stated that his preference for the death penalty in cases of first degree murder with special circumstances would render him predisposed at the onset of the penalty phase to choosing death over life in prison. (20 R.T. 3611.) Finally, when asked whether due to this belief he would expect the defense to persuade him that death was not the appropriate punishment, he replied, "Yes, exactly." (20 R.T. 3615.)

Elaborating on his feelings about the death penalty, as shown below, Robert C. further explained that in his opinion the death penalty was not utilized enough and that it should always be imposed for taking a human life, regardless of the circumstances:

> Q. -- Okay. Do you feel -- I believe you indicated on your questionnaire that you felt the death penalty was something that was -- that was given out too seldom. Do you remember that?
>
> A. -- Yes.

Q. -- What did you mean by that, sir?

A. -- I've taken notice of cases where it's been very evident that this person was guilty of premeditated murder or something like that --

Q. -- Right.

A. -- and they were just given a life sentence.

Q. -- Life sentence or light sentence? I'm sorry. I didn't hear.

A. -- A life sentence.

Q. -- A life sentence. And you felt that that was too -- too lenient or --

A. -- Too lenient, yes. (20 R.T. 3614.)

Finally, Robert C. stated that he supported the death penalty because it "saves tax payers a lot of money." When asked to expand on his answer he stated "Well, they're always talking about it. How many prisoners we have on death row, that have been there for 10, 12, 15 years, and how much it costs to maintain these prisons. And if they were executed when they -- when the decision was made to do so, they would have saved the taxpayers a lot of money over all those years." (20 R.T. 3618-3619.)

Defense counsel brought a motion to excuse Robert C. for cause. He stated:

The grounds are that based on his questionnaire in total, it's our position that he is substantially impaired. He takes the position that if you kill, you should forfeit your life, and that he indicated that it saves a lot of money to taxpayers if a person is to be housed for life without the possibility of -- I mean, it would save a lot of money for taxpayers if the person

got death as opposed to life without the possibility of parole. Most significantly, it's our position that for him not to be substantially impaired -- it's not enough for him to simply say consider mental health in terms of mitigation. I believe under Factor K there is a whole range of information concerning a person's background that may in fact be extenuating that he would foreclose because of his long-term attitude. Problems a person has in his childhood are things that he wouldn't give meaningful consideration to.

Despite the fact that we read him the instruction, I think that the Court is allowed in voir dire to proceed in such a way that we can clarify whether his views would impair him from giving serious consideration to both punishments as an option, and I think if he's not going to be open to hearing mitigation, other than strictly mental health, under the statute as you read to him he is so foreclosed. (20 R.T. 3633.)

The trial court denied the motion, ruling:

Well, I think that's exactly what he said. He came here with misconceptions, and he stated -- he stated that. He thought these were the rules and that's the way it works. Every time he stated a rule, found out it was different, he said, 'Oh, okay. Then I'll do that.' He's not hewn to any particular discipline. He unquestionably favors the death penalty. I'm not going to be so bold as to suggest to the contrary. But when asked specifically as to each factor, it sort of evolved. Well, how do you feel about "X"? Well, no, I'm not going to pay any attention to that. If you're told you're supposed to pay attention to it, will you? If that's the rule, I will. The point I think was most especially made when there was inquiry concerning the cost of maintenance to prisoners. When told he shouldn't consider it, he said, 'Okay, I won't.' He's a man that states what seems to be strong positions. I think on scrutiny, they just aren't that strong. The motion to disqualify him for cause is denied. I think we covered the other question with him. (20 R.T. 3634-3635.)

2. Kristen S.

The following colloquy between prospective juror Kristen S. and the defense attorney occurred during *Hovey* examination:

> Q. In general, do you have some belief that if there's a premeditated, intentional, deliberate murder of a police officer, that that automatically calls for the death penalty?
>
> A. Premeditated, thought out -- I'd have to say yes. Premeditated, definitely. I'm -- I do feel very strongly about -- about police officers. I have great respect for police officers. And I believe something that's premeditated, it's done with malice and they know it in their mind ahead of time, is very vicious. (23 R.T. 4239.)

Elaborating on her feelings about the death penalty, Kristen S. further explained that in her opinion the death penalty was not utilized enough:

> Q. One of the things that you wrote, I think, in your questionnaire is you had -- little box where you checked that you felt that the death penalty was given out too seldom. Do you remember that question?
>
> A. Yes. Yes, I do.
>
> Q. A lot of these questions are kind of ambiguous. Can you tell us what you meant by it?
>
> A. I think there are a lot of people on death row -- should say bye-bye. They've been there for years and years and years and there's no -- they've been in appeal after appeal. The circumstances are proven, have been proved and proved and proved. And that's literally -- if you really want to know, that's what I meant. It's seldom used. There's people waiting on death row that have been there so long. They know -- they know they're guilty. They know they deserve -- that's what I meant. That's really what I meant. (23 R.T. 4240-4241.)

Defense counsel brought a motion to excuse Kristen S. for cause. He stated:

> We challenge for cause based on not only her responses in court today but her questionnaire, which clearly indicated that

there was a relationship with a Los Angeles police officer such that she has some -- not just a preference for death but if she feels that there was proof and she was certain that it was a premeditated murder of a police officer that she would automatically give someone the death penalty. (23 R.T. 4258-4259.)

The trial court denied the motion, ruling:

> One other factor that came out and struck me as interesting, if I recall it correctly, she thinks in some circumstances life without is more serious than death. And her response to your question came before I think clearly understanding -- what has been a continuing drumbeat in this trial is the understanding of this evolution of the voting process. Her last answer was directly responsive to the exact question you asked in the context of two things that she was not clear on. One, that life without really meant that, at least as far as her deliberative process is to be concerned. And, secondly, the actual evolution of the thinking concerning the consideration of factors in aggravation and mitigation. Her answer was after those matters were explained to her. 'Yes, I could vote for either one of those.' And in the totality of her responses, I think that's true. The objection is -- or the motion to have her disqualified for cause is denied. (23 R.T. 4259-4260.)

3. Shirley J.

Shirley J. indicated in her juror questionnaire "I believe justice could not be served if someone takes the life of another without suffering the same fate." (21 R.T. 3775; 7 C.T. 5287, Q 165.) During *Hovey* examination Shirley J. stated unequivocally that she would always vote for death:

> Q. I'm saying the person has been convicted of a premeditated murder. I'm asking you, in that circumstance of a premeditated murder, without lawful excuse, without justification, do you believe that that automatically calls for the death penalty?"

A. I would have to say yes. (21 R.T. 3799.)

Q. I'm just wondering -- based on what you said in your questionnaire -- you indicated if in fact you found there was a premeditated murder -- and you decided that now beyond a reasonable doubt, without justification or excuse -- that that would automatically call for the death penalty, in your mind.

A. Yes. (21 R.T. 3801.)

The trial court sought to disabuse Shirley J. of her improper opinion, limited to the following exchange:

The Court: I have a couple of questions -- a question for you and then maybe we'll do a little further. In 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 nondeterrent effect of the death penalty in general or the monetary cost to the state of execution or maintaining a prisoner for life without the possibility of parole. Do you understand what I'm saying?

Prospective Juror J: Yes, I do.

The Court: Do you have any quarrel with that proposition?

Prospective Juror J: No, not at all. (21 R.T. 3807.)

Defense counsel moved to excuse Shirley J. for cause, stating:

Two grounds. One, that she indicated about her -- if indeed it turned out this was a premeditated murder, that she would vote for the death penalty, and also her stated reason would seem to be her only reason being for the death penalty appeared to be based on an improper consideration which would be deterrence of others. So I would submit it. (21 R.T. 3808.)

The trial court denied the motion, ruling:

The question was asked and as soon as she was given the opportunity to consider alternatives, she immediately, and I thought without any prompting whatsoever by the defense,

> responded oh. of course I'd consider those things and persisted in that once given an understanding of the availability of alternatives. As to her consideration, she was simply asked what she'd think about. She candidly answered and I have no doubt she would follow the instructions of law as given to her. (21 R.T. 3808-3809.)

4. Gregory D.

On Gregory D.'s juror questionnaire he indicated a 10 on a scale of 1 to 10 in favor of the death penalty. Mr. D. believed the appropriate penalty for first degree murder was death. He indicated he would not consider any further information if the murder was deliberate. Mr. D. also indicated he wanted to limit appeals. (18 C.T. 4600-4632.) In response to being asked if the defendant was found guilty of murder in the first degree with special circumstances would he always vote for the death penalty and refuse to consider life imprisonment, Gregory D. stated "It would be highly unlikely that I would not vote for the death penalty under that circumstance." (23 R.T. 4155.)

Elaborating on his feelings about the death penalty, Gregory D. stated that his views regarding the death penalty were such that it would be "highly unlikely" for him to impose a penalty of life without the possibility of parole regardless of the evidence at the penalty phase. (23 R.T. 4158.) When asked what he thought the death penalty accomplished he answered, "[f]air justice – If you murder someone deliberately with malice aforethought – you should pay with your life for your choice of taking

someone else's life." (23 R.T. 4145; 5 C.T. 4626, Q. 167.)

Gregory D., as illustrated below, further explained notwithstanding the evidence presented at the penalty phase, he believed that the death penalty would be the only appropriate punishment for first degree murder with special circumstances:

> A. Right. Well, my personal opinion in regards to how the penalty phase of such matters should be handled is purely a matrix-type formula. It's not important to me where the defendant, if proven guilty, grew up, how he grew up. It is just the act itself or what the trial was [sic] set forth, in this case, the murder of a police officer in the line of duty. If that is proven up and murder in the first degree is voted on by the jury and the special circumstances are met, to me it becomes very clear what I would do going in as far as my opinion: the death penalty would be appropriate.
>
> Q. Okay. Now, what that answer says to me is that having made that finding in the first trial, that the special circumstances has [sic] been met, else, you wouldn't get to the second trial –
>
> A. Right.
>
> Q. -- having made the finding of first-degree murder, else you wouldn't get to the second trial –
>
> A. Right.
>
> Q. -- that those are the factors at the second trial you are going to focus on to the exclusion of all others and therefore it just follows the death penalty would be imposed, and I don't want to misstate your thinking.
>
> A. No. That would be a correct representation of my thinking going in at that point in the trial. (23 R.T. 4158-4159, emphasis added.)

Finally, on follow-up questioning Gregory D. responded in a way

which demonstrated perfectly the logical inconsistency of his answers. Gregory D. stated, "I can consider all conditions set forth that is required for me to consider as far as mitigating circumstances to the death penalty. I can consider those. Those are conditions. It's just my opinion going in that if you do meet the conditions of first-degree murder and there are those special circumstances, then to me there is a stronger likelihood or not, on an objective basis, I would vote for the death." (23 R.T. 4162.)

Defense counsel moved to excuse Gregory D. for cause, stating:

> I believe this juror is substantially impaired. In response to question 3 the Court asked him at the outset with regards to whether he would always go for the death penalty, he indicated it was highly unlikely he would not vote for the death penalty. That was his initial response. That's his central theme and opinion throughout the questionnaire and voir dire this morning and I feel based upon his responses, particularly in the questionnaire where he indicated he would always vote for the death penalty, that it is the appropriate sentence for the person who murdered Deputy Aguirre, death penalty is appropriate for first-degree murder with special circumstances of a peace officer in the line of duty. Every question with regard to the appropriateness of the death penalty he had that same opinion for. He indicated on his questionnaire the life and basically the life history of defendant is meaningless to him. I believe he said -- he indicated it is not important to him where and how the defendant grew up and I don't believe he'll be able to give factors in mitigation or weigh those factors as required by law. We ask the Court excuse him. (23 R.T. 4178.)

The trial court denied the motion, ruling:

> The Court is of the opinion that the motion will be denied. The reason is he's a very interesting man, he knows he could get off the jury in a heartbeat by giving you any answer he wanted, and he could have been perfectly consistent by doing

so in simply saying sure. He doesn't even want to be here; yet, he understands what his obligations and duties are and answered responsibly. And does he have a feeling about the death penalty? Absolutely. Given a strong set of hypotheticals of what's appropriate, he agrees it's appropriate. I'd be surprised if there are not a significant number of people who share that view, but that isn't the test. The test is given what he was presented with, will he consider everything? He will consider everything, and the question was put well and he handled it rather interestingly, he says if we get to the death penalty phase, these are things I already know and I will have known there was a deliberate, intentional deliberate killing of a police officer. Does that give me inclination towards the death penalty? Well, yes. And certainly that's one of the factors he can consider but he doesn't stop there. He goes on to say he can consider these other factors. He has strong views, I believe he'll do his very best to consider them, and I believe that he understands his obligation and will meet it. Motion denied. (23 R.T. 4179-4180.)

5. Marguerite S.

Miss Marguerite S. indicated a 9 on a scale of 1 to 10 in favor of the death penalty on her juror questionnaire. In addition to her strong opinions about the death penalty Miss. S. indicated that she knew Sheriff Larry Carpenter and District Attorney Michael Bradbury. (24 C.T. 6745-6777.)

During *Hovey* examination, Marguerite S. made clear that she did not believe appellant was innocent until proven guilty.

Q. We start with the presumption of innocence in that the defendant is presumed to be innocent of the charge. Are you at this time of that state of mind?

A. No.

Q. You're not?

A. No. (21 R.T. 3676.)

When asked whether she would be willing to consider information concerning the defendant's background or behavior in determining the appropriate penalty, she answered, "I would listen but still believe that he should be held accountable for his actions." (21 R.T. 3670; see also 12 C.T. 6773, Q. 173.) Marguerite S. harbored very strong resentment that she had suffered deaths in her family, and yet, if proven guilty, appellant would be asking her to be allowed to live. The following colloquy occurred:

> Q. The question asks: What are your opinions and views on the death penalty? And you commented that the victims and their families don't seem to have many rights. If proven guilty, why should the criminal live? And victims' families are the ones suffering the loss. I want to focus on that second sentence there. "If proven guilty, why should the criminal live?" Could you explain to me what you meant by that?
>
> A. This is very difficult for me.
>
> Q. Take your time, please.
>
> A. I have lost three members of my family in two years. I'll never get over that. They will never come back. My daughter was 30 when she died. I'll never ever see her again. And I don't think it's right for someone who has committed a crime like this to continue. I'm sure their families are very upset, too. But I'll never see my daughter again. Thank you.
>
> The Court: Thank you.
>
> Prospective Juror: And you never get over it. Never.
>
> Defense Attorney:
>
> Q. So, is your state of mind at this moment such that if you were a juror on a case involving the first-degree murder of a police officer, that if that person was found guilty, that at that point in time you'd be inclined during the penalty phase to vote for death?

A. Yes. (21 R.T. 3667-3668.)

During questioning by the prosecution, Ms. S. acknowledged that despite her desire to, and despite instruction from the trial court to, she might not be able to follow the law over her feelings. The following exchange exemplifies this:

> Q. If this gentleman sitting to your left over here tells you what the law is when you're a juror, are you going to feel morally compelled to follow that law?
>
> A. Probably.
>
> Q. If the judge told you something about the law that was different than how you feel about something, is your belief in the law strong enough that you could follow what the judge tells you?
>
> A. I'd have to think very closely. (21 R.T. 3672.)

Even during questioning by the trial court, Ms. S. was honest about the incredible difficulty she would have in setting aside her emotional bias against appellant.

> Q. In 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 in general or the monetary cost to the State of execution or maintaining a prisoner for life without the possibility of parole. Do you understand what I have just said?
>
> A. Uh-huh.
>
> Q. Can you follow that instruction?
>
> A. Yes.
>
> Q. Does any of that cause you concern that you would not be able to set those feelings aside?

A. I think I would have to, but I don't know if I could. (21 R.T. 3678, emphasis added.)

Defense counsel brought a motion to excuse Marguerite S. for cause. He argued:

> The emotion of this juror -- obviously, she was tearful during a portion of the examination. She definitely leaves the impression that despite her best intentions, she could not be fair. In fact, she answered directly to my question, 'Are you biased in favor of the prosecution?' The answer was 'yes.' She answered directly my question, 'Are you biased against Mr. Johnson?' The answer is 'yes.' The answer to her questionnaires -- to the questionnaire, 'If proven guilty, why should the criminal live? We should not have to pay for a crook to watch TV for the rest of his life.' She would listen to additional evidence but still feels the defendant should be accountable for his actions. The fact that her very closest friends apparently in the world are CHP officers, the fact that she discussed the death of a peace officer within the last year with these close friends of hers, who are law enforcement officers, all indicate that she is quite biased in favor of law enforcement, biased in favor of the prosecution, and that she cannot be impartial. And I think that not only is she substantially impaired both from her answers during the voir dire as well as the questionnaire, but when one factors in the depth of her emotion it leaves one with the impression that she cannot be fair. (21 R.T. 3680.)

Even the prosecutor recognized Ms. S.'s "passionate" bias in favor of law enforcement. The prosecutor, however, placed his flawed and slanted spin on this passion:

> I think she's passionately biased in favor of the law, and I think that her bias in favor of the law and her belief and her duty to follow the law and her identification with law enforcement in terms of following the law is something that puts the Court in a position where it can feel confident that, as the representative of the law in the courtroom, she's going to do what you say. I think that's the basic test. (21 R.T. 3681.)

The trial court denied appellant's motion, finding:

> The responses to the questionnaire were predicated upon introductory comments that seem, as I've said from the beginning, loaded. And her responses were, I think, in response to that. Her emotion was evident. This is a woman who is in substantial pain, having suffered three losses in the face of two years that nobody should have to endure once in the space of two years. That she has strong feelings about a case is true.
>
> That she has expressed unqualifiedly that she would hear the entirety of the evidence, accept the presumption of innocence, and could consider life without the possibility of parole she has stated as someone who understands her duty. Does she have a leaning for the prosecution? I think that's true. I think that's fairly clear, that her contacts and her associations with the law enforcement personnel, the highway patrol people, the two in particular that she alluded to, are very close and meaningful to her. I don't think that disqualifies you. I'm not prepared to say that at this point that her views on capital punishment would prevent or substantially impair her ability to fairly try the case. In fact, after having pointed out to her a couple of the factors she could consider, she expressed the fact that she would consider them. And in response to my specific question, said that she would meaningfully consider life as a viable alternative and not just something on the plate. (21 R.T. 3681-3682.)

6. Raymond L.

Raymond L. believed in the death penalty. Mr. L. indicated an 8 on a scale of 1 to 10 in favor of the death penalty. (21 C.T. 5458-5490.) Mr. L. believed the murder of a police officer was more deserving of the death penalty, because, "police represent authority. Authority. So going against authority -- I don't know. To me you're basically going against -- against the Government ... it probably is an attack on the society at large if

the police officer represents the -- the society, representative on what they want done or at least enforcing their opinion." (20 R.T. 3456.) Furthermore, Raymond L. repeatedly stated he did not know if he could be fair. In his questionnaire response, whether he could be fair and impartial during the penalty phase and decide the penalty entirely on the evidence, Raymond L. responded "Unsure." (20 R.T. 3452; 8 C.T. 5486, Q. 175.) Defense counsel moved to excuse Raymond L. for cause. The trial court summarily denied the motion. (20 R.T. 3465.)

7. Ernest M.

Ernest M. had friends, relatives or co-workers in the L.A. Sheriff's Department, LAPD, Highway Patrol, and Probation Department. Mr. M. had a cousin who was shot and killed during a robbery. He indicated a 9 on a scale of 1 to 10 in favor of the death penalty. (22 C.T. 5987-6019.) Ernest M. exhibited an inability to consider imposing a penalty other than death. For example, he stated, "Well if that was the point we got to, I feel strongly about the death penalty. I feel like I would vote for it." (26 R.T. 4988-4989.) Indeed, if given a choice with regard to penalty Ernest M. stated unequivocally that he would always vote for death:

> Q. Now, bearing that in mind, as you sit here now, do you have any present state of mind -- as you sit here, that you'd have an open mind? Or you feel so strongly about it that, yeah, you can talk about life without the possibility of parole, but, judge, those are just words. It isn't going to happen. Or can you tell me, yes, you'll have an open mind, hear all the evidence and can envision coming into this courtroom in a

case in which there's a finding of a murder of a police officer and saying that based upon what I've heard, I could vote for life without the possibility parole?

A. Right now I have strong feelings --

Q. I understand that.

A. -- about a peace officer --

Q. Okay.

A. -- doing his duty.

Q. Okay.

A. And I -- at this time I'm kind of leaning toward death. That way. If that's the verdict. If that's what the jury was to find.

Q. Yes.

A. I'd feel very strongly that he was doing his duty, and that law is in place for that reason.

Q. Okay. So I guess my question is of you: Is your state of mind one now, given that set of facts, that you would be receptive to hearing evidence which we call in mitigation, that would enable you to come back into the courtroom on that scenario and say, "I've heard the stuff which moves me and on this scale that I have, I could vote life without the possibility of parole in that case"? Or are you telling me, no, if it's the situation, police officer killed in the performance of duty, that ends the discussion and there's nothing more to talk about?

A. Umm, yeah, I really feel strongly that way. I feel strongly about police officers. (26 R.T. 4991-4992, emphasis added.)

Defense counsel brought a motion to excuse Ernest M. for cause. He argued:

I believe this juror's true feelings came forth when your Honor was actually questioning him initially, when he

indicated that yes, he would always vote for the death penalty. And I believe that it's more than just a preference for the death penalty. It's actually a very strong bias in favor of the death penalty such that he could not meaningfully weigh the factors in mitigation and that he is substantially impaired. There was a case -- federal case, Morgan versus Illinois, cited at 504 U.S. 719, at p. 734, which dealt with the reverse situation, in which a juror's unalterable prejudice against the death penalty was not cured -- or cannot be rehabilitated by their statements they could follow the law. I think this is the reverse of the situation. The fact he says he'll follow the law -- he will follow the law, I think his gut instinct is to go with death every time, particularly in this kind of a case. (26 R.T. 5010-5011.)

The trial court denied appellant's motion, finding:

He did something very interesting in the questions. I was really being very meticulous in my questioning. When he finished with me, I had kind of a feeling I'd sustain an objection. He corrected it without prompting by anybody. In questions asked by the defense, he wanted to clarify his feelings. Moreover, you have to draw a distinction, I think, between his opposition to the death penalty or favor of the death penalty -- and he's fairly well in the middle on that issue. His problem, if it can be denominated a problem, is that peace officers -- he thinks it's really wrong to kill peace officers and he has a strong feeling about that. Well, okay. Now, having said that, now we're down to prejudging the case. And that's the problem. And that's a line that's been very difficult to walk in this case. In terms of Witt and Witherspoon, he's unobjectionable, in my estimation. In terms of his particularized feelings, he's now elaborated that he has a feeling that he can't understand why police officers who are making stops on the street are shot to death. That's not a particular great revelation to any of us. None of us understand that, I suspect. He was very candid about that. He feels pro-law enforcement in that regard. Okay. Now, the question is: Having said that, can he follow the Court's instructions? And he says he can. I accept that. So the motion is denied. (26 R.T. 5012.)

8. Robert G.

Robert G. indicated on his juror questionnaire that death was appropriate where a life is deliberately taken, i.e. the act was premeditated and not accidental. Mr. G. also indicated a 10 on a scale of 1 to 10 in favor of the death penalty. Mr. G. believed the death penalty removed corrupting influences, was emotionally healing for victims, and acknowledged to society that justice had been rendered and served. (18 C.T. 4732-4764.)

Robert G's bias towards police officers became evident when he admitted he would give officer's testimony more weight and that he believed he should "afford them all the protection that I can." (21 R.T. 3819.) When asked if a police officer were to take the stand in this trial if he would give their testimony more weight or believability Robert G. replied "[f]airly, I would have to say yes. Um, I think they're in a position of responsibility that, um, I give a little more weight to." (21 R.T. 3821.) When asked whether there was anything about the nature of the charges against Mr. Johnson that would make it difficult for him to be fair and impartial, he marked "yes" and wrote, "He shot and killed a police officer." (21 R.T. 3822.) Robert G. further explained that this was still his current frame of mind and that Johnson would probably not receive a fair trial from him. The following stark colloquy revealed Mr. G.'s impairment:

> Q. Do you feel as you sit here right now that Mr. Johnson can get a fair trial from you?

A. I'd have to honestly say probably not.

Q. So as you sit here right now, you feel that you would be biased in favor of the prosecution; is that true?

A. More than likely.

Q. That bias that you have indicated you have in favor of the prosecution, again, does that relate back to the fact that one of the charges in this case is the first-degree murder of a police officer and the feelings you have expressed before about that?

A. Yeah. (21 R.T. 3822-3823.)

Indeed all of Robert G's responses also indicated that he was skeptical of the presumption of innocence. (21 R.T. 3818-3824.)

Robert G. had also heard media coverage and when asked if he could disregard what he had heard and judge the case solely on the evidence presented, his response was negative:

Q. If you were selected as a juror in this particular case, do you feel that you could put aside what you have previously heard and judge the case based solely upon the evidence presented in court or do you think that what you already heard about the case may influence your decision-making process?

A. It would always be there.

Q. Uh-huh. So are you saying that even if you tried not to consider that, it would still be in the back of your mind?

A. I don't know how anyone could.

Q. It's kind of hard to edit things from your mind.

A. Yeah. (21 R.T. 3823.)

In addition to Robert G's above obvious biases, he demonstrated an inability to be impartial on the issue of mental illness. Robert G. believed

an individual had the ability to overcome his background or behaviors, and therefore did not believe mental illness was a mitigating factor. When asked how he would weigh a psychiatrist's testimony he stated "I take it with a grain of salt." (21 R.T. 3828.) Robert G. explained his skepticism by saying "[n]ow, not difference in – difference probably in -- see, what I'm trying to find out – not discipline but if are you talking about mathematician, physicist, that's pretty hard science; there's right and wrong answers, black-and-white. Mental health, I can't call that a hard science. So that's the difference." (21 R.T. 3829.) He further explained "[i]f I say one and one is two, that's a truth. If someone were to tell me someone is incapacitated, that is -- I think I mentioned in my questionnaire -- I said in my questionnaire that the human mind is a very complex thing. How do I know that's the truth?" (21 R.T. 3829.)

Defense counsel moved to excuse Robert G. for cause, stating:

> He told us that Mr. Johnson would not get a fair trial from him, that he's biased against Mr. Johnson, that – I realize his answers were somewhat conflicting but he made it clear several times that in the murder of a -- first-degree murder of a police officer, he would vote for the death penalty. He's biased in terms of police officers. Perhaps not as important but still a factor to consider, he has apparently a stressful situation at work to deal with. (21 R.T. 3834.)

The trial court denied the motion stating:

> I think this is a very thoughtful man who is as candid as one could pray for, who expresses his biases, and I doubt anybody comes to a courtroom without them. In fact, I believe it's exactly to the contrary: people do come to court with biases.

> He's put them on the table and expressed unequivocally he will put them aside and fairly judge this case based upon the factors presented and he can consider life without possibility of parole and I believe him. I think he's sincere, I think he's honest and the motion is denied. (21 R.T. 3835.)

9. Michael S.

Michael S.'s questionnaire indicated that he had a father-in-law who was killed in a shooting accident. He witnessed a murder. His wife was a paralegal and his brother was an attorney. His brother-in-law was an Oxnard Police Officer. He believed jurors were often railroaded or conned into making emotional judgments. He preferred a three judge system to the jury system. He supported the death penalty for extreme cases of murder that would include the death of a police officer. Michael S. indicated a 10 on a scale of 1 to 10 in favor of the death penalty. (25 C.T. 6580-6612.) Like Robert G., Michael S. repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof.

First, Michael S. demonstrated his inability to be fair and impartial towards appellant in his answers to the juror questionnaire. When asked if he had feelings favorable or unfavorable about defense attorneys, he responded, "Sometimes unfavorable – since a defense attorney may have to represent a client who is 'guilty' yet pleads 'not guilty' for whatever reason." (12 C.T. 6594, Q. 82.)

Additionally, Michael S. determined early on that appellant was

guilty. When asked about pretrial publicity and if he had formed any opinions based on that information, Michael S. responded, "There was not presented any other explanation for Mr. Johnson's murder/shooting of the Deputy Aguirre that would explain away guilt." (12 C.T. 6603, Q. 151.) He also stated "It already seems obvious that Mr. Johnson shot and killed Deputy Aguirre. This is due to the reading of the newspaper article and the circumstances involved (other deputy and ex-wife). At this point, I think that this trial and the 'not guilty' plea are to avoid a harsher penalty – probably the death penalty." (24 R.T. 4350, 4355; 12 C.T. 6604, Q. 159.) Michael S. shifted the burden of proof to appellant to prove he did not commit the crime and to prove he should receive life. When asked if he would be willing to consider any further information concerning the defendant's background or behavior in determining the appropriate penalty, Michael S. responded, "There may be evidence of other crimes (as listed before) that indicate the evil nature of Mr. Johnson." (12 C.T. 6608, Q. 173.)

Michael S. also acknowledged he could not be impartial due to the involvement of drugs in the case:

> Q. Again, assuming the prerequisite before you even get to a penalty phase that there's some type of first-degree murder, perhaps premeditated, intentional murder with special circumstances. Given your views, again, about the death penalty, would you consider evidence concerning any problems with substance abuse in terms of deciding what an appropriate punishment would be?

A. This is my view on that matter. If somebody intentionally takes drugs and they're in the state of mind -- this is difficult. On the face of it I would say that if someone intentionally takes drugs and they end up committing a crime but they're not aware of their committing a crime, they're still responsible for that crime. Now, if they are taking drugs because of a dependency or because of a problem where they're addicted to something, then I would think that would be -- that might possibly be mitigating but I would still take a harsh view on that. (24 R.T. 4361-4362.)

Defense counsel brought a motion to excuse Michael S. for cause. He stated:

Challenge for cause and for the record I think the last question I had asked him was whether he would be able to return a verdict of life without possibility of parole. He really struggled with that question for about 20 seconds before he answered and although he answered in the affirmative I think given his overall questions not only here today in court but on the questionnaire left one with a definition [sic] impression he would be unable or at least substantially impaired to faithfully and impartially apply the law as you would give it to him to consider both aggravating and mitigating. It's one thing to have a preference for death because an officer has been killed but to indicate that he would require an awful lot of mitigation just based on the nature of the charges I believe unfairly shifts the burden to the defense despite the fact that the Court indicated to him that you would instruct him about the weighing process. I believe that his personal views that he brings into the case go beyond a mere preference and substantially impair him from carrying out his obligations as a juror. (24 R.T. 4369-4370.)

The trial court denied defense counsel's timely challenge for cause. (24 R.T. 4372.) As an explanation for the denial the court stated:

The very nature of the inquiry concerning the death penalty is by its nature frontloaded in this particular case, quite unique to all others, because the very question that makes the inquiry builds into it a known factors versus a considerable number of

> variables that are unknown and which can't be known. You say to somebody, you now assume as a factor, we tell them they will -- you just found he killed a police officer in the performance of his duties without justification or excuse. That's a very heavy load right on the front end. (24 R.T. 4370-4371.)

10. Barbara C.

Barbara C. harbored strong pro-death opinions. In response to the juror questionnaire Mrs. C. explained her death penalty views as follows: "It is a justified and necessary penalty. If it were used more there would be a reduction in murders. I think it would have a deterrant [sic] effect if criminals knew it would be enforced. Allowing years of appeals is a waste of resources, both human and financial." (1 C.T. 159, Q. 165.) She also indicated a 10 on a scale of 1 to 10 in favor of the death penalty. (1 C.T. 159, Q. 166.) She also indicated that the death penalty was given out too seldom. (1 C.T. 160, Q. 169.) She exhibited an inability to consider imposing a penalty other than death. This was exhibited early on when she wrote in her questionnaire that in a case of a first-degree murder with special circumstances the death penalty is automatically appropriate. Barbara C. stated, "I think the reason I marked that was because I had a preconceived notion that the death penalty was appropriate." (24 R.T. 4541.) Barbara C. further explained, "I thought I was more of a law-and-order person, a hanging judge." When asked to explain she stated, "[w]ell, according to what I had read, but I meant just in general. I had always

considered that if you committed a murder, then the death penalty was appropriate." (24 R.T. 4543.)

Although Barbara C. understood the court's instructions she expressed grave difficulty in separating her personal views and following the court's instructions:

> Q. Because of the publicity you've read in this particular case, as well as the publicity that you read about the officer who was shot and killed in Ventura a while back, do you feel that in the case of the first-degree murder with special circumstances of a police officer that the death penalty is automatically the appropriate sentence?
>
> A. I would have said yes, except that Judge Perren says that we need to listen to the mitigating circumstances. I -- that we have to consider those other things, not just -- in my opinion, my philosophical opinion would be yes.
>
> Q. Your philosophical opinion would be yes to the question I just asked you?
>
> A. Correct.
>
> Q. That the death penalty is automatically –
>
> A. Right.
>
> Q. -- the appropriate penalty under those circumstances?
>
> A. But if we are instructed to consider mitigating circumstances, then, no, that wouldn't be automatic.
>
> Q. Judge Perren asked you perform a tough task, and that's to --
>
> A. Disregard.
>
> Q. -- disregard what you heard before. Can you honestly tell us as you sit here right now today you'll be able to do that if you're selected as juror in this case?

A. I think so. If I think I heard and saw everything presented, yes. (24 R.T. 4540-4541.)

Barbara C. was also exposed to pretrial publicity. In response to the juror questionnaire asking, "What do you recall seeing, hearing or reading about this case?" Barbara C. wrote, "That Deputy Aguirre was shot without warning -- was enticed in and 'ambushed.'" (1 C.T. 156, Q. 150.) Mrs. C. also admitted that she heard or read appellant had a history of mental problems. (1 C.T. 157, Q. 155.) During her *Hovey* examination Mrs. C. also stated that she had already formed as opinion as to appellant's guilt. (24 R.T. 4538.) Due to the pretrial publicity Mrs. C. was "unsure" whether she could be a fair and impartial juror. (1 C.T. 161, Q. 175; 24 R.T. 4541.)

Defense counsel moved to excuse Barbara C. for cause, stating:

> Your Honor, we'd challenge (Juror 3121) for cause based upon her comment that in a case of a first-degree murder with special circumstances the death penalty is automatically appropriate. (24 R.T. 4557.)

Even the Prosecution recognized Barbara C's pro-death bias. The prosecutor, however, placed her flawed and slanted spin on this bias:

> Just to say in this case I believe this is a unique circumstance where we actually had an admission from somebody that they did have somewhat of an epiphany when they came in here. This woman brought in here a philosophical bent when she came in and realized the gravity of the situation and looked upon the human being upon whom she may be called to render judgment. I think it was very clear she is going to follow the law. (23 R.T. 4557.)

The trial court denied the challenge, stating:

> I agree with counsel. I think there are actually two moments of lucidity. One was when she finally understood what the process was. And she made one of the more profound statements I think we're ever going to hear. I had a real strong opinion until I actually had to look at a human being. Then I had to question actually how strong I felt. Right on the money. The motion is denied. (24 R.T. 4557.)

B. Governing Principles

"[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors'" – individuals whose verdict will be based exclusively "upon the evidence developed at the trial" *Irvin v. Dowd* (1961) 366 U.S. 717, 821-722 [citations omitted.] – who have "no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States* (1895) 158 U.S. 408, 413 [15 S.Ct. 951, 39 L.Ed. 1033]; Accord, 1 Burr's Trial 416 (1807) n3 [Marshall. C.J.] Fairness "requires an absence of actual bias in the trial of cases." (*In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].)

An essential element to a fair trial is an unbiased jury. Both the federal and the state Constitutions guarantee a criminal defendant a trial by an impartial jury (*People v. Garceau* (1993) 6 Cal.4th 140, 173-174 [24 Cal.Rptr.2d 664, 862 P.2d 664]; see *People v. Mickey* (1991) 54 Cal.3d 612, 683 [286 Cal.Rptr. 801, 818 P.2d 84]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 104 [270 Cal.Rptr. 817, 793 P.2d 23]; *People v. Bonin* (1988) 46

Cal.3d 659, 679 [250 Cal.Rptr. 687, 758 P.2d 1217]), made up of jurors who will not automatically vote for the death penalty, but who will consider the mitigating evidence presented. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, 733-736 [119 L.Ed.2d 492, 502-503, 505-507, 112 S.Ct. 2222]; accord, *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [109 S.Ct. 2934, 106 L.Ed. 256].) This same requirement similarly mandates that jury members hold no biases or prejudices, which would automatically work against the defendant. (See *Glasser v. United States* (1942) 315 U.S. 60 [62 S.Ct. 457, 86 L.Ed. 680] and former Code of Civ. Proc. §§ 601 & 602; Pen. Code §§ 1073 & 1074.) Such biases or prejudices may be actual or implied. (Code of Civ. Proc. §§ 601 & 602; former Pen. Code §§ 1073 & 1074.)

Whether the contention is that the trial court erroneously failed to exclude prospective jurors who exhibited a pro-death bias, or excluded prospective jurors who exhibited an anti-death bias, the same standard of review has been held to apply. (*People v. Pride* (1992) 3 Cal.4th 195, 227-228 [10 Cal.Rptr.2d 636, 833 P.2d 643]; *People v. Mincey* (1992) 2 Cal.4th 408, 456 [6 Cal.Rptr.2d 822, 827 P.2d 388]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224 [255 Cal.Rptr. 569, 767 P.2d 1047].) A juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath; juror's bias need not be proved with unmistakable clarity.

(*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Mincey*, *supra*, 2 Cal.4th 408, 456.)

If a defendant contends that the trial court wrongly denied a challenge for cause, he or she must demonstrate that the right to a fair and impartial jury was thereby affected. (*People v. Garceau*, *supra*, 6 Cal.4th 140, 174; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088 [259 Cal.Rptr. 630, 774 P.2d 659].) Initially, a defendant must establish that he or she exercised a peremptory challenge to remove the juror in question, exhausted the defendant's peremptory challenges, and communicated to the trial court the defendant's dissatisfaction with the jury selected. (*People v. Morris* (1991) 53 Cal.3d 152, 184 [279 Cal.Rptr. 720, 807 P.2d 949]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [30 Cal.Rptr.2d 818, 874 P.2d 248]; *People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1087.) "[I]f he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (*People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088; cf. *People v. Mason* (1991) 52 Cal.3d 909, 954 [277 Cal.Rptr. 166, 802 P.2d 950] [6th Amend. claim obviated by exercise of peremptory challenges to exclude prospective jurors not excused for cause, without comment by this court on other potential constitutional claims].)

On appeal the duty is to examine the context in which the trial court denied the challenge, in order to determine whether the trial court's decision that the juror's beliefs would not "substantially impair the performance of [the juror's] duties" is fairly supported by the record. (See *People v. Mincey*, *supra*, 2 Cal.4th 408, 456-457; *People v. Johnson*, supra, 47 Cal.3d 1194, 1224.) Where a prospective juror provides conflicting answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind is binding upon the appellate court. (*People v. Pride*, *supra*, 3 Cal.4th 195, 229; *People v. Mincey*, *supra*, 2 Cal.4th 408, 456; *People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1089.)

C. The Trial Court Erred In Denying The Challenges For Cause To Ten Prospective Jurors Who Demonstrated Actual Or Implied Bias Against Appellant.

The trial court's denial of ten challenges for cause to prospective jurors who demonstrated actual bias against the defendant deprived the defendant of his state and federal constitutional rights to due process and to a fair and impartial jury. (*People v. Ranney* (1931) 213 Cal. 70, 75-76 [1 P.2d 423]; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I § 16.) The court similarly erred when it refused to exclude certain prospective jurors for actual bias because of their inability to presume the innocence of appellant at trial, to adhere to the prosecution's burden of proof, or to remain impartial with regard to evidence involving law

enforcement, substance abuse, mental health, or the Vietnam War. (19 R.T. 3197.) Finally, the trial court erred when it refused to exclude certain prospective jurors for implied bias because their previous relationships with certain types of witnesses precluded them from acting as impartial jurors.

1. The trial court's denial of challenges for cause to prospective jurors automatically favoring capital punishment was clearly erroneous.

A prospective juror who would automatically vote for the death penalty is substantially impaired within the meaning of *Wainwright v. Witt*, *supra*. 469 U.S. at page 424 and must be excused for cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [119 L.Ed.2d 492, 112 S.Ct. 2222]; *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86 [108 S.Ct. 2273, 101 L.Ed.2d 80]; *People v. Coleman* (1988) 46Cal.3d 749, 764-765 [251 Cal.Rptr. 83].) When a prospective juror gives equivocal or conflicting answers, a trial court's factual finding as to the juror's state of mind is generally binding. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962 [2 Cal.Rptr.2d 112].) However, a ruling on a challenge for cause cannot be upheld where, as here, "'the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law.'" (*Ibid.* quoting *People v. Fredericks* (1895) 106 Cal. 554, 559 [39 p. 944].)

In the context of persons who favor life without parole, the California Supreme Court has held that a prospective juror's consideration of the death penalty must be "a reasonable possibility." (*People v. Ashmus*,

supra, 54 Cal.3d at p. 963.) If the substantial impairment test of *Wainwright v. Witt*, *supra*, 469 U.S. at page 424 applies equally to prospective jurors with a pro-death bias (*People v. Coleman* (1988) 46 Cal.3d 749, 765 [251Cal.Rptr. 83, 759 P.2d 1260]), their willingness to consider a life sentence also must be within the realm of "a reasonable possibility."

Robert C., Shirley J., Gregory D., Marguerite S., Raymond L., Ernest M., and Barbara C. all answered questions on the questionnaire and during voir dire which indicated that they would automatically vote for death in the present case.

a. Robert C.

During *Hovey* voir dire, as noted in detail above, Robert C. made clear that his personal feelings in favor of the death penalty would make him inclined to vote for death should appellant be found guilty of murder with special circumstances. Robert C. demonstrated his inability to follow the law when directly asked if he would always vote for the death penalty in the penalty phase of the trial and refuse to consider life imprisonment without parole, no matter what evidence was presented. (20 R.T. 3611.) Further, he stated that his preference for the death penalty in cases of first degree murder with special circumstances would render him predisposed at the onset of the penalty phase to choosing death over life in prison. (20 R.T. 3611.) Thus, the real question at the penalty phase of the trial was

whether the defense could convince him that there was some reason appellant should live. (20 R.T. 3615.)

On his juror questionnaire, Robert C. stated that he was in favor of the death penalty and that he believed in "an eye for an eye." (21 R.T. 3612-3613; 5 C.T. 4561, Q. 165.) When asked whether due to this belief he would expect the defense to persuade him that death was not the appropriate punishment, he replied "Yes, exactly." (20 R.T. 3615.)

Elaborating on his feelings about the death penalty, Robert C. further explained that in his opinion the death penalty was not utilized enough and that it should always be imposed for taking a human life, regardless of the circumstances. (20 R.T. 3614.) Finally, Robert C. stated that he supported the death penalty because it "saves tax payers a lot of money." (20 R.T. 3618-3619.) Defense counsel challenged Robert C. for cause based on his apparent strong pro death penalty views and his inability to consider mitigating factors. (20 R.T. 3633.)

Robert C's views on saving the taxpayers money by imposing the death penalty impaired his ability to consider a life term, and was an illegitimate and impermissible reason for supporting the death penalty. (See *Edwards v. Scroggy* (5th Cir. 1988) 849 F.2d 204, 210, cert. denied, 489 U.S. 1059 (1989).)

Although, like any good citizen, Robert C. expressed a desire to follow the court's instructions, he repeatedly indicated that his unwavering

preference for the death penalty would hinder his ability to impose any penalty other than death. As such, his ability to follow the law was substantially impaired and he should have been excused pursuant to *Morgan* and *Witt*. Moreover, because, in reaching a penalty determination, he would not "engage in an individualized determination on the basis of the character of the individual and the circumstances of the crime," Robert C.'s ability to follow the law was substantially impaired, and the trial court's refusal to exclude him was clearly erroneous. (See *People v. Brown* (1985) 40 Cal. 3d 512, 540 [230 Cal.Rptr. 834, 726 P.2d 516].)

b. Kristen S.

Despite prospective juror Kristen S.'s expression of her desire to follow the law, her zealous support for the death penalty unquestionably impaired her ability to be fair and impartial. As detailed above, although Kristen S. did not specifically say that she believed the death penalty should be imposed in all cases of first degree murder, her answers to counsel's questioning indicated that this was the case. She unequivocally stated that a premeditated, intentional, deliberate murder of a police officer automatically called for the death penalty. (23 R.T. 4239.)

Elaborating on her feelings about the death penalty, Kristen S. further explained that she had a strong belief that the death penalty was not utilized enough. That people remain on death row far too long even though they have had a trial, been found guilty, and deserve the punishment meted

out to them. (23 R.T. 4240-4241.)

Defense counsel challenged Kristen S. for cause based on her *Hovey* examination and questionnaire responses, which clearly indicated that in a case of premeditated murder of a police officer she would automatically vote for the death penalty. (23 R.T. 4258-4259.) The trial court denied the motion.

Although Kristen S. briefly stated that she believed that "no life" is worse than death (23 R.T. 4238-4239.), she repeatedly stated she would automatically vote for death in a case involving the murder a police officer. Her pro-death opinions in this case specifically hinged on the fact that the victim was a police officer. Because Kristen S.'s state of mind was such that she could not fairly and impartially consider and weigh the evidence in determining the appropriate penalty, the trial court's failure to exclude this juror upon defense counsel's timely motion was clearly erroneous. (*Morgan v. Illinois, supra,* 504 U.S. 719; *Wainwright v. Witt, supra,* 469 U.S. at p. 424.)

c. Shirley J.

Like Robert C., Shirley J. exhibited an inability to consider imposing a penalty other than death. For example, Shirley J. put on her juror questionnaire "I believe justice could not be served if someone takes the life of another without suffering the same fate." (21 R.T. 3775; 7 C.T. 5287, Q 165.) Indeed, if given a choice with regard to penalty Shirley J.

stated unequivocally that she would always vote for death. That is, in a case of premeditated murder without justification, her penalty decision would automatically be death. (21 R.T. 3799, 3801.)

The trial court sought to disabuse Shirley J. of her improper opinion, by informing her that she, by law, could not consider "the deterrent or nondeterrent effect of the death penalty in general or the monetary cost to the state of execution or maintaining a prisoner for life without the possibility of parole." Shirley J's only response to the court was that she understood what the court said and when asked if she had any "quarrel with that proposition," she responded "No." (21 R.T. 3807.)

Defense counsel challenged Shirley J. for cause based on two reasons: she would automatically vote for death in a case of premeditated murder; and she supported the death penalty because she thought it was a deterrent. (21 R.T. 3808.) The trial court denied the motion. (21 R.T. 3808-3809.)

The trial court's attempt to rehabilitate Ms. J. was confusing at best, and hollow at least. First, the trial court merely admonished Ms. J. that she was not to consider the possible deterrent effect of the death penalty "in general," nor the cost of maintaining a prisoner for life. This did nothing to address the immediacy of Ms. J.'s improper opinion that the death penalty for appellant should be automatic. Nothing in the court's inquiry sought to determine the extent of this apparent pro-death bias. Second, the trial court

did not ask Ms. J. whether its instruction would override her firmly held belief. Rather, the court merely asked whether she had any "quarrel" with his instruction. Ms. J.'s appropriate response that she would not quarrel with the judge's proposition, did not mean she had any understanding that she could not maintain a solid view that death was automatic for premeditated murder.

Shirley J.'s unmitigated preference for the death penalty revealed that given a choice she could not equally consider both punishments in determining appellant's sentence. Because, under the law, appellant is entitled to jurors who will properly consider both potential penalties, Shirley J.'s ability to function as a juror was "substantially impaired" and she should have been excused for cause. (*People v. Howard* (1988) 44 Cal. 3d 375, 417 [243 Cal.Rptr. 842, 749 P.2d 279].) The trial court's denial of the challenge for cause against Shirley J. was clearly erroneous.

d. Gregory D.

From the outset of his questioning, juror Gregory D. demonstrated an unwavering pro-death bias and belief that appellant was guilty. (23 R.T. 4155.) Elaborating on his feelings about the death penalty, juror Gregory D. stated that his views regarding the death penalty were such that it would be "highly unlikely" for him to impose a penalty of life without the possibility of parole regardless of the evidence presented at the penalty phase. (23 R.T. 4158.) He believed a penalty trial was unnecessary

because the death penalty was the only appropriate punishment for first degree murder with special circumstances. (23 R.T. 4158-4159.)

When asked what he thought the death penalty accomplished he answered, "[f]air justice – If you murder someone deliberately with malice aforethought – you should pay with your life for your choice of taking someone else's life." (23 R.T. 4145; 5 C.T. 4626, Q. 167.)

Finally, on follow-up questioning Gregory D. demonstrated perfectly the logical inconsistency of his answers. Gregory D. stated "I can consider all conditions set forth that is required for me to consider as far as mitigating circumstances to the death penalty. I can consider those. Those are conditions. It's just my opinion going in that if you do meet the conditions of first-degree murder and there are those special circumstances, then to me there is a stronger likelihood or not, on an objective basis, I would vote for the death." (23 R.T. 4162.)

For reasons made obvious by Gregory D.'s responses, defense counsel challenged Gregory D. for cause. (23 R.T. 4178.) The trial court denied the motion. (23 R.T. 4179-4180.)

Gregory D.'s responses reveal not only a pro-death bias, which he repeatedly stated would influence his guilt determination, but a premature certainty that appellant must have been guilty. Moreover, his illogical assertion that he could follow the law even though he believed his feelings about the death penalty would influence his decision making with regard to

guilt amply demonstrate that Gregory D.'s ability to follow the law was substantially impaired. The trial court's refusal to exclude him was therefore clearly erroneous. (23 R.T. 4180; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.)

e. Marguerite S.

During *Hovey* examination, Marguerite S. made clear that her bias against appellant caused her to presume him guilty, and her personal feelings in favor of the death penalty would make her vote for death irrespective of the law. Marguerite S. demonstrated her impairment with respect to the guilt phase. While she acknowledged to the court that the state of the law was such that appellant was innocent until proven guilty, as noted in detail above, she did not hesitate to advise that this was not her view. (21 R.T. 3676.)

Thus, despite accepting that she must follow the law, Ms. S. was unwavering in her personal view that appellant was already guilty. It would exalt form over substance to believe that she would require anything less than appellant proving himself not guilty.

With consistency, Ms. S. followed this view with her inability to accept mitigating evidence during the penalty phase. When asked whether she would be willing to consider information concerning the defendant's background or behavior in determining the appropriate penalty, she indicated she would listen but her belief remained that appellant must be

held accountable for his actions. (21 R.T. 3670; see also 12 C.T. 6773, Q. 173.) Thus, in her mind the real question at the penalty phase of the trial was whether the defense could **ever** convince her that there was some reason appellant should live.

As set forth in detail above, Marguerite S. harbored very strong resentment and was extremely troubled by the fact that she had suffered many recent deaths in her family, and yet, if proven guilty, appellant would be asking her to allow him to live. Ms. S. also responded that her belief was such that death should be automatic after a guilt finding of first-degree murder of a police officer. (21 R.T. 3667-3668.)

During questioning by the prosecution, Ms. S. acknowledged that despite her desire to, and despite instruction from the trial court to, she might not be able to follow the law over her feelings. (21 R.T. 3672.) Even during questioning by the trial court, Ms. S. was honest about the incredible difficulty she would have in setting aside her emotional bias against appellant. While Ms. S. attempted to accept that she was duty bound to follow the law (21 R.T. 3677-3678), she ultimately informed the court that she did not know whether, in the end, she could set her feelings aside and follow the law. (21 R.T. 3678.)

Ms. S.'s desire but inability to follow the law existed not in a vacuum, but within the real world. Ms. S. had suffered tragedies in her family. Ms. S.'s best friends' daughters were Highway Patrol officers. She

acknowledged she was biased in favor of law enforcement. (21 R.T. 3672, 3674.)

Defense counsel challenged Marguerite S. for cause based on her multiple biases including: a bias for law enforcement, a bias for the prosecution, and a bias for death, and a bias against the appellant. (21 R.T. 3680.) The trial court denied appellant's motion. (21 R.T. 3681-3682.)

Because Marguerite S's state of mind was such that she could not fairly and impartially consider and weigh the evidence in determining the appropriate penalty, the trial court's failure to exclude this juror upon defense counsel's timely motion was clearly erroneous. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

f. Raymond L.

Raymond L. demonstrated a pro-death bias in cases involving the murder of a police officer. Mr. L. believed the murder of a police officer was more deserving of the death penalty, because, "police represent authority." (20 R.T. 3456.) Furthermore, Raymond L. repeatedly stated he did not know if he could be fair. In his questionnaire response, Raymond L. responded that he was "unsure" whether he could be fair and impartial during the penalty phase and whether he could decide the penalty based entirely on the evidence presented. (20 R.T. 3452; 8 C.T. 5486, Q. 175.) It was precisely this ability to recognize his own limitations which made Raymond L's assertions that he could not be impartial so persuasive.

Defense counsel challenged Raymond L. for cause, and the trial court summarily denied the motion. (20 R.T. 3465.)

Raymond L.'s preference for the death penalty revealed that given a choice he would not equally consider both punishments in determining appellant's sentence. Because, under the law, appellant is entitled to jurors who will properly consider both potential penalties, Raymond L.'s ability to function as a juror was "substantially impaired" and he should have been excused for cause. (*People v. Howard, supra*, 44 Cal. 3d at p. 417.)

g. Ernest M.

Ernest M. exhibited an inability to consider imposing a penalty other than death. He informed the court that he felt strongly about the death penalty and further indicated if in a position to do so, he felt he would vote for it. (26 R.T. 4988-4989.) Indeed, if given a choice with regard to penalty, Ernest M. unmistakably stated that he would always vote for death. (26 R.T. 4991-4992.)

Defense counsel challenged Ernest M. for cause based on his obvious bias favoring the death penalty. (26 R.T. 5010-5011.) Again, the trial court denied appellant's motion. (26 R.T. 5012.)

During his *Hovey* examination by the prosecution, Ernest M. stated that he would follow the law; however, he nevertheless consistently demonstrated that he was not impartial. He acknowledged that it would be difficult for him to vote for life, and if given a choice, he would always

choose death. Indeed, nothing in his assertions that he would follow the court's instructions countered his unwavering preference for death or his own multiple statements affirming his preference for death. Clearly, in reaching a penalty phase determination, Ernest M. would not "engage in an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*People v. Brown*, *supra*, 40 Cal. 3d. at p. 540.)

Because of Ernest M.'s state of mind was such that he could not fairly and impartially consider and weigh the evidence in determining the appropriate penalty, the trial court's failure to exclude this juror upon defense counsel's timely motion was clearly erroneous.

h. Barbara C. (Juror #5)

Barbara C.'s voir dire illustrated she harbored strong pro-death opinions. She exhibited an inability to consider imposing a penalty other than death. This was exhibited early on when she wrote in her questionnaire that in a case of a first-degree murder with special circumstances the death penalty is automatically appropriate. (24 R.T. 4541, 4543.)

Although Barbara C. understood the court's instructions, as noted in detail above, she expressed grave difficulty in separating her personal views and following the court's instructions. (24 R.T. 4540-4541.)

Defense counsel challenged Barbara C. for cause based on her bias

for the death penalty. (24 R.T. 4557.) The trial court denied the challenge. (24 R.T. 4557.)

In light of the extreme views expressed by Barbara C., her equivocal and tentative responses following the court's instructions made it unreasonable to expect that she could actually give each potential punishment equal consideration as required by the law. Because Barbara C.'s views in favor of the death penalty were so strong she was substantially impaired in her ability to perform her duties as a juror, and she should have been removed from the jury. (*People v. Ashmus, supra*, 54 Cal.3d at p. 962.)

The trial court's error in denying the challenge for cause against Barbara C., was most egregious in that appellant was not able to remove Barbara C. via a peremptory challenge. Appellant exhausted peremptory challenges on perspective jurors he had earlier challenged for cause, but for whom the Court had incorrectly denied the challenges. Those jurors were Robert C., Kristen S., Shirley J., Robert G., Gregory D., Marguerite S., Michael S., Raymond L., and Ernest M. Appellant moved for additional peremptory challenges, but the Court denied the motion. (31 R.T. 5991.) This left pro-death Barbara C. seated on the jury as Juror number 5.

2. The trial court's failure to grant challenges to prospective jurors demonstrating actual bias against appellant or against certain evidence involved in appellant's case was clearly erroneous.

a. Raymond L.

Throughout jury selection, Raymond L. repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof.

First, responding to a question in the jury questionnaire that related to whether there was anything about the nature of the charges against appellant that would make it difficult for him to be fair and impartial, Raymond L. marked "not sure." He went on to indicate that in fact he would not be impartial because other things, such as, "all the previous crime that was read [sic] by the judge at the hearing, that Mr. Johnson has committed [sic]," would unfairly affect his judgment. (20 R.T. 3451.) Another question on the jury questionnaire asked if he could be fair and impartial in the penalty phase and decide the penalty based entirely on the evidence and the court's instructions completely disregarding any prior opinion he may have had before coming to court. Again, Raymond L. marked that he was "unsure" whether he would be able to disregard his personal feelings in arriving at a penalty determination. (20 R.T. 3452; 8 C.T. 5486, Q. 175.)

Regardless of Raymond L.'s attentiveness and intelligence, his

uncertainty in his ability to be a fair and impartial juror in the face of the evidence regarding past criminal history rendered him unfit to sit on appellant's jury. Consequently the trial court clearly erred in denying defense counsel's challenge.

b. Robert G.

Throughout jury selection, Robert G. repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof.

First, Robert G's bias in favor of police officers became evident when he admitted he would give officer's testimony more weight and that he believed he should "afford them all the protection that I can." (21 R.T. 3819.) When asked if a police officer were to take the stand in this trial would he give their testimony more weight or believability, Robert G. candidly admitted he clearly would. Robert G. replied "[f]airly, I would have to say yes. Um, I think they're in a position of responsibility that, um, I give a little more weight to." (21 R.T. 3821.) When asked whether there was anything about the nature of the charges against appellant that would make it difficult for him to be fair and impartial, he marked "yes" "He shot and killed a police officer." The fact that appellant was accused of shooting a police officer was in and of itself enough to unfairly influence Robert G.'s decision making process. (21 R.T. 3822.) Robert G. further informed the court through voir dire that his current frame of mind favored the

prosecution and he believed that appellant would probably not receive a fair trial from him. (21 R.T. 3822-3823.)

Indeed, Robert G's responses illustrated an obvious bias against appellant and a strong skepticism of the presumption of innocence. (21 R.T. 3818-3824.)

Robert G. was biased in yet another way. As a result of having heard media coverage concerning appellant's case, he informed the court and the parties on voir dire that he was unable to disregard what he had heard and he was further unable to judge the case solely on the evidence presented. (21 R.T. 3823.)

Appellant recognizes that under California Penal Code §1076 a prospective juror is not automatically impaired by "reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety;" however, the juror is impaired and should be excused if it appears he can not set aside such an opinion, and "act impartially and fairly upon the matters to be submitted to him." While Robert G. superficially voiced that he would "have to be bound by the law to" weigh mitigating circumstances, and that he "would try to weigh" mitigating evidence (21 R.T. 3824-3825) the totality of his responses make clear that he could not set aside his opinions and biases. He was impaired.

In addition to Robert G.'s above noted biases, he also demonstrated

an inability to be impartial on the issue of mental illness. Robert G. believed an individual had the ability to overcome his background or behaviors, and therefore he did not believe mental illness was a mitigating factor. When asked how he would weigh a psychiatrist's testimony he stated, "I take it with a grain of salt." (21 R.T. 3828.) Robert G. explained he doubted the science of mental health because he did not consider mental health to be a "hard science" such as math or physics. (21 R.T. 3829.) He effectively demonstrated his belief that mental health issues were not legitimate when he stated, "[i]f I say one and one is two, that's a truth. If someone were to tell me someone is incapacitated, ... that the human mind is a very complex thing. How do I know that's the truth?" (21 R.T. 3829.)

Defense counsel challenged Robert G. for cause based on Mr. G.'s inability to be a fair and impartial juror. (21 R.T. 3834.) The trial court denied the motion. (21 R.T. 3835.)

Robert G.'s responses demonstrated that he would have had a virtually impossible time: (1) adhering to the presumption of innocence; (2) returning a verdict of not guilty should the prosecution fail to meet its burden of proving guilt beyond a reasonable doubt; and (3) remaining impartial during testimony relating to mental illness. Any one of these factors, alone, was sufficient grounds for excusal for cause. To exalt Robert G.'s form responses that he would "have to," or "try to," follow the law, is to ignore the substantive reality that he could not. The trial court's

failure to grant appellant's challenge for cause was clearly erroneous.

c. Marguerite S.

Marguerite S. was unable to be a fair and impartial juror due to her strong friendships with law enforcement. She plainly stated that because her best friends were in law enforcement, she was biased in favor of the prosecution and biased against appellant. (21 R.T. 3664.) She did not believe she could be fair to appellant or anyone accused of killing a police officer. (21 R.T. 3664.) Also, she had discussed the death of a peace officer within the last year with her close law enforcement friends. (21 R.T. 3666.)

Marguerite S. was aware of her bias. It was precisely this ability to recognize her own limitations which made Marguerite S.'s assertion that she could not be impartial so persuasive. The trial court's failure to remove her based on appellant's timely motion was in clearly erroneous.

d. Michael S.

Like Robert G., Michael S. repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof.

First, Michael S.'s answers in the juror questionnaire demonstrated his inability to be fair and impartial towards appellant. He acknowledged some unfavorable feelings towards defense attorneys "since a defense attorney may have to represent a client who is 'guilty' yet pleads 'not

guilty' for whatever reason." (12 C.T. 6594, Q. 82.) Additionally, Michael S. determined early on that appellant was guilty. As a result of being exposed to pretrial publicity, Michael S. formed the opinion that it was obvious appellant shot and killed Deputy Aguirre because no other explanation "that would explain away [his] guilt" was offered. (12 C.T. 6603, Q. 151.) Michael S. believed that appellant entered a not guilty plea in order "to avoid a harsher penalty – probably the death penalty." (24 R.T. 4350, 4355; 12 C.T. 6604, Q. 159.) He further shifted the burden of proof to appellant to prove he did not commit the crime and that life without the possibility of parole was the appropriate penalty. Michael S.'s voir dire responses demonstrated a limited ability to consider appellant's background or behavior when reaching an appropriate penalty decision. His answers clearly showed a willingness to consider background or behavior information as aggravation but not as mitigation. He declared that his limited consideration would include evidence of other crimes appellant had committed as an indication of "the evil nature of Mr. Johnson." (12 C.T. 6608, Q. 173.)

Michael S. also showed that his beliefs regarding voluntary drug use made him unable to be fair and impartial in considering substance abuse evidence in deciding an appropriate punishment. Specifically, he believed that "if someone intentionally takes drugs and they end up committing a crime but they're not aware of their committing a crime, they're still

responsible for that crime." He also believed that if someone had a dependency problem it "might possibly be mitigating" but he would still take "a harsh view on that." (24 R.T. 4361-4362.)

Defense counsel challenged Michael S. for cause due to his biases and his inability to seriously consider life without the possibility of parole. (24 R.T. 4369-4370.) The trial court denied defense counsel's timely challenge for cause. (24 R.T. 4372.)

While the trial court explained the difficulties in getting an unbiased jury because the questions are "front loaded," it remained that Michael S. had already determined appellant was guilty and the only issue left to resolve was the penalty. Michael S. should have been removed for cause and therefore the trial court's denial was clearly erroneous.

e. Ernest M.

Ernest M. was biased against appellant in that he demonstrated an inability to presume appellant's innocence and to hold the prosecution to its burden of proof. Ernest M. was unable to be impartial because appellant's case involved the shooting of an officer in the line of duty. Ernest M. admittedly had strong feelings in favor of law enforcement, and had friends and relatives who were police officers. During *Hovey* examination Ernest M. exhibited his opinions and unequivocally stated that because of his many law enforcement contacts, he had a bias or prejudice in favor of the prosecution. (26 R.T. 4998-4999.)

Although Ernest M. responded that he might be able to listen to the evidence and not make a decision based on his own feelings, the totality of his answers show in fact that he was biased against appellant and he was doubtful of his ability to be impartial. (26 R.T. 4998-4999.) Consequently, the trial court clearly erred when it denied appellant's challenge for cause to this juror.

D. Because Appellant Exhausted His Peremptory Challenges Before He Was Able To Remove A Biased Juror His Convictions Must Be Reversed.

1. It is likely that one or more biased juror sat on the jury; the procedures used by the court make it impossible to conclude that an impartial jury was empanelled.

Prejudice for an erroneous denial for a challenge for cause "turns on whether the defendant's right to a fair and impartial jury was affected" and is assessed under the harmless-beyond-a reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112].) Consequently, to obtain reversal:

> "[The] defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation] or can justify his failure to do so [citation], and that he was dissatisfied with the jury as selected." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088 [259 Cal.Rptr. 630]; accord *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86 [108 S.Ct. 2273, 101 L.Ed.2d 80].)

These requirements have been met in appellant's case. Reversal is

required here.

One need look no further than the voir dire examination of Juror Barbara C. (Juror #5). As discussed above, Barbara C. was substantially impaired and served on appellant's jury. Barbara C. had read about the murder and had come into the voir dire with preconceived views that appellant should receive the death penalty. During voir dire, Barbara C. stated "... I had a preconceived notion that the death penalty was appropriate." (24 R.T. 4541.) She stated, "I thought I was more of a law-and-order person, a hanging judge." She explained her statements stating "[w]ell, according to what I had read, but I meant just in general. I had always considered that if you committed a murder, then the death penalty was appropriate." (24 R.T. 4543.)

There were ten prospective jurors (Robert C., Kristen S., Shirley J., Robert G., Gregory D., Marguerite S., Michael S., Raymond L., Ernest M., and Barbara C.) whom appellant had challenged for cause on the basis that they were substantially impaired due to an actual or implied bias; in each instance the challenge for cause was erroneously denied. (20 R.T. 3635 [Robert C.]; 23 R.T. 4260 [Kristen S.]; 21 R.T. 3808 [Shirley J.]; 21 R.T. 3836 [Robert G.]; 23 R.T. 4180 [Gregory D.]; 21 R.T. 3682 [Marguerite S.]; 24 R.T. 4372 [Michael S.]; 20 R.T. 3465 [Raymond L.]; 26 R.T. 5012 [Ernest M.]; 24 R.T. 4557 [Barbara C.]; see argument D, ante.) Subsequently, appellant exercised peremptory challenges against nine of

these prospective jurors. (31 R.T. 5927 [Robert C.]; 31 R.T. 5931 [Kristen S.]; 31 R.T. 5933 [Shirley J.]; 31 R.T. 5936 [Robert G.]; 31 R.T. 5939 [Gregory D.]; 31 R.T. 5941 [Marguerite S.]; 31 R.T. 5942 [Michael S.]; 31 R.T. 5943 [Raymond L.]; 31 R.T. 5978 [Ernest M.].)

After exhausting his peremptory challenges, appellant expressed dissatisfaction with the jury as constituted because it contained at least one juror, Barbara C., who was substantially impaired due to her pro-death bias. (31 R.T. 5991.) For the reasons expressed in subsection D, 1, h, ante, the court erred in denying appellant's challenges for cause to this juror. Therefore, the errors in denying appellant's challenges for cause were not harmless beyond a reasonable doubt, and his convictions must be reversed. (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 965; *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86 [108 S.Ct. 2273, 101 L.Ed.2d 80]; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

2. Harmless Error Analysis.

In the event the law changes and a harmless-error analysis must be undertaken, the result would be the same.

As set out in detail in Argument IV, post, appellant admitted the shooting of Deputy Aguirre and the only issue at trial was the mental state of appellant at the time of the shooting.

One biased juror, consequently, could have made a difference. It is reasonably possible that, if appellant had been tried by a jury of 12

impartial jurors, he would not have been convicted of capital murder -- especially if the other errors attacked in this brief had not been committed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES IN ORDER TO REMOVE THE SEATED JUROR WHO DEMONSTRATED A BIAS IN FAVOR OF THE DEATH PENALTY.

Appellant's right to a fair and impartial jury was violated by the trial court's denial to one additional peremptory challenge to remove a biased juror, Barbara C. Appellant was compelled through erroneous rulings on his challenges for cause to use nine of his peremptory challenges, with the result that, having finally exhausted all such challenges allotted him by law; a disqualified juror was forced upon him.

A. Facts

There were ten prospective jurors (Robert C., Kristen S., Shirley J., Robert G., Gregory D., Marguerite S., Michael S., Raymond L., Ernest M., and Barbara C.) whom appellant had challenged for cause on the basis that they were substantially impaired due to an actual or implied bias; in each instance the challenge for cause was erroneously denied. (20 R.T. 3635 [Robert C.]; 23 R.T. 4260 [Kristen S.]; 21 R.T. 3808 [Shirley J.]; 21 R.T. 3836 [Robert G.]; 23 R.T. 4180 [Gregory D.]; 21 R.T. 3682 [Marguerite S.]; 24 R.T. 4372 [Michael S.]; 20 R.T. 3465 [Raymond L.]; 26 R.T. 5012 [Ernest M.]; 24 R.T. 4557 [Barbara C.]; see argument D, ante.) Subsequently, appellant exercised peremptory challenges against nine of the prospective jurors. (31 R.T. 5927 [Robert C.]; 31 R.T. 5931 [Kristen S.]; 31 R.T. 5933 [Shirley J.]; 31 R.T. 5936 [Robert G.]; 31 R.T. 5939

[Gregory D.]; 31 R.T. 5941 [Marguerite S.]; 31 R.T. 5942 [Michael S.]; 31 R.T. 5943 [Raymond L.]; 31 R.T. 5978 [Ernest M.].)

After exhausting his peremptory challenges for actual jurors, appellant expressed dissatisfaction with the jury as constituted on the grounds that it contained at least one juror who demonstrated a bias in favor of the death penalty. (31 R.T. 5991.) Appellant requested additional peremptory challenges to cure the problem, but this request was denied. (31 R.T. 5993.) As a result, appellant was denied a fair and impartial jury, due process, and a reliable determination of his capital sentence. (U.S. Const., Amends, Fifth, Sixth, Eighth, and Fourteenth; Cal. Const., art. I §§ 15, 16, 17.)

B. Governing Principles

If an objectionable juror, who should have been removed for cause, is removed by use of a peremptory challenge, no damage is done to the challenger's position unless it can be shown he was deprived of the use of a peremptory challenge. This requires that the challenger show a use of all peremptory challenges and that he indicate dissatisfaction with the jury, suggesting that he would have benefited by the availability of at least one more peremptory challenge. (*People v. Coleman* (1988) 46 Cal.3d 749, 770 [251Cal.Rptr. 83, 759 P.2d 1260]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088 [259 Cal.Rptr. 630, 774 P.2d 659].)

Generally to support a claim that he is constitutionally entitled to

more peremptory challenges than are provided by statute, a defendant must establish "at the very least that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury." (*People v. Bonin* (1988) 46 Cal.3d659, 679 [250 Cal.Rptr. 687, 758 P.2d 1217].) Where a defendant contends that the trial court wrongly denied a challenge for cause, he or she must demonstrate that the right to a fair and impartial jury thereby was affected. (*People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1087-1088.)

Initially, a defendant must establish that he or she exercised a peremptory challenge to remove the juror in question, exhausted the defendant's peremptory challenges, and communicated to the trial court the defendant's dissatisfaction with the jury selected. (*People v. Morris* (1991) 53 Cal.3d 152, 184 [279 Cal.Rptr. 720, 807 P.2d 949]; *People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1087.) n4 "[I]f he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (*People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088; cf. *People v. Mason* (1991) 52 Cal.3d 909, 954 [277 Cal.Rptr. 166, 802 P.2d 950] [6th Amend. claim obviated by exercise of peremptory challenges to exclude prospective jurors not excused for cause, without comment by this court on other potential

constitutional claims].)

This reasoning necessarily implies that an erroneous denial of a challenge for cause can be cured by giving the defendant an additional peremptory challenge. One older case, *People v. Freeman* (1891) 92 Cal. 359, 365-366 [28 P. 261], so holds. More recent cases which speak of defendant's obligation to advise the court of his dissatisfaction with the jury assume that the court, so advised, could fashion an appropriate remedy (see, e.g., *People v. Crowe* (1973) 8 Cal.3d 815, 832 [106 Cal.Rptr. 369, 506 P.2d 193]), and the grant of additional peremptory challenges would seem to be such a remedy.

1. The trial court clearly erred in denying appellant's request for additional peremptory challenges to remove the biased juror.

For the reasons set forth in Argument I D., ante, regarding the denial of his challenges for cause, appellant demonstrated a reasonable likelihood that he would receive an unfair trial from jurors who had an actual or implied bias against appellant. Appellant's jury included Juror 5, Barbara C., who was substantially impaired due to her pro-death bias. (31 R.T. 5991.) Barbara C. should have been excused for cause on the basis of her pro-death bias. (See Argument D, 1, h, ante.) Therefore, in denying appellant at least one additional peremptory challenge in order to remove Barbara C., the trial court violated appellant's right to a fair trial by impartial jurors, and his convictions must be reversed. (U.S. Const.,

Amends. Fifth, Sixth, Eighth and Fourteenth; Cal. Const., art. I, §§ 15, 16; *People v. Bonin*, *supra*, 46 Cal.3d at p. 679; see *Leonard v. United States*, (1964) 378 U.S. 544 [84 S.Ct. 1696, 12 L.Ed.2d 1028]; *Irvin v. Dowd*, (1961) 366 U.S. 717, 728 [81 S.Ct. 1639, 6 L.Ed.2d 751].)

2. Reversible error.

"[I]f he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (*People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088; cf. *People v. Mason* (1991) 52 Cal.3d 909, 954 [277 Cal.Rptr. 166, 802 P.2d 950] [6th Amend. claim obviated by exercise of peremptory challenges to exclude prospective jurors not excused for cause, without comment by this court on other potential constitutional claims].) Appellant demonstrated that he was denied his right to a fair and impartial jury due to the trial court's denial of his challenges for cause and denial of one additional peremptory challenge to remove the biased juror. Therefore, appellant is entitled to have his conviction reversed.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ERRONEOUSLY EXCUSING A PROSPECTIVE JUROR FOR CAUSE UNDER THE WITT/WITHERSPOON STANDARD.

The trial court violated appellant's state and federal constitutional rights to due process, a fair and impartial jury and to reliable guilt and penalty determinations, when it improperly excluded a prospective juror who, despite her reservations about capital punishment, demonstrated she was able to perform her duties as instructed by the court.

A. Legal Analysis

As discussed in Argument I, supra, whether the contention is that the trial court erroneously failed to exclude prospective jurors who exhibited a pro-death bias, or excluded prospective jurors who exhibited an anti-death bias, the same standard has been held to apply. (*People v. Pride* (1992) 3 Cal.4th 195, 227-228 [10 Cal.Rptr.2d 636, 833 P.2d 643]; *People v. Mincey* (1992) 2 Cal.4th 408, 456 [6 Cal.Rptr.2d 822, 827 P.2d 388]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224.) A juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 851-852, 105 S.Ct. 844]; *People v. Crittenden* (1994) 9 Cal.4th 83, 121 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Mincey*, *supra*, 2 Cal.4th 408,

456.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Ochoa* (1998) 19 Cal.4th 353, 444-445 [79 Cal.Rptr.2d 408, 966 P.2d 442].) A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction; to be excused for cause, a prospective juror must make unmistakably clear that his views on capital punishment would prevent him from considering a death sentence, no matter what evidence was adduced. (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].) Improper exclusion of prospective juror under *Witherspoon-Witt* is reversible per se. (*Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622].)

Decisions of the United States Supreme Court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*, *supra*, 469 U.S. 412. In *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S. Ct. 1758, 90 L.Ed.2d 137], the high court observed that "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."

Similarly, in *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [276 Cal.Rptr. 788, 802 P.2d 278], the court observed: "Neither *Witherspoon* [*v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]] nor *Witt*, [*supra*, 469 U.S. 412,] nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty." The *Kaurish* court also recognized that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*People v. Stewart* (2004) 33 Cal.4th 425, 446 [15 Cal.Rptr.3d 656, 93 P.3d 271].) 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. The real question is whether the juror's attitude will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, fn. omitted.) A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.

On appeal, the trial court's ruling will be upheld 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 equivocal, i.e., capable of multiple inferences, conflicting, or ambiguous. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975 [108 Cal.Rptr.2d 291, 25 P.3d 519] citing *People v. Jenkins* (2000) 22 Cal.4th 900, 987 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; see also *People v. Heard* (2003) 31 Cal.4th 946, 958 [4 Cal.Rptr.3d 131, 75 P.3d 53]; *People v. Cooper* (1991) 53 Cal.3d 771, 809 [281 Cal.Rptr. 90, 809 P.2d 865]; *People v. Mincey* (1992) 2 Cal.4th 408, 456 [6 Cal.Rptr.2d 822, 827 P.2d 388].) If there is no inconsistency, and the only question is whether the prospective juror's responses in fact demonstrated an opposition to or bias in favor of the death penalty, then trial court's determination will not be set aside as long as it is supported by substantial evidence and hence not clearly erroneous. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1047 [60 Cal.Rptr.2d 225, 929 P.2d 544].)

In the case at bar, the trial court's grant of the prosecution's challenge for cause of Ann I. was not "fairly supported by the record," and was therefore clearly erroneous. In combination with the trial court's refusal to grant appellant's challenges for cause to oppositely impaired jurors (Argument I, supra), both appellant's conviction and death sentence must be reversed.

B. Improper Exclusion of Ann I.

Prospective juror Ann I. stated that she believed in capital punishment but only in the most extreme cases. In her view, extreme cases were multiple or serial murders; the murder of a police officer was not, in and of itself, an extreme case. (20 R.T. 3588; 7 C.T. 5121, Q. 165.) However, Ann I. was prepared to follow the law and consider the death penalty. The following colloquy illustrated Ms. I.'s views:

> A. If that was -- I feel that the death penalty should be reserved for somebody who is a habitual criminal in a serious way, such as someone who has murdered many times, who is a danger not only to one person but to many people. And that's about the only time I think I could vote for it. (20 R.T. 3588.)
>
> Q. Well, I guess I'm trying to reconcile -- and I don't mean to argue with you. Again, as his Honor indicated, there is no right or wrong answer.
>
> A. Right.
>
> Q. I'm trying to reconcile your position that you just stated there with your answer to the questionnaire that you would

not automatically vote either way.[10]

A. Well, I wouldn't automatically vote. I would be -- I would listen to the evidence first, and then at that point I'd want to hear everything before I'd vote.

Q. So if his Honor were to instruct you, assuming that you were picked as a juror in this case and you got to the penalty phase, certain things that you could take into consideration with regards to either aggravation or mitigation, you're indicating that you would follow that instruction and -- and listen to all the evidence as it may pertain to those factors?

A. Yes.

Q. So do you feel that you could set aside your personal feelings with regards to the death penalty and follow the Court's instructions with regards to the factors that come into play in determining what the appropriate sentence should be?

A. I hope so.

Q. And when you say you hope so, does that mean you would give it an honest –

A. Yes.

Q. - an honest effort to do so?

A. Yes, I would. (20 R.T. 3588-3590.)

Additionally, in response to the trial court's questioning, Ms. I. responded that she had no preconceived notion "as to guilt or innocence of [appellant], or of any punishment that should be imposed." (20 R.T. 3588.)

The prosecutor inquired in general terms about Ann I.'s

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[10] Ms. I. stated in response to a question on the questionnaire: "I would not automatically vote for either life without parole or the death penalty. I would consider all the evidence and I could vote for either depending on the evidence." (20 R.T. 3588; see also 7 C.T. 5122, Q. 171.)

"conscience." The prosecutor asked Ann I. if she thought that her conscience would allow her "to set aside [her] religious beliefs" in order to seriously consider the death penalty. (20 R.T. 3590, emphasis added.) Ms. I. replied "That's very hard to answer. I feel if -- if this is a very serious crime and it would seem like it's a series of serious crimes, then I might be able to do it." (20 R.T. 3591.) The prosecution then asked if Ann I. was going to be able to "leave behind, if necessary, [her] conscience," Ms. I. replied, "I cannot be positive that I could just -- no, I can't be positive." (20 R.T. 3591.)

The prosecution challenged Ann I. for cause claiming that she was "substantially impaired" due to her religious beliefs. (20 R.T. 3605.)

In opposition to the prosecution's challenge for cause defense counsel argued:

> "I simply think this prospective juror is -- is having the same struggles with the death penalty as many of the jurors have. I don't think that's unusual or not to be expected. And I think that it may be a difficult decision, but there's no indication really that if called upon she would not follow the Court's instructions." (20 R.T. 3605.)

In ruling on the prosecution's challenge for cause, the trial court stated:

> "And watching her -- again, it just becomes highly subjective, but I really -- really believe that this juror can verbalize her willingness to make every effort to make an attempt and then follow it up with statements that make it clear she couldn't do it. And I don't think -- I think it's fairly clear to me that she couldn't, but it is absolutely clear that I – one is left with the

> definite impression of substantial impairment of performance of her duties. And that is the test. On that basis, I again sustain the objection." (20 R.T. 3606.)

The trial court's concession that its analysis, "just becomes highly subjective...," reveals that the trial court was not viewing the juror's responses objectively. It appears both the prosecutor and the trial court were focused on Ms. I.'s responses to questions regarding following her "conscience." However, following one's conscience is not, in any way, incongruent with following the law. Conscience is defined as: "The awareness of a moral or ethical aspect to one's conduct together with the urge to prefer right over wrong ... Conformity to one's own sense of right conduct." *The American Heritage Dictionary of the English Language: Fourth Edition. 2000.* Conscience does not stop at the doorstep of doing right versus wrong; it is the very pursuit of right over wrong. It permeates all decisions of morality and ethics. This would include following the law. As to Ann I.'s conscience with respect to the law, Ms. I. stated unequivocally that she would follow the court's instructions. She stated unequivocally that she would not automatically decide life or death, but rather would listen to the evidence.

All that is required of a juror is that she be willing to follow the law regardless of her beliefs; the test is not whether a juror's conscience will be stressed if she so follows the law. Ms. I. expressed her willingness to follow the court's instructions. The only equivocal responses were with

respect to "absolute" questions, such as whether she could "blank out her conscience," in reaching a decision on life or death. (20 R.T. 3591-3592.) Even with respect to her religious beliefs – Ms. I. was Catholic, and her brother was a priest – she indicated a willingness to separate religious beliefs from her obligation to follow the law. The following exchange with the prosecutor is illustrative:

> Q. Is it going to cause -- let's assume for the moment that you are leaning towards the death penalty. Is it going to cause any strain or difficulty in your relationship with your brother?
>
> A. I don't believe so.
>
> Q. Would you be able to resist the temptation perhaps to discuss the issue with him?
>
> A. Yes. He is a canon lawyer. So he's well aware of legal rules. (20 R.T. 3592.)

Former Chief Justice Rehnquist clearly delineated the distinction between firmly held beliefs and impairment: "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, [106 S.Ct. 1758, 1766, 90 L.Ed.2d 137].)

Rather than look at the responses of Ms. I. objectively, the trial court made a subjective call that Ms. I.'s conscience would render her unable to

follow the law. Throughout her voir dire, Ann I. gave answers that reflected only an honest struggle with the consequence of doing what was right. Her responses reflected the grave responsibility in deciding whether a person should live or die. At no point did Ms. I state or imply, that she could not, or would not, follow the law. Her responses reflected only the expected difficulty in making the decision to impose death. This was reflected in the following exchange with the trial court:

> A. I don't know. I honestly don't know. I mean, it seems like something from another world to me. It's not -- not something I would deal with or even think about.
>
> Q. Well, now you have to deal with it.
>
> A. I know.
>
> Q. You have to think about it.
>
> A. I know. I really don't know whether I could do it or not. I have a feeling it would be something that would weigh on me terrible.
>
> Q. Meaning that the decision itself would?
>
> A. The decision itself would.
>
> Q. Well, one would be --
>
> A. And -- and if I made that decision, having to live with that decision for the rest of my life. I think it would be very difficult. (20 R.T. 3601-3602.)

Defense counsel in his argument to the trial court hit the nail on the head. Ann I.'s struggle is exactly what every juror would be expected to endure in a death penalty case. Irrespective of the jurors' personal beliefs, the jurors must make a decision whether someone is put to death. That is a

tremendous burden. It would be absurd to expect jurors to have no conscience. The objective evidence proved that Ms. I. was fully capable of evaluating the evidence and following the law.

Without any objective evidence of substantial impairment, the trial court was left with only an "impression," that Ms. I. was impaired. This Court has found that jurors responding such as Ann I. cannot be excluded. Although personally opposed to the death penalty, she was "nonetheless [] capable of following [her] oath and the law." (*People v. Kaurish* (1990) 52 Cal. 3d 648, 699.) Even if her "personal opposition toward the death penalty may have predisposed [her] to assign greater than average weight to the mitigating factors presented at the penalty phase, [she] may not be excluded, unless that predilection would actually preclude her from engaging in the weighing process and returning a capital verdict." (*Ibid.*)

The United States Supreme Court has recognized the same. "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' (*Wainwright v. Witt*, 469 U.S. at 423, 105 S.Ct., at p. 851.) To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. 'To execute [such a] death sentence would deprive him of his

life without due process of law.' (*Witherspoon v. Illinois*, 391 U.S. at p. 523, 88 S.Ct. at p. 1778.)" (*Gray v. Mississippi, supra*, 481 U.S. at p. 659.)

While Ann I. expressed strong concerns about imposing the death penalty, she did not express that she would not follow the court's instructions. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." (*Witherspoon v. State, supra*, 391 U.S. at p. 519.)

As the *Witherspoon* Court further stated: "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. (footnote omitted.) But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." (*Witherspoon v. State, supra*, 391 U.S. at pp. 520- 521.)

In excluding Ann I., the State produced a jury uncommonly willing to condemn a man to die.

C. The Improper Exclusion of Potential Juror Ann I. Mandates Reversal of Not Only The Death Sentence, But The Judgment Of Conviction.

The Supreme Court in *Gray* "established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause." (*Ibid.*) The *Gray* Court also noted with approval that certain court's including this Court have, "concluded that the improper exclusion of even a single prospective juror from a capital jury required reversal of a death sentence for the reason that it prejudiced a defendant's right to an impartial jury, a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required. (Citation omitted.) The Supreme Court of California refused to find an erroneous exclusion harmless even though it was suggested that the prosecutor would have used his peremptory challenges to exclude all prospective jurors opposed to the death penalty. (*In re Anderson* (1968) 69 Cal.2d 613, 618-620 [73 Cal.Rptr. 21, 25-26, 447 P.2d 117, 121-122], cert. denied, *sub nom. Anderson v. California* (1972) 406 U.S. 971 [92 S.Ct. 2415, 32 L.Ed.2d 671]; *Gray v. Mississippi, supra,* 481 U.S., at pp. 659, fn. 9.) The *Gray* Court expressly rejected any notion that error could be deemed harmless because the prosecutor could exercise peremptory challenges. (*Id.* at p. 664.)

Because the record amply demonstrates there was no substantial evidence Ms. I. was impaired, her exclusion violated the *Witherspoon/Witt* doctrine and therefore requires automatic reversal of appellant's death sentence. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 666-667.)

However, here, more is required. As set forth in Argument I above, the trial court denied appellant's challenges for cause to jurors impaired by their biases against appellant and/or their automatic belief in the death penalty. As the United States Supreme Court has recognized, "It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" (*Witherspoon v. State, supra,* 391 U.S. at p. 521; citing to *Fay v. People of State of New York,* 332 U.S. 261, 294 [67 S.Ct. 1613, 1630, 91 L.Ed. 2043], and *Tumey v. State of Ohio,* 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749].) The trial court's denial of challenges to jurors who were impaired by biases against appellant and for the death penalty, required appellant to exhaust his peremptory challenges. The result was that at least one impaired juror actually served. This juror, Barbara C., had read about the murder and had come into the voir dire with preconceived views that appellant should receive the death penalty. During voir dire, Barbara C. stated "... I had a preconceived notion that the death penalty was appropriate." (24 R.T. 4541.) She stated, "I thought I was more of a law-and-order person, a hanging judge." She explained her statements stating "[w]ell, according to

what I had read, but I meant just in general. I had always considered that if you committed a murder, then the death penalty was appropriate." (24 R.T. 4543.)

The trial court's combined errors in denying appellant's challenges for cause, and granting the prosecution's challenges for cause, resulted in an unfair jury. This mandates reversal of both the convictions and judgment of death.

IV. APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE SHERIFF'S OFFICE, THE DISTRICT ATTORNEY'S OFFICE AND THE DISTRICT ATTORNEY'S AGENT, DR. PATTERSON, REPEATEDLY DISREGARDED APPELLANT'S INVOCATIONS OF HIS RIGHTS TO REMAIN SILENT AND TO HAVE COUNSEL PRESENT PRIOR TO INTERROGATION, ULTIMATELY COERCING ADMISSIONS AND CONFESSIONS TO THE CRIMES CHARGED. THE ADMISSIONS AND CONFESSIONS WERE ERRONEOUSLY ADMITTED INTO EVIDENCE. THE ERROR REQUIRES REVERSAL.

A. Summary Of Facts

Appellant was arrested and taken into custody in the early evening on July 17, 1996. Having been shot in the chest, appellant was transported to Ojai Valley Community Hospital. (13 R.T. 2268.) Appellant arrived at the Ojai Valley emergency room at about 6:15 p.m. (2 C.T. 256, 529.) During a two and a half hour period, while suffering from blood loss, and while being treated and stabilized by medical personnel, appellant was interrogated by representatives of the Ventura County Sheriff's and District Attorney's Office no less than seven times (2 C.T. 251-252, 270-271, 279, 333-334, 336; 5 C.T. 1106-1107, 1143-1144, 1150,1158, 14 R.T. 2310.)

The first contact occurred at 7:01 p.m. Ventura County Sheriff's Detective Bob Young entered the emergency room and advised appellant of his *Miranda*[11] rights. Appellant clearly and unequivocally invoked those

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

rights, responding "no" to a request that he waive them. (2 C.T. 251, 333-334; 5 C.T. 1106, 1143-1144.) Young then terminated his prospective interrogation. (2 C.T. 257, 333-334.)

Despite appellant's unequivocal invocation to Detective Young, only four minutes later, knowing that appellant had invoked his *Miranda* rights to Detective Young, Michael Bradbury, District Attorney of Ventura County, approached appellant allegedly to "clarify" whether appellant understood, and intended to invoke, his rights.[12] (2 C.T. 251, 270-271; 5 C.T. 1106, 1205-1206.) District Attorney Bradbury asked appellant if he could understand him, if appellant had been advised of his right to remain silent, if he understood everything he was told regarding his rights, and if it was correct that he did not want to talk about the incident. According to Bradbury, appellant answered these questions in the affirmative. (5 C.T. 1205-1206.) Bradbury claimed that when he asked appellant if it was true that appellant did not want to talk, appellant responded, "Yes, I feel a little bit in shock right now. I may want to talk to you later." Mr. Bradbury then told appellant, "If you decide you want to talk to us later, you should bring that to our attention, okay?" According to D.A. Bradbury, Appellant

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[12] Michael Bradbury was the then elected District Attorney for Ventura County. (2 C.T. 270.) Just after Detective Young left appellant's room Bradbury approached Young, who told him appellant had refused to waive his rights, Bradbury immediately went into appellant's room to "clarify" appellant's invocation. (2 C.T. 270-271.)

replied, "Okay." (5 C.T. 1205-1206.) However, Detective Young provided a different version of appellant's response. According to Detective Young, a little over an hour after Bradbury and appellant spoke, appellant informed Detective Young that he told Bradbury, "I think I'm in a state of shock right now and I'm kinda confused so I'd rather wait to talk to a lawyer, I think that'd be a good idea." (5 C.T. 336, 1150.)

A third interrogation occurred approximately 20 to 25 minutes later. At about 7:30 p.m., Ventura County District Attorney's Investigators Haas and Fitzgerald, along with Detective Young, approached appellant again. They did not re-advise appellant of his rights. (2 C.T. 257, 338-340.) Initially, the interrogators asked appellant for consent to search the residence at 122 North Encinal. (2 C.T. 338-340; 12 R.T. 2017.) Appellant told them it was not his house. Appellant also explained that he had been spending the night there for three weeks, but that two days earlier he had removed all his belongings from the house. (2 C.T. 338-340.) The interrogation did not stop there. Among other things, Investigator Haas asked appellant if he would be willing to talk to a psychiatrist. (12 R.T. 2025) Appellant responded, "Yes, the last time I talked to one was probably a year and a half ago."[13] (5 C.T. 1147; 12 R.T. 2025.) During the

[13] As will become relevant below, Haas did not explain to appellant the psychiatrist would not be a treating doctor – which, by appellant's response, it was clear he was anticipating -- but rather the psychiatrist

interrogation appellant made statement's regarding his residence at a home for recovering addicts who also suffered mental illness, his current employment, his history with chemical dependency, and his diagnosed mental disorder. (2 C.T. 338-340.)

A fourth interrogation occurred at about 8:30 p.m. when Detective Young again approached appellant. Again, Young did not re-advise appellant of his *Miranda* rights. Young asked appellant if he recalled telling Mr. Bradbury earlier that he "might be willing to talk after he felt a little more comfortable." (2 C.T. 336.) Appellant replied "I think I told him that, uh, I think I'm in a state of shock right now and I'm kinda confused so I'd rather wait to talk to a lawyer, I think that would be a good idea." (5 C.T. 336.) Despite appellant's reply; Young continued to press appellant and then asked him whether he wished to talk about the shooting at 122 North Encinal. Again, appellant invoked his right to remain silent and added that he also wished to be represented by counsel. (2 C.T. 252, 336; 5 C.T. 1106, 1150.) The trial court acknowledged that appellant invoked his right to counsel at this point. (16 R.T. 2724.)

A fifth interrogation occurred 15 minutes later, at about 8:45 p.m., just prior to appellant's transfer to the Ventura County Medical Center when appellant was again approached by Detective Young. Detective

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would be acting as the District Attorney's forensic analyst.

Young did not advise appellant of his rights during this contact, and did not ask any questions. (5 C.T. 1114.) Instead, Young gave appellant an angry, disparaging lecture. According to Young:

> "I told Mr. Johnson that he hadn't just shot a uniform or a -- or a representative of the establishment. I told him words to the effect that he killed a living, productive human being, unlike himself. I told him I wanted to know -- wanted him to know the name of the deputy he had murdered. I told him his name was Peter Aguirre, that he was 26 years old, that he had a wife and child. I told him that I wanted him to remember Peter Aguirre and his family every minute of every day for the rest of his life." (10 R.T. 1634.)

A sixth interrogation occurred after appellant's transfer to the Ventura County Medical Center. At Chief District Attorney Ronald Janes' request, psychiatrist Dr. Donald Patterson went to the hospital to interrogate appellant. (10 R.T. 1716.) Dr. Patterson, a "forensic" psychiatrist,[14] was

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[14] Dr. Patterson described his role as a forensic psychiatrist, as opposed to a treating or clinical psychiatrist. A forensic psychiatrist applies his knowledge of psychiatric principles to matters of law. Patterson's examples included: determining mental competency to stand trial, sanity, and the evaluation of disabilities. (52 R.T. 4455.) In this case, he was hired to determine the mental status of the appellant as close as possible to the time of the commission of the act. (52 R.T. 9598-9599.) Dr. Patterson admonished that a forensic psychiatrist cannot treat or act as clinician because a forensic psychiatrist is skeptically examining and evaluating the credibility of the subject, whereas the treating, or clinical, psychiatrist is treating a patient and thus occupies a position of trust. He testified: "A forensic psychiatric evaluation is more concerned with the reliability and I'll use the word "truth" in a very free sense, it's not absolutely a technique for actually telling the truth but certainly those are evaluated as credibility and so forth. For example, a forensic psychiatrist by the nature of the examination and his position must be somewhat more skeptical of what the individual he is examining tells him, whereas a treating psychiatrist, clinical

charged with the duty to determine appellant's mental status at or near the time of the homicidal event. (10 R.T. 1655.) Dr. Patterson arrived at the hospital sometime after 8:00 p.m., possibly 8:30 p.m. (10 R.T. 1659.) Appellant had not yet arrived. While awaiting his arrival, Dr. Patterson spoke to District Attorney Investigator Briner who informed him that a deputy had been fatally wounded. (10 R.T. 1713.) Mr. Briner supplied Dr. Patterson with a tape recorder and Senior Deputy District Attorney Holmes gave Dr. Patterson a *Miranda* advisement card. (10 R.T. 1714.) After he arrived, Dr. Patterson observed appellant for about an hour before he first attempted to talk to him. (10 R.T. 1659-1660.)

At about 10:04 p.m., as appellant was being prepared for surgery to remove a bullet from his chest, Dr. Patterson approached appellant. Dr. Patterson introduced himself by telling appellant, "I'm Dr. Patterson. I'm a psychiatrist from Santa Barbara. [T]he DA's Office asked me to come and talk with ya." (2 C.T. 278-279.) Dr. Patterson did not explain that he was the District Attorney's "forensic psychiatrist," or what his

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psychiatrist, is more in the position of he must be willing to relate to the individual in the sense of trying to accept or trying to at least hold for questioning, not being skeptical and being -- denying of the validity of the person he's examining. So it's a different type of patient/doctor relationship than between the treating clinical psychiatrist and the evaluating forensic psychiatrist." (52 R.T. 9596.) There is no doctor/patient relationship in forensic psychiatry. (52 R.T. 9596.) Forensic psychiatry does not involve treatment of a patient. (52 R.T. 9596.)

purpose was in talking with appellant. However, Dr. Patterson advised appellant of his rights under *Miranda*. When Dr. Patterson asked appellant whether he would be willing to talk, the following exchange occurred:

> MJ: Uh, I don't think so. I'm facing very serious charges and I think I'd rather talk to a lawyer first.
>
> DP: Okay.
>
> MJ: And (INAUDIBLE). That be okay? I think right now I'm in a state of shock and kind of confused and I don't know that the information I'd give would be that accurate.
>
> DP: I see. Well that's your decision, you have to make that –
>
> MJ: That's the decision I've made, yes.
>
> DP: I'm gonna just stay around here with you and let you get back from x-ray and see how you're getting along and see if you still feel, feel that way or –
>
> MJ: Yeah.
>
> DP: --cause at some point you did say that you would be willing to talk with me[15] and so –
>
> MJ: Yeah.
>
> DP: Yeah. So I, I'll wait a little bit and they're gonna take you over to x-ray and get going and get these other things, your medical condition taken care of. But I'll be around for a little while. (2 C.T. 279-280; 5 C.T. 1158.)

Dr. Patterson turned the tape recorder on while appellant received x-

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[15] Again, appellant's response to Investigator Haas was not that he would be willing to talk to a forensic psychiatrist, or to Dr. Patterson himself, but rather what appellant perceived to be a treating psychiatrist. Whether intentional or not, neither Haas nor Patterson explained this critical distinction.

rays and surgery preparation. (2 C.T. 280.) There is no indication on the tape that Dr. Patterson terminated the interview. (2 C.T. 273-327.) Dr. Patterson left appellant's room for five to ten minutes to tell Senior Deputy District Attorney Holmes that appellant had refused to waive his rights. (10 R.T. 1750.) Despite appellant's reiteration that had invoked his rights to remain silent and to have a lawyer present, Holmes instructed Dr. Patterson to "stick around and observe the suspect as to anything in his behavior or demeanor anything that might occur." (10 R.T. 1750.) Dr. Patterson, following Homes' directions, again approached appellant while appellant was being x-rayed. (10 R.T. 1753.) Dr. Patterson followed appellant from the x-ray department back to his room. (10 R.T. 1757.)

At this time, a seventh interrogation began. Appellant looked at Dr. Patterson and remarked,

> MJ: Still here, huh?
>
> DP: Yeah, just, just in case you're – I can, I can, whatever.
>
> MJ: Yeah, you seem like you have a kind face.
>
> DP: Um, thank you.
>
> MJ: The last psychiatrist I talked to, maybe you know him?
>
> DP: You know who it was? (2 C.T. 281.)

Dr. Patterson's question, "[y]ou know who it was?" (2 C.T. 281; 5 C.T. 1160.), opened the door and resulted in a long dialogue between appellant and Dr. Patterson. Appellant told Dr. Patterson about his mental illness, his history of drug and alcohol abuse, past criminal history, and ultimately admissions about what led up to the July 17th incident and the

July 17, 1996 incident itself. (8 C.T. 1988-2044.)

The following is a summary of the statements appellant made to Dr. Patterson:

> Appellant told Dr. Patterson that he had been a patient in the Ventura county mental health system two years earlier. (8 C.T. 1997.) Dr. Lisa Kus, a psychologist, diagnosed appellant with organic delusional disorder. (8 C.T. 1998-1999.) Appellant explained that at the time he went to see Dr. Kus he thought his parents were poisoning his food. (8 C.T. 1999.) Dr. Kus told appellant that he had a hard time with "faulty thinking," due to his history of using drugs. Appellant understood this to mean that his interpretations of the way things were "wasn't quite correct." (8 C.T. 1999.) Dr. Kus referred appellant to Dr. Lance, a psychiatrist. (8 C.T. 2000.) Dr. Lance prescribed Haldol, an anti-psychotic medication. Appellant took Haldol for three days, but stopped because he did not like the side effects. (8 C.T. 2000.) Appellant had a lot of hallucinations while on Haldol, and it frightened him. (8 C.T. 2000.) The next week, Appellant had a follow-up appointment with Dr. Peace. Appellant felt Dr. Peace was very confrontational. Dr. Peace made appellant angry, so he never went back for further mental health treatment. (8 C.T. 2001.)

Appellant also told Dr. Peterson that he attended Oxnard Community College for two years to get a drug and alcohol counselor's certificate. (8 C.T. 2001.) Appellant studied the DSM[16] IV in one of his classes. (8 C.T. 2030.) Based on these classes appellant diagnosed himself with "schizophreniform." (8 C.T. 2003.) Appellant had also worked as a resident manager for a sober living house for men with dual diagnosis

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[16] The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.

(mental disorder and chemical dependency). Appellant had worked and lived there for 15 months. (8 C.T. 2001.) Appellant was a role model for recovering persons. (8 C.T. 2014.)

Appellant told Dr. Patterson that he had a history of taking methamphetamines and marijuana, but he had not used drugs or alcohol since March 15, 1994. (8 C.T. 1999, 2012.) Appellant attended twelve step meetings and recovery programs for drug addiction, alcoholism. (8 C.T. 2001.) Appellant shared with Dr. Patterson his criminal history. He explained he had been to prison twice, once for armed robbery and the other time for selling drugs (MDA and marijuana). (8 C.T. 2027.)

Appellant explained his recent marital problems including that he had been very jealous and had accused his wife (Alonso) of cheating on him. (8 C.T. 2032.) On the day of the incident appellant had decided that he and his wife were never going to be separated again so he went to her work pulled a gun on her and said "we're gonna be together forever." (8 C.T. 2036.) Dr. Patterson asked appellant, "Was [Alonso] involved in this thing tonight?" Appellant answered, "I kidnapped her." He then went on to explain the details. (8 C.T. 2035.) Appellant and Alonso went to their home on North Encinal, and Alonso told everyone (her daughter and her daughter's boyfriend) to leave. Appellant and Alonso then went for a drive. When they got back to the house on North Encinal they took a shower. While in the shower appellant and Alonso heard a knock on the door.

Appellant looked at the front door and the police were pulling his wife out the door. Appellant thought Alonso's daughter called the police because she was afraid appellant would hurt her mother. (8 C.T. 2039.) An officer came in and said "Put your hands where I can see 'em." Appellant shot him. Appellant could not see the officer clearly because he did not have his glasses on. Appellant reacted to the situation. (8 C.T. 2037-2038.)

B. Pretrial Motions

Prior to trial, the defense moved in limine to suppress the statements made by appellant to Investigator Haas and Dr. Patterson on the grounds that appellant's Fifth and Fourteenth Amendment rights had been violated by the state's failure to observe appellant's repeated invocations of the right to remain silent and the right to counsel. (2 C.T. 528-546.) The trial court held a hearing on the motion, reviewed the audiotapes (Exhibits 5A and 5B) and heard extensive testimony from over 17 witnesses.[17]

As to the statements to Investigator Haas, the trial court ruled, "the

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[17] The witnesses called at the Miranda hearing included: Detective Robert Young (10 R.T. 1615), Dr. Donald Patterson (10 R.T. 1649), Commander William Wade (11 R.T. 1762), District Attorney Michael Bradbury (11 R.T. 1882), Richard Ernest Holmes (12 R.T. 2065), Clayton Walter Duke (13 R.T. 2127), Tomas Edward Arce (13 R.T. 2127), Ronald James (13 R.T. 2180), Robert Briner (13 R.T. 2280), Mark Burgess (13 R.T. 2225), Shelly Morre (13 R.T. 2267), Clea James (14 R.T. 2303), Taurino Almazan (14 R.T. 2325), Dennis Fitzgerald (14 R.T. 2334), John Thomas Fitzgerald (14 R.T. 2340), Scott Hyatt (14 R.T. 2370), and Stephen Miles Estner (14 R.T. 2392).

initial consent for the purpose of gaining consent [sic], is fine. The remainder of the statement I don't believe is admissible and would not be admitted." (16 R.T. 2722.) When asked to clarify his ruling the trial court stated, "Young made inquiries where he lived, I think that is a fair inquiry. Lived at 122 North Encinal. And then he requested permission to search and I think that was a fair inquiry. He is trying to establish standing and trying to determine where the gentleman lives for purposes of consent... the conclusion would not be admissible[,]"..."[b]ecause it was an inquiry made; I don't think it was booking information. I think it was questions asked other than for booking information. I don't think that's permitted. He didn't initiate it; they did, they came in. They asked, they're not allowed to." (16 R.T. 2722-2723.)

As to the statements made to Dr. Patterson, the court found: 1) that Detective Young gave a full and complete *Miranda* advisement and appellant refused to waive; (16 R.T. 2712.) However, (2) appellant "initiated the conversation [with Dr. Patterson], controlled the conversation, directed the conversation and took it to the places he wished to go;" (16 R.T. 2715.) (3) Appellant knew and understood the nature of the rights that he had and he waived those rights; (16 R.T. 2717-2718.) And, (4) Not all of the content would be admissible. (16 R.T. 2718.)

Based on the Court's ruling, the prosecution filed a motion to admit during the guilt phase certain portions of appellant's statement to

Dr. Patterson. (8 C.T. 1983-1987.) The prosecution argued that only these portions of the statement were relevant and admissible to explain appellant's actions on July 17, 1996.[18] (8 C.T. 1984.) The prosecution argued that the rest of the statement was irrelevant or inadmissible hearsay, stating:

> "The bulk of the defendant's statement to Dr. Patterson included a recounting of the defendant's criminal history, his educational and mental health background and family history. None of these subjects are relevant to what the defendant was thinking or doing on the day in question and do not shed any light on the issues in the case." (8 C.T. 1986.)

In response, appellant filed a motion to admit the full statement under California Evidence Code section 356[19], and under the federal constitution. (8 C.T. 2120-2127.) Defense counsel argued that appellant's entire statement is an explanation of his belief that the shooting was a product of his mental illness. (8 C.T. 2121.) At the hearing defense counsel argued:

> "It's our position that within the meaning of the due process clause and the confrontation clause of the United States Constitution, to parse the statement as you've suggested we

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[18] The people selected only statements relating to events surrounding the day in question. (8 C.T. 1986.)

[19] Section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

believe would unfairly preclude the defense from inquiring into issues that truly have a bearing on the reasons why the shooting occurred. And I think it's clear from the factual scenario that the jury is going to hear in this case -- and that -- the fact that the defendant admitted a number of times that he shot the sheriff. There was no real question as to the fact that he shot the sheriff. And I would suggest to the Court that the -- the information that the People are submitting go to the question of why he shot the deputy sheriff. And to that extent, the jury is going to make some assumptions when they hear this information that that is all that Mr. Johnson said on the topic. And as the Court has carefully gone through and struggled with the question of how to parse the statement, it's our contention that we should be allowed to present the whole of the statement. Not only, as we've argued in the moving papers, to present the context, but it's our contention that the entire statement is really an explanation by the defendant, Mr. Johnson, as to why the shooting occurred. And it's his belief that the shooting occurs and he's describing his emotional state -- then existing emotional state in the context of a mental illness that he believes he has suffered under for some time. To that extent, as you know, we've argued that has a bearing upon his ultimate explanation as to how the shooting occurred. And it's our contention, respectfully disagreeing with the Court, that to keep out other information, the entire context of the statement, I think will -- will cause the jury to assume Mr. Johnson only offered these statements as to the explanation to a psychiatrist about why the shooting occurred." (29 R.T. 5726-5727.)

The court denied appellant's motion to admit the complete statement. (29 R.T. 5749.) The court ruled:

"It appears to me strictly -- the People's offer is what happened at the scene, the kidnapping and the shooting and his [appellant's] state of mind at the scene." (29 R.T. 5723.) "I don't believe it is appropriate to introduce...his subjective evaluation of his own psychological state as it reflects back upon what he thought he was doing in the context of the psychoanalysis and other treatment he had received throughout, other therapists. That's just not what's going on here. Insofar as he says this is what I did, this is what I felt, I

think that comes in, and I think I've probably included just about everything that pertains to that." (29 R.T. 5723-5 724.)

C. The Prosecution's Use Of Appellant's Admissions And Confessions In Its Guilt And Penalty Cases In Chief.

Appellant did not testify at trial. The prosecution used appellant's statements to Dr. Patterson in both its Guilt and Penalty Cases in Chief.

During the guilt phase, the prosecution played an edited version of appellant's conversation with Dr. Patterson to convince the jury that appellant was guilty of first degree murder. (39 R.T. 7119.) The prosecution argued three theories of murder: deliberate and/or premeditated, felony murder, and lying in wait. The prosecution argued that appellant's own statements proved deliberate and premeditated murder and felony murder. (44 R.T. 8151-8153, 8141, 8157-8158, 8164-8165.) The prosecution also used appellant's statements to convince the jury that both charged special circumstances were true. (44 R.T. 8166-8167.)

Having heard appellant's taped statements, the jury convicted appellant on all five counts and found both special circumstance allegations true. (10 C.T. 2706-2708, 2709-2723.)

During the penalty phase of trial the prosecutor played another, less edited, version of the tape, and gave each juror a copy of the tape transcript. (Exhibits 54 and 55.) This tape contained a more substantial portion of appellant's conversation with Dr. Patterson. (52 R.T. 9667.) Additionally, based on appellant's statements to him, Dr. Patterson testified at great

length about appellant.

The prosecution used appellant's statements to urge the jury to impose death. (47 R.T. 8577-8591; 54 R.T. 10047-10068.) During closing argument in the penalty phase the prosecutor argued:

> "Cold-blooded and arrogant. And when he talked to Dr. Patterson later, when he talked to Dr. Patterson, it wasn't just the 'what' that happened. He was asked about the 'why.' And what did he say? 'You don't wonder why. It was just a reaction.' That's as cold as it gets. That's not a delusion. That is the horror, the horror, that's implanted in the minds of everyone who was there that day that will never end." (54 R.T. 10057.)

Having heard the statements by appellant, the jury returned a verdict of death. (54 R.T. 10136-10137.)

D. The Systematic Disregard Of Appellant's Miranda Invocations By The Sheriff's Office, The District Attorney's Office And The District Attorney's Agent, Dr. Patterson, Violated Appellant's Rights To Due Process Under The Fifth And Fourteenth Amendments To The United States Constitution And Compels Reversal.

The State employees, including law enforcement officers, district attorney staff, and Dr. Patterson, repeatedly, intentionally, and flagrantly ignored appellant's Fifth, and Fourteenth Amendment rights by refusing to scrupulously honor his repeated invocations of the right to silence and to counsel. The state's persistent and systematic refusal to observe appellant's multiple invocations rendered appellant's statements to Dr. Patterson inadmissible. The admission of the statements at trial was error. Because the statements were devastating to the defense, the error compels reversal.

1. General law

It long has been settled under the due process clause of the Fourteenth Amendment to the United States Constitution that an involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion is inadmissible in a criminal proceeding. (*People v. Neal* (2003) 31 Cal.4th 63, 67 [1 Cal.Rptr.3d 650, 72 P.3d 280], Citing, e.g., *Brown v. Mississippi* (1936) 297 U.S. 278, 285-286, [56 S.Ct. 461, 80 L.Ed. 682].) In *Miranda v. Arizona* (1966) 384 U.S. 436, 479 [86 S. Ct. 1602, 16 L. Ed. 2d 694], the United States Supreme Court held that an accused has a Fifth and Fourteenth Amendment right to remain silent and have counsel present during custodial interrogation. (*See also Edward v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378].) The Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that any custodial interrogation be preceded by advice to the suspect that he has the right to remain silent and also has the right to the presence of an attorney. (*Ibid.*)

If the accused indicates that he wishes to remain silent, "the interrogation must cease," and if he requests counsel, "the interrogation must cease until an attorney is present." (*Miranda v. Arizona, supra*, 384 U.S. at p. 474.) The invocation of the right to counsel also operates as an invocation of the right to silence and creates an absolute bar to further questioning. "[A]n accused's request for an attorney is per se an invocation

of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare v. Michael C.* (1979) 442 U.S. 707, 719 [99 S.Ct. 2560, 61 L.Ed.2d 197].)

For *Miranda* purposes, "interrogation includes both direct questioning and its "functional equivalent." (*People v. Boyer* (1989) 48 Cal.3d 247, 273 [256 Cal.Rptr. 96, 768 P.2d 610].) "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely [from the suspect's perspective] to elicit an incriminating response from the suspect..." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S. Ct. 1682, 64 L. Ed. 2d 297].)

"Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel. (Citation omitted.) In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. (Citation omitted)." (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [105 S.Ct. 490, 83 L.Ed.2d 488].)

The Supreme Court and lower federal courts have strictly enforced the "bright-line rule" of *Edwards*. Thus, they have consistently held that

requests for counsel are to be given broad effect even when they are less than all-inclusive (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [107 S.Ct. 828, 93 L.Ed.2d 920]; *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1529.) Similarly, a suspect's responses to further questioning cannot be used to cast doubt upon the adequacy of his initial request. (*Smith v. Illinois* (1984) 469 U.S. 91, 97-99 (per curium).) Even when the initial request is ambiguous or equivocal, all questioning must cease, except inquiry strictly limited to clarifying the request. (*United States v. Fouche* (9th Cir. 1985) 776 F.2d 1398, 1405, *after remand*, 833 F.2d 1284, 1287 (1987); *United States v. Nordling* (9th Cir. 1986) 904 F.2d 1466, 1470.)

The conditional exception to the bright line rule is where "the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 485 [101 S.Ct. 1880, 68 L.Ed.2d 378].) However, even when further communication is initiated by the accused, the burden still remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [103 S. Ct. 2830, 77 L. Ed. 2d 405].) This is because "if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently

compelling pressures' and not the purely voluntary choice of the suspect." (*Arizona v. Roberson* (1988) 486 U.S. 675, 681 [108 S.Ct. 2093, 100 L.Ed.2d 704].)

To carry this burden, the prosecution must show that "the purported waiver was knowing and intelligent" and the waiver must be "found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (*Ibid.*; *Edwards v. Arizona, supra*, 451 U.S. at p. 486, n. 9.) The question of whether the communication was initiated by the accused is separate from the question of whether the accused voluntarily, knowingly, and intelligently waived the right to counsel, and "clarity of application is not gained by melding them together." (*Ibid.*) "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*People v. Honeycutt* (1977) 20 Cal.3d 150, 160 [141 Cal.Rptr. 698, 570 P.2d 1050].) In *Oregon v. Elstad* (1985) 470 U.S. 298, 317 [105 S.Ct. 1285, 84 L.Ed.2d 222], the United States Supreme Court affirmed that to assure a waiver is knowingly and voluntarily made, reviewing courts must refuse to "condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him." Disrespect of a suspect's invocation of his right to cut off questioning, is a hallmark of coercion, and

mandates suppression of all subsequent statements. "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." (*Miranda v. Arizona*, *supra*, at p. 474; *see also People v. Montano* (1991) 226 Cal.App.3d 914, 934-935 [277 Cal.Rptr. 327] [multiple invocations ignored by interrogators is a "coercive *Miranda* violation" involving "actual infringement of the suspect's constitutional rights" and activates the auxiliary exclusionary rule of *Wong Sun v. United States* (1963) 371 U.S. 471 [83 S.Ct. 407, 9 L.Ed.2d 441]; *also citing Oregon v. Elstad, supra*, 470 U.S. at pp. 305-309, 312-314 [84 L.Ed.2d at pp. 229-232, 234-236].)

In reviewing the trial court's determinations of voluntariness of a waiver, this Court must apply an independent standard of review, doing so "in light of the record in its entirety, including 'all the surrounding circumstances-both the characteristics of the accused and the details of the [encounter]'...." (*People v. Neal, supra*, 31 Cal.4th at p. 80.) This Court may not simply defer to the trial court's findings of fact but "must undertake an independent and plenary determination as to whether defendant's confession was truly voluntary." (*People v. Montano* (1991) 226 Cal.App.3d 914, 930; *People v. Mattson* (1990) 50 Cal.3d 826, 854, fn. 18 [268 Cal.Rptr. 802, 789 P.2d 983]; *Miller v. Fenton* (1985) 474 U.S. 104, 109-118 [106 S. Ct. 445, 88 L. Ed. 2d 405].)

2. Appellant's repeated unequivocal invocations of his Miranda rights were not scrupulously honored and thus his statements are inadmissible.

In *Michigan v. Mosley* (1975) 423 U.S. 96 [96 S.Ct. 321, 46 L.Ed.2d 313], the U.S. Supreme Court set forth the standard for police resumption of questioning after a suspect asserts his right to remain silent. Once a suspect, who has been advised of his rights under *Miranda*, indicates in any manner, prior or during questioning, that he wishes to remain silent, the interrogation must cease.

> "...any statement taken after the [suspect] invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. (*Mosley, supra*, p. 101, quoting *Miranda, supra*, pp. 473-474.) "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." (*Michigan v. Mosley, supra*, 423 U.S. at p. 102.)

The Court found that the admissibility of statements obtained after a suspect in custody has indicated his desire to remain silent will depend on whether his "right to cut off questioning" is "scrupulously honored." Failure to honor that right is shown either by the police "refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley, supra*, 423 U.S. at pp. 105-106.)

Mosley's interesting factual scenario highlights the distinction between appropriate post-invocation State activity, and the abuse committed by the State here. A detective in the Armed Robbery Division of the Detroit Police Department initially interrogated *Mosley* as a suspect in two robberies. *Mosley* was advised of his *Miranda* rights and indicated he did not want to talk about the robberies. The interrogation was immediately terminated. However, two hours later, *Mosley* was brought to the Detroit Homicide Division, for questioning by a Homicide Detective on an unrelated fatal shooting. *Mosley* was re-advised of his *Miranda* rights. As to this potential charge, appellant never stated an unwillingness to talk and never indicated he wanted a lawyer. He then made implicating statements with respect to the homicide. The United States Supreme Court found this re-interrogation was not a violation of *Miranda* and its progeny, because the original interrogation was immediately terminated when the suspect declined to discuss the crimes then in question. This invocation was scrupulously honored. Of critical importance in the allowance of subsequent statements were the facts that the second interrogation was "[a]fter an interval of more than two hours [and] Mosley was questioned by another police officer at another location about an unrelated holdup murder." (*Michigan v. Mosley, supra*, 423 U.S. at p. 104.)

In the case at bar, as in *Mosley*, when appellant unequivocally asserted his right to remain silent, Detective Young immediately and

properly terminated his interrogation. However, unlike in *Mosley*, just four minutes after Detective Young terminated the interrogation, District Attorney Michael Bradbury attempted to re-interrogate appellant. Moreover, again unlike in *Mosley*, District Attorney Bradbury did not re-advise appellant of his rights. Rather, he asked appellant a list of questions, allegedly to determine whether appellant "understood everything" he was told regarding his rights and to confirm that appellant had invoked his right to remain silent. District Attorney Bradbury then explained to appellant that appellant would need to be the one to initiate any further conversations. (2 C.T. 270-271; 5 C.T. 1205-1206.)

As the United States Supreme Court stated in *Mosley*, "[t]o permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." (*Michigan v. Mosley, supra*, 423 U.S. at p. 102.) A four minute delay between interrogation attempts is nothing other than a momentary cessation. It embodies the very meaning of, "persisting in repeated efforts to wear down [a suspect's] resistance [to] make him change his mind." (*Id.* at pp. 105-106.) Only moments after unequivocally invoking his rights under *Miranda*, appellant was confronted by no less than the very District Attorney of the County of Ventura, who in essence asked, "Did you really mean to invoke those rights?" At this point

appellant was alone, handcuffed to a gurney, amidst the swirl of activity by emergency room physicians working to stabilize his gunshot wound.

The District Attorney's immediate re-interrogation violated appellant's "right to cut off questioning." (*Michigan v. Mosley, supra*, 423 U.S. at p. 103.) The insidiousness of District Attorney Bradbury's conduct cannot be minimized. When reporting appellant's invocation to Bradbury, Detective Young was crystal clear; appellant had refused to waive his rights as read to him by Young. There was nothing about appellant's invocation that needed clarifying. Nor did Bradbury testify that it was he who was unclear about appellant's invocation. And, even if he was, his recourse was to question Detective Young for clarification not appellant. This leaves as the sole purpose for Bradbury's "clarification," the impermissible attempt to undermine the will of [appellant.]" (*Michigan v. Mosley, supra*, 423 U.S. at p. 102.) As the *Mosley* Court stated:

> Through the exercise of his option to terminate questioning [a suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored.

(*Id.* at pp. 103-104.) Here, appellant's right to cut off questioning was not scrupulously honored. Therefore, if appellant began to soften his

invocation from a direct "no" to a more cooperative, "I'm in shock right now, but I may want to talk to you later," it must be presumed to be the result of the coercive pressures placed on appellant by the State.

District Attorney Bradbury's tactic to "clarify" appellant's clear invocation was partially successful. Though appellant re-invoked his right to remain silent, according to Bradbury, appellant softened, modifying his invocation by stating he might be willing to talk at a later time. However, "[a]mbiguity or equivocation in a suspect's subsequent responses to impermissible questioning cannot be used to cast doubt on the original clear invocation." (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [105 S.Ct. 490, 83 L.Ed.2d 488].) The Supreme Court held that upon the initial unequivocal invocation of rights, the interrogation should have immediately ceased. Any ambiguity or equivocation in a suspect's subsequent responses to questioning cannot be used to cast doubt on the original clear invocation. The purpose of this rule is to prevent authorities from badgering the suspect, or using other explicit or subtle measures to wear down the suspect, and undermine his willingness to remain silent. (*Ibid.*)

District Attorney Bradbury knew appellant had invoked his right to remain silent only moments before, yet he deliberately and intentionally initiated a contact with appellant to purportedly see if he could "clarify" the sincerity of appellant's responses. The original clear invocation of appellant must stand. Appellant's subsequent softened response – though still an

invocation -- to Mr. Bradbury's unwarranted intrusion cannot be used to cast doubt on his original intent.

The State's disregard of appellant's clear invocation did not end with District Attorney Bradbury's violation. Only about 20 to 25 minutes later, Detective Young and District Attorney Investigators Hass and Fitzpatrick entered the emergency room to try and elicit a statement from appellant. The three did not even re-advise appellant of his *Miranda* rights. While, as the trial court found, the original questions were related to normal booking information and thus did not constitute an interrogation (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297], but the questioning expanded into an interrogation once the investigators asked questions "reasonably likely to lead to an incriminating response." (*Ibid.*; 16 R.T. 2722-2723.) As the trial court correctly found this questioning was in violation of *Miranda*.

Since this interrogation took place a mere twenty-odd minutes after appellant had <u>twice</u> invoked his rights under *Miranda*, it evidenced a systematic intent by the Ventura County Sheriff's and District Attorney's offices to entirely disregard appellant's right to cut off questioning. This minimal gap between appellant's original invocation certainly does not meet the *Mosley* standard of a "substantial period of time." Nor, unlike in *Mosley*, had the original interrogation ceased after appellant's invocation. Finally, also unlike *Mosley*, Young, Haas and Fitzgerald made no attempt

to re-advise appellant of his *Miranda* rights. This interrogation, too, was aimed at "frustrating the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." (*Michigan v. Mosley, supra*, 423 U.S. at p. 102.)

The coercive breaking of appellant's will continued. At about 8:25 p.m., less than an hour after Young, Haas and Fitzgerald concluded their improper interrogation of appellant, Detective Young again approached appellant for the purpose of eliciting a statement. In further violation of the *Miranda/Edwards/Mosley* mandates, Young did not re-advise appellant of his rights. Instead, Young asked appellant if he recalled telling Mr. Bradbury earlier that he might be willing to talk after he felt a little more comfortable. Appellant responded, "I think told him that, uh, I think I'm in a state of shock right now and I'm kinda confused so I'd rather wait to talk to a lawyer, I think that would be a good idea." (5 C.T. 1150.) No question, by this fourth attempt at interrogation, the State was made unequivocally aware that appellant not only wanted to remain silent, but he wanted the assistance of a lawyer. Wisely, Young terminated this interview.

Once the suspect has 'expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him ... (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-85.)

In stark contrast to the right to remain silent, which as in *Mosley*, can be subject to some leeway, the invocation of the right to counsel is sacrosanct and subject to the *Edwards* "bright line rule." The United States Supreme Court, in *Arizona v. Roberson* (1988) 486 U.S. 675, 683 [108 S.Ct. 2093, 100 L.Ed.2d 704] stated, "as *Mosley* made clear, a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice." Put more bluntly by the same Court: "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at p. 682.)

At this point, all attempts by the Sheriff and the District Attorney to interrogate should have absolutely ceased. Sadly, they did not. The State was now in possession of further information that would allow them to weaken the resolve of appellant. In requesting a lawyer, appellant had told the State he was in a state of shock and was somewhat confused. This was just the weakness the State would exploit.

At about 8:50 p.m., shortly after appellant told Detective Young he wanted a lawyer because he was in a state of shock and confused, and just prior to appellant's being transferred to another hospital for surgery, Young

confronted appellant yet again. However, Detective Young did not question appellant. Rather, he castigated appellant that he had "murdered a living, breathing human being" who, unlike appellant, was a productive member of society and that he wanted appellant "to think about Deputy Aguirre and his family every minute of every day for the rest of his life." (5 C.T. 1114.)

Forbidden renewed "interrogation" includes both direct questioning or its "functional equivalent" or any words or action on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely, from the suspect's perspective, to elicit an incriminating response from the suspect. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) Regardless of Detective Young's motives for this gratuitous lecture, from a suspect's perspective, especially one who had voiced shock and confusion, such comments are reasonably likely to lead to incriminating responses. (*People v. Boyer* (1989) 48 Cal.3d 247, 273-275.) It is easy to see that Detective Young's comments would lead to appellant pouring out his thoughts to a psychiatrist he assumed was there to "talk with him." It is reasonable to foresee that Detective Young's comments contributed to appellant's later willingness to talk to someone with "a kind face" that was not confrontational, namely Dr. Patterson. (*People v. Harris* (1989) 211 Cal.App.3d 640, 649 [259 Cal.Rptr. 462].) As such, Detective Young's lecture qualifies as an interrogation that was absolutely forbidden

by appellant's prior invocation of his right to communicate only through counsel.

Once again, the State ignored the repeated unequivocal invocations by appellant. This time to soften-up appellant and undermine his will to remain silent, the prosecution sent in Dr. Patterson. With a combination of deception (never revealing that Patterson, the psychiatrist Investigator Haas had offered, who presented as a trusting and kindly therapist, was actually an interrogator), and persistent refusal to scrupulously honor appellant's invocations, Patterson would break appellant's will.

At 10:04 p.m., Dr. Patterson went into the emergency room, introduced himself to appellant, and advised him of his rights under *Miranda*.[20] When asked by Patterson whether he would be willing to talk, appellant again replied, "Uh, I don't think so. I'm facing very serious charges and I think I'd rather talk to a lawyer first... And then maybe we can talk...I think right now I'm in a state of shock and kind of confused and I don't know that the information I'd give would be that accurate." (2 C.T. 279; 5 C.T. 1158.) When Patterson replied that this was a decision

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[20] An examination of a criminal defendant by a psychiatrist or psychologist retained by the prosecution or the court constitutes a custodial interrogation for Fifth Amendment purposes and must be preceded by *Miranda* warnings. (*Estelle v. Smith* (1981) 451 U.S. 454, 466-469 [101 S. Ct. 1866, 68 L. Ed. 2d 359]; *Vanderbill v. Collins* (5th Cir. 1993) 994 F.2d 189, 196-197.)

appellant would have to make, appellant replied, unequivocally and unambiguously "That's the decision I've made, yes." (2 C.T. 279; 5 C.T. 1158.) At that point, there could have been no doubt in Dr. Patterson's mind that appellant wanted to deal with him only through counsel. Dr. Patterson was legally compelled to terminate his conversation with appellant. (*See* FN 12.)

Instead, Dr. Patterson consulted with Senior Deputy District Attorney Holmes who ordered Patterson to stick with appellant. Patterson then told appellant he would wait around until appellant returned from x-ray to see if he still wanted to assert his rights because, "at some point you did say that you would be willing to talk to me..." (2 C.T. 280; 5 C.T. 1158.)

Dr. Patterson's comment to appellant after he had asserted his desire to be represented by counsel -- on top of Detective Young's similar comment after appellant had invoked his rights to District Attorney Bradbury -- is strikingly similar to a comment made by an interrogating officer in *People v. Harris* (1989) 211 Cal.App.3d 640, 645-49.

In *Harris*, as the officer terminated an interview with the suspect who had invoked his right to remain silent, the officer commented, "I thought you were going to come back and straighten it out."[21] The suspect

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[21] This comment referenced an earlier telephone conversation with the

acknowledged that he previously said this, but now he was scared and his parents were retaining a lawyer and the suspect was advised not to speak to anyone until the lawyer had been retained. The officer then left the room but returned one minute later and asked the defendant if it was true that he might be willing to change his mind and talk. The suspect then agreed to talk, waived his rights and confessed. The court found the officer's initial remark ("I thought you were going to come back and straighten it out") to be the "functional equivalent of further questioning" (*Id.* at p. 648.) and that the officer, should have known that the remark was likely to draw damaging statements from the suspect. "We think it is reasonably foreseeable that a suspect would react to [the officer's] statement as a prodding invitation to further discussions about the incident." "...[the] comment had the effect of loosening [the suspect's] tongue." (*People v. Harris, supra*, 211 Cal.App.3d at p. 649.)

The *Harris* court found the subsequent confession inadmissible because it was the product of the officer's comment, which was "reasonably likely to chip away at the [suspect's] resolve to remain silent, and thereby to dishonor his Fifth Amendment privilege against self-incrimination." (*People v. Harris, supra*, 211 Cal.App.3d at p. 649.)

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suspect, where the suspect who was out of town at the time, indicated he wanted to talk to the police. (*People v. Harris* (1989) 211 Cal.App.3d 640, 645-49.)

The same analysis applies to the present case. Appellant clearly invoked his right to counsel. Dr. Patterson, an agent of the District Attorney, admonished appellant that he had previously stated he might be willing to talk later. Dr. Patterson then followed appellant, confronted him again about 15 minutes later, and elicited appellant's incriminating statements. As the Court's holding in *Harris* makes clear, the incriminating statements made by appellant are inadmissible because they were the product of Dr. Patterson's comment, which was the "functional equivalent of further questioning" and a "prodding invitation to further discussion about the incident." (*People v. Harris, supra*, 211 Cal.App.3d at p. 649.)

3. The trial court erred in finding that Appellant initiated the statements to Dr. Patterson, and that they were thus admissible.

Although the trial court recognized at least one violation of appellant's Miranda rights occurred (the third interrogation by Young, Haas and Fitzgerald), it nonetheless found that appellant "initiated the later conversation [with Dr. Patterson], controlled the conversation, directed the conversation and took it to the places he wished to go." (16 R.T. 2715.) The trial court further found that appellant knew and understood the nature of the rights that he had and that he waived those rights. (16 R.T. 2717-2718.) The trial court thus found that the statements to Patterson were admissible. The trial court was wrong.

This Court must independently review the circumstances to

determine whether, as the trial court found, appellant initiated the conversation with Dr. Patterson, and that he knowingly and intentionally waived his *Miranda* rights after repeated invocations. (*People v. Montano, supra*, 226 Cal.App.3d at p. 930.) While even if viewed alone, the statements to Patterson were not the result of appellant's initiation and voluntary waiver. However, this Court does not review the Patterson interrogation in a vacuum. "In reviewing the trial court's determinations of voluntariness, we apply an independent standard of review, doing so "in light of the record in its entirety, including 'all the surrounding circumstances-both the characteristics of the accused and the details of the [encounter]'...." (*People v. Neal* (2003) 31 Cal.4th 63, 80; cites omitted.)

4. Dr. Patterson, not appellant, initiated their conversations.

The first conversation between appellant and Dr. Patterson at 10:04 p.m., was planned, staged, and initiated by the District Attorney. The District Attorney hired and briefed Dr. Patterson, transported him to Ventura County Medical Center, provided him with a tape recorder and instructions in its use, provided him with a *Miranda* advisement card, and supervised his actions during the entire interrogation. Under the direction of the District Attorney, Dr. Patterson walked into the emergency room where appellant was being treated, introduced himself, and proceeded to advise appellant of his rights under *Miranda*. Clearly, that contact, and

conversation, was initiated by the District Attorney, through its agent, Dr. Patterson, not by appellant.

The 10:21 p.m. contact between appellant and Dr. Patterson was also made with the full knowledge and supervision of the District Attorney. Dr. Patterson reported the results of his 10:04 p.m. attempted interview of appellant to Senior District Attorney Holmes, and also reported to him that appellant had refused to waive his rights under *Miranda*. (10 R.T. 1750.) Despite this knowledge, District Attorney Holmes directed Dr. Patterson to "stick around and observe the suspect as to anything in his behavior or demeanor, anything that might occur." (10 R.T. 1750.) Dr. Patterson, following D.A. Holmes' directions, again approached appellant while appellant was being x-rayed. (10 R.T. 1753.) Dr. Patterson dutifully followed appellant from the x-ray department back to his room. (10 R.T. 1757.)

At some point appellant said, "Still here huh?" (2 C.T. 281; 5 C.T. 1160.) This innocuous bit of chit-chat certainly was not a comment that could be characterized as an initiation of dialogue, which is defined as words or conduct that could be "...fairly said to represent a desire on the defendant's part to open up a more generalized discussion relating directly or indirectly to the investigation." (*Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045.)

Rather than appellant, it is Dr. Patterson's next comment that opened

the door to a more generalized discussion relating directly or indirectly to the investigation. He responded to appellant's "Still here huh?" not with "Yes I am", or "How do you feel?", but with "Yeah, just, just in case you're – I can, I can, whatever." (2 C.T. 281; 5 C.T. 1160.) Patterson was obviously communicating to appellant that he was there for the purpose he earlier brought up, whether appellant was now willing to talk.[22] Though an interrogator need not remain mute following an invocation, "any discussion with the suspect other than that 'relating to routine incidents of the custodial relationship' must be considered a continuation of the interrogation." (*Christopher v. Florida* (11th Cir. 1987) 824 F.2d 836, 845; *citing to Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045, and *Rhode Island v. Innis, supra*, 446 U.S. at p. 301.) While "the police may make routine inquiries of a suspect after he requests that they terminate questioning, such as whether he would like a drink of water, ...they may not ask questions or make statements which 'open up a more generalized discussion relating directly or indirectly to the investigation,' as this constitutes interrogation." (*Ibid.*)

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[22] Dr. Patterson may have intentionally masked his true purpose for being there. A review of the audiotapes (Exhibits 5A, 5B, 54, 55) convinces that Patterson was repeatedly trying to earn appellant's trust and relate to appellant as if he were trying to treat him. As discussed earlier Dr. Patterson was a forensic psychiatrist and was not there to treat the appellant but to evaluate him for the District Attorney's Office. Dr. Patterson himself warned against confusing the two roles.

Even though Patterson was enticing appellant to open up, appellant's next comment is still innocuous, "Yeah, you seem like you have a nice face." (2 C.T. 281; 5 C.T. 1160.) Dr. Patterson thanks him and appellant says, "The last psychiatrist I talked to made me very angry you know." (2 C.T. 281; 5 C.T. 1160.) Nothing in appellant's part of the seemingly innocuous conversation indicated appellant was opening up a more generalized discussion relating directly or indirectly to the investigation." (*Oregon v. Bradshaw, supra*, 462 U.S. at p. 1045.) In fact, the only fair inference in appellant's portion of the conversation is that he was telling Patterson he wasn't happy with his last psychiatrist and that Patterson seemed to have a kinder bed side manner, which incidentally is further indication appellant believed Dr. Patterson was a clinical psychiatrist and not an arm of the state. Not a word appellant said related to the instant crimes.

It was Patterson's response that began the true interrogation. Patterson responded with "you know who it was?" (2 C.T. 281; 5 C.T. 1160.) It was this question that began the long dialogue between appellant and Dr. Patterson concerning appellant's psychological and mental health history. Dr. Patterson asked specific questions about appellant's mental illness and directed the conversation to the acts that occurred earlier that day. Eventually with continued encouragement and questions from Dr. Patterson, the conversation turned to appellant's past criminal history,

and ultimately to the incriminating admissions and confessions.

Both conversations between appellant and Dr. Patterson were initiated by Dr. Patterson. Distinguish this case from *People v. Mickey* (1991) 54 Cal.3d 612, 652, where the suspect blurted out a long, emotional, spontaneous, unassisted confession to a detective accompanying him on a plane trip, then said, unprompted by the detective, "Curt I would like to continue our conversation at a later time." In this case appellant did not invite further contact by the Sheriff, District Attorney, or Dr. Patterson. At most, he may have said "I may want to talk to you later" over three hours before, and following repeated violations of his *Miranda* rights. Further, after making that comment, appellant unequivocally asserted his rights to counsel on two separate occasions. One of the occasions was to Dr. Patterson himself, only moments before Patterson reminded appellant of the comment.

Ironically, District Attorney Bradbury was aware of how critically important it would be for appellant to initiate any further discussions about the investigation after he had invoked his rights. Mr. Bradbury's final comment to appellant was, "If you decide you want to talk to us later, you should bring that to our attention." (2 C.T. 270-271; 5 C.T. 1205-1206.) Appellant never brought a desire to talk to the attention of the Sheriff, District Attorney or Dr. Patterson, instead he made it unambiguously clear to all who asked that he wanted to remain silent and desired to talk to an

attorney. The desire that appellant should talk about the incident was generated from the Sheriff's and District Attorney's offices. They were the ones who initiated all contacts and substantive conversations with appellant, and they were the ones who deliberately and repeatedly ignored his constitutionally protected requests to remain silent and to speak to an attorney.

a. Even if appellant initiated the conversations with Dr. Patterson, Patterson did not obtain a knowing, intelligent waiver of appellant's just previously invoked Miranda right to counsel.

Even if appellant is deemed to have initiated a dialogue with Dr. Patterson aimed at discussing the investigation, it could only have occurred after appellant invoked his *Miranda* right to counsel. Thus, Dr. Patterson was required to obtain a knowing and intelligent waiver of those rights.

"In the event that a suspect does in fact 'initiate' dialogue, the police may commence interrogation if he validly waives his rights." (*People v. Mickey* (1991) 54 Cal.3d 612, p. 649, *citing Oregon v. Bradshaw, supra*, 462 U.S. at p. 1046 and *Edwards v. Arizona, supra*, p. 486, fn. 9.) "The initiation of further dialogue by the accused, however, does not in itself justify reinterrogation. Even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel' is initiated by the accused, where reinterrogation follows, the

burden remains upon the prosecution to show that the subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." (*People v. Sims* (1993) 5 Cal.4th 405, 440 [853 P.2d 992, 20 Cal.Rptr. 537], quoting *Oregon v. Bradshaw, supra*, 462 U.S. at p. 1044, italics added.)

"[I]n light of the record in its entirety, including 'all the surrounding circumstances-both the characteristics of the accused and the details of the [encounter]'... [,]" (*People v. Neal, supra*, 31 Cal.4th at p. 80) it cannot be said that Dr. Patterson obtained a knowing and intelligent waiver from appellant. As did the Court in *Neal*, this Court must find there was no voluntary waiver of the previously invoked *Miranda* rights.

In *Neal*, the interrogator (Detective Martin) continued to interrogate defendant, even after multiple invocations of his *Miranda* rights. The detective ceased his initial interrogation when he tired of the defendant's denials of culpability. The following day the defendant initiated contact with the detective and made two subsequent confessions. The detective acknowledged he violated the principles of *Miranda*. He did so, because he was trained that violating *Miranda* was a useful tool to gather statements and though not admissible in the prosecution's case in chief, the illegally obtained statements could be used for impeachment. (*Id.* at p. 81.) The *Neal* Court, clearly troubled by the State's cavalier disregard of the defendant's *Miranda* invocations, held: "Under our review of the record in

its entirety, the first circumstance that weighs most heavily against the voluntariness of defendant's initiation of the second interview, and against the voluntariness of his two subsequent confessions as well, is the fact that in the course of the first interview, Detective Martin intentionally continued interrogation in deliberate violation of *Miranda* in spite of defendant's repeated invocation of both his right to remain silent and right to counsel. Martin's message to defendant could not have been clearer: Martin would not honor defendant's right to silence or his right to counsel until defendant gave him a confession." (*People v. Neal, supra*, 31 Cal.4th at pp. 82-83.)

There is no substantive difference between what Detective Martin did in *Neal* and what the Detectives, District Attorneys, Investigators and finally Dr. Patterson did in the instant case. In *Neal*, detective Martin repeatedly ignored Neal's invocations, he branded Neal a liar and he deceived Neal into thinking he had more evidence than he had. The combination of these acts this Court found deeply disturbing. (*Id.* at p. 82.) Moreover, this Court voiced its disgust at what was revealed as a taught practice to ignore *Miranda* invocations. (*Id.* at pp. 81-82.) This Court should be no less nonplussed at what was the systematic equivalent here. Though appellant's interrogators did not admit to intentionally violating *Miranda*, the overwhelming circumstantial evidence of intent to violate *Miranda* cannot be ignored.

First, just as in *Neal*, there was repeated, flagrant disregard of

invocations of both the right to remain silent and the right to an attorney. Second, beyond even *Neal*, multiple, senior District Attorneys, including the elected District Attorney himself --all, no doubt, well versed in fundamental constitutional law – participated in, and supervised others, in the violations. Third, similar to *Neal*, Detective Young berated appellant. Fourth, as in *Neal*, appellant's interrogators deceived him; but their deceit was more insidious. Rather than deceive appellant as to the quantum of evidence, they took advantage of his mental illness background, and deceived him as to the purpose for which Dr. Patterson was sent to see him. Fifth, again beyond even *Neal*, there was no break in the repeated interrogations. In *Neal*, the defendant was given a day's break, which this Court found not "sufficient to dissipate custodial pressures and permit defendant to consult counsel." (*Id.* at p. 83, *quoting People v. Storm* (2002) 28 Cal.4th 1007, 1024-1025.) Here, appellant was not given even that much of a break. From the first encounter with Detective Young the series of repeated interrogations continued, with no let up beyond an hour. Sixth, and again beyond even *Neal*, by the time the District Attorney sent in Dr. Patterson – and in utilizing him in the first place – the District Attorney was aware that appellant suffered from serious mental illness, had been treated for delusional disorders, was suffering from a gunshot wound, and had claimed to be in a shock and confused state. Taken as a whole, the systematic violations of *Miranda* were more serious and disturbing than

those found in *Neal*.

There is at least one substantive fact that makes the instant case even more disturbing and egregious than *Neal*. In *Neal*, the purpose of the intentional violations was to use Neal's statements to impeach him. Therefore, it was understood they could not be used in the prosecutor's case in chief. Irrespective of this limited intended use, the *Neal* Court found the police conduct "unethical." (*Id.* at p. 81.) However, in the case at bar, the District Attorney's office sought and obtained a much broader use. Despite having participated in, and otherwise supervising, the systematic violations, the District Attorney sought and obtained the right to use the statements in his Case in Chief.

The trial court erred in finding that appellant had voluntarily waived his multiple invocations of his *Miranda* rights.

5. The admission of Appellant's statements was devastating to the defense case, and under the Chapman standard requires reversal.

When an involuntary confession is admitted at trial, the error is one of federal constitutional dimension and is therefore tested under the standard of prejudice enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 303.) Such errors compel reversal of the conviction and the resulting death sentence unless the prosecution can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v.*

California, supra, 386 U.S. at p. 24.) The state cannot carry this burden here.

As the Ninth Circuit has stated, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him...[T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (*Colazzo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 424, *quoting Bruton v. United States* (1968) 391 U.S. 123, 139-40.)

While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely on that evidence alone in reaching its decision. (*See Arizona v. Fulminante, supra*, 499 U.S. at p. 295.) As Justice Kennedy observed in his concurrence in *Fulminante*, "the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence." (*Id.* at p. 313, Kennedy, J., concurring.)

In the instance case, appellant's statements to Dr. Patterson provided the basis for the People's contentions regarding the mental elements for the crimes charged, as well as the two special circumstances. Appellant's statement to Dr. Patterson described in detail the events that took place on July 17, 1996, and the events leading up to that date. The prosecution used appellant's statements to convince the jurors that they should find appellant guilty of first degree murder. The prosecution argued three theories of murder: deliberate and/or premeditated, felony murder, and lying in wait. The prosecution argued that two of them, deliberate and premeditated murder, and felony murder, were proven by appellant's own statements.

To convince the jury that appellant's actions were premeditated and deliberate, the prosecutor stated:

> "Let's take a look at his statement. Remember the question is: Is there a cold, calculated judgment to kill Peter Aguirre in which he weighed and considered the reasons for and against and killed with the consequences in mind? First of all, he knew the police were at the door. He knew that. He knew that when he positioned himself for ambush, he knew that as he waited for Pete to move into position. He said -- this is his statement: 'Somebody in her family called the police so I knew they had called the police then. We were in the shower and heard a knock and I looked at the front door and the police were pulling her out of the door. She went to the front door and I went back to get a towel or something and I looked out and they were pulling her out of the door.' He knew the police were there. He then positioned himself to kill police instantly because he, again, had already decided he was going to do that if the situation presented itself. Like a motorcade in front of a sniper. When the situation presented himself [sic], he was ready. See, and the officer said, 'Put your hands where I can see 'em.' I was kind of looking out

behind the wall. I just jumped out and shot him. I was in a situation and I just reacted. That was my reaction to that situation.' And that was a reaction that was only possible because he had prepared himself with deadly force. The defendant also had contemplated the consequences of a shootout with the police. He even admitted it. 'I think possibly this afternoon was a passive suicide attempt' -- a lot of this is pompous psychobabble but -'I think possibly this afternoon was a passive suicide attempt 'cause I don't think I could kill myself but I was hoping that the officers would kill me.' 'Hoping that the officers would kill me.' He had already weighed the consequence that if he got into a shootout with the police, he could get killed. That's one of the consequences, along with going back, that he considered and weighed. He admitted it." (44 R.T. 8151-8153.)[23]

To contrast appellant's allegedly premeditated and deliberate actions with heat of passion, the prosecutor argued:

"Passion. Heat. Ladies and gentlemen, there's no heat in this at all. This is the most cold-blooded execution that one can imagine. Even the defense expert, Mr. Thornton, couldn't help but use words like 'execution' and 'coup de grace.' It's cold. There's no heat here at all. You heard what the defendant had to say about this to Dr. Patterson later that night. You heard exactly how cold and matter-of-fact he is. 'Just a reaction,' he said." (44 R.T. 8141.)

The prosecutor also relied on appellant's statements to Dr. Patterson, to convince the jury that he was guilty of first degree murder under the felony murder rule. The prosecutor argued that felony murder was a "given," because appellant had confessed it to Dr. Patterson. He argued:

"The specific intent to commit kidnapping and the commission of such crime must be proved beyond a

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[23] For this and the following several examples, appellant's statements are in bold.

> reasonable doubt. Well, in this case that's a given. The defendant admits it. '**I kidnapped her. I went over there with a gun. I kidnapped her.**'" (44 R.T. 8157-8158.)

Finally the prosecution used appellant's statements to convince the jury of both special circumstances. The prosecutor explained: "[t]here are two special circumstances, the first being the murder of a peace officer in the performance of his duties and the second being the murder during the commission of a kidnapping, a felony." (44 R.T. 8166.) "Ladies and gentlemen, come on. He admitted he saw they were police officers. He knew police officers were coming, he admitted he killed a police officer. You heard the statements he made before. He knew these were police officers. He knew they were sheriff's deputies. He knew that. In fact, ladies and gentlemen, the term he knew he was a peace officer simply means he knew he was someone who comes within that class of people that are called peace officers. He knew he was a policeman, he knew he was a sheriff's deputy." (44 R.T. 8166-8167.)

The prosecution also used appellant's statements in an inappropriate and highly prejudicial manner to inflame the prejudice of the jury. Without any foundation that appellant's affectation and manner of speech at the time of the Patterson interview was in any way relevant to a determination of appellant's state of mind at the time of the murder, and without the jury having the entire interview for context, the prosecution argued: "And as I had suggested before, ladies and gentlemen, all you have to do, all you have

to do is listen to that tape to hear the cold and to hear the ice." (44 R.T. 8157.) This argument was inflammatory, and principally aimed at arousing the passions of the jury. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251 [278 Cal.Rptr. 640, 805 P.2d 899].)[24]

In the penalty phase the prosecutor used appellant's statements to Dr. Patterson to prove that appellant was not under the influence of an extreme mental or emotional disturbance, and that he was not suffering from a mental disease or defect.

The prosecution presented the testimony of Dr. Patterson in addition to playing the audiotape of the interrogation. Among other things, Dr. Patterson used appellant's statements to refute that he was suffering from schizophrenia or delusional psychosis at the time of the events in issue. For example, Dr. Patterson testified appellant's statements to him, show appellant's social and occupational functioning were adequate. (52 R.T. 9631.) Based on appellant's statements, Dr. Patterson believed appellant was exaggerating the severity of some of his symptoms. (52 R.T. 9635.) Dr. Patterson testified that appellant had breakfast with his parents just a couple days before the events of July 17, 1996, and appellant did not exhibit any unusual behavior. (52 R.T. 9632.)

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[24] This prosecutorial misconduct is also the subject of Argument VII, below.

Patterson testified that the fact appellant expressed that his thoughts were ridiculous was evidence that he could not have had delusional beliefs. (52 R.T. 9572.) Patterson testified that he believed appellant was trying to manipulate him. (52 R.T. 9757.) Patterson implied that appellant's use of terms such as schizophreniform and schizotypal, to describe his mental state, was more the result of appellant studying the DSM-IV or studying psychiatric terminology, than a correct testament of his actual illness. (52 R.T. 9755.) Patterson used appellant's statements to opine that appellant was being manipulative with respect to his claims of delusions. He testified:

> "[Appellant] was very creative. Whether he truly believed it or not or whether he was -- I would say be playing a game with [Alonso], manipulating her to further impress her. Yes, I can do this. As a matter of fact, he does give the clue that his having a gun gave him a sense of power and that maybe he got carried away with it. 'Yes, we're doing a movie right now. We're going to do it. We're acting right now.' It's going on just as he told me. 'I remember everything that happened. I have a tape running in my head that I can play it back and I can tell you everything.' These do not appear to me to be delusional. These are over evaluated ideas about himself as opposed to delusional aspects of, say, jealousy or, as I say, the other -- other things. And possibly grandiosity in his thinking. Possibly it falls there ..." (52 R.T. 9760.)

The prosecutor argued that appellant's own statements show that rather than acting under the influence of schizophrenia, appellant was simply calculating and cold-blooded. Referring to appellant's statements to Patterson the prosecutor implored the jury that appellant was:

> "[c]old-blooded and arrogant. And when he talked to Dr. Patterson later, when he talked to Dr. Patterson, it wasn't just the 'what' that happened. He was asked about the 'why.' And what did he say? 'You don't wonder why. It was just a reaction.' That's as cold as it gets. That's not a delusion. That is the horror, the horror, that's implanted in the minds of everyone who was there that day that will never end." (54 R.T. 10057.)

The prosecution's use of appellant's statements to argue he was not under the influence of extreme mental or emotional disturbance, or suffering from a mental disease or defect, is particularly troubling in that the prosecutor knew different. As is set forth in greater detail in Argument VIII below, the prosecution has admitted it deliberately withheld evidence from the defense that the prosecution's own mental health expert diagnosed appellant as schizophrenic.

As the foregoing discussion demonstrates, the prosecution's entire case, both guilt and penalty phases, relied heavily on appellant's statements made to Dr. Patterson. Under these circumstances, the prosecution cannot demonstrate that the error in the admission of appellant's statements to Dr. Patterson was harmless beyond a reasonable doubt. Reversal is compelled. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING ONLY SELECT PORTIONS OF APPELLANT'S STATEMENT TO DR. PATTERSON, WHILE EXCLUDING THE MAJORITY.

The trial court ruled that the statement made by appellant to Dr. Patterson on the evening of July 17, 1996, was admissible against him under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S. Ct. 1602, 16 L. Ed. 2d 694]. (16 R.T. 2712-2721.) However, during the guilt phase, the prosecution sought admission of only certain portions of appellant's statement. (8 C.T. 1983-1987.) The prosecution argued that only these portions of the statement were relevant and admissible to explain appellant's actions on July 17, 1996.[25] (8 C.T. 1984.)

The prosecution argued that the rest of the statement was irrelevant or inadmissible hearsay and must be excluded:

> "The bulk of the defendant's statement to Dr. Patterson includes a recounting of the defendant's criminal history, his educational and mental health background and family history. None of these subjects are relevant to what the defendant was thinking or doing on the day in question and do not shed any light on the issues in the case." (8 C.T. 1986.)

In response, appellant filed a motion to admit the entire statement under California Evidence Code section 356[26], and under the federal

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[25] The People selected only certain portions of the statement where appellant talked about the events of the day in question. (8 C.T. 1986.)

[26] California Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when

constitution. (8 C.T. 2120-2127.) Defense counsel argued that appellant's statement, in its entirety, explained the context of the statement, and presented a view into appellant's state of mind at the time of the shooting, including why he shot Deputy Aguirre. (8 C.T. 2121.) Defense counsel argued:

> "It's our position that within the meaning of the due process clause and the confrontation clause of the United States Constitution, to parse the statement as you've suggested we believe would unfairly preclude the defense from inquiring into issues that truly have a bearing on the reasons why the shooting occurred. And I think it's clear from the factual scenario that the jury is going to hear in this case -- and that -- the fact that the defendant admitted a number of times that he shot the sheriff. There was no real question as to the fact that he shot the sheriff. And I would suggest to the Court that the -- the information that the People are submitting go to the question of why he shot the deputy sheriff. And to that extent, the jury is going to make some assumptions when they hear this information that that is all that Mr. Johnson said on the topic. And as the Court has carefully gone through and struggled with the question of how to parse the statement, it's our contention that we should be allowed to present the whole of the statement. Not only, as we've argued in the moving papers, to present the context, but it's our contention that the entire statement is really an explanation by the defendant, Mr. Johnson, as to why the shooting occurred. And it's his belief that the shooting occurs and he's describing his emotional state -- then existing emotional state in the context of a mental illness that he believes he has suffered under for some time. To that extent, as you know, we've argued that has a bearing upon his ultimate explanation as to how the

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a letter is read, the answer may be given; and when a detached act, declaration, given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

> shooting occurred. And it's our contention, respectfully disagreeing with the Court, that to keep out other information, the entire context of the statement, I think will -- will cause the jury to assume Mr. Johnson only offered these statements as to the explanation to a psychiatrist about why the shooting occurred." (30 R.T. 5726-5727.)

The court denied appellant's motion to admit the complete statement. (29 R.T. 5749.) The court stated:

> "It appears to me strictly -- the People's offer is what happened at the scene, the kidnapping and the shooting and his [appellant's] state of mind at the scene." (29 R.T. 5723.) "I don't believe it is appropriate to introduce...his subjective evaluation of his own psychological state as it reflects back upon what he thought he was doing in the context of the psychoanalysis and other treatment he had received throughout, other therapists. That's just not what's going on here. Insofar as he says this is what I did, this is what I felt, I think that comes in, and I think I've probably included just about everything that pertains to that." (29 R.T. 5723-5724.)

The trial court parsed appellant's statement to Dr. Patterson, and only allowed a nine page transcript to be admitted during the guilt phase of appellant's trial.[27] (Exhibit 21) In contrast, forty-eight pages were admitted during the penalty phase of appellant's trial. (Exhibit 55.)[28]

In its guilt phase case-in-chief, the prosecution played for the jury the edited version of appellant's conversation with Dr. Patterson. (39 R.T.

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[27] The original taped conversation between appellant and Dr. Patterson was over an hour long. (39 R.T. 7131-7133.) The entire transcript of appellant's statements to Dr. Patterson consisted of fifty-seven pages. (8 C.T. 1988-2044.)

[28] This included the nine pages that were admitted into evidence during the guilt phase.

7119.) Defense counsel renewed his motion under California Evidence Code § 356 to have the entire tape played. (39 R.T. 7120.) The court again denied the motion. (39 R.T. 7126.)

The prosecution subsequently argued three theories of murder: deliberate and/or premeditated, felony murder, and lying in wait. The prosecution argued that all three theories were supported by appellant's statement to Dr. Patterson. (44 R.T. 8151-8153, 8141, 8157-8158, 8164-8165.) The prosecution also used appellant's statements to convince the jury that both charged special circumstances were true. (44 R.T. 8166-8167.)

There were two significant errors resulting from the Court's admission of the parsed statement. First, it resulted in the jury receiving an incomplete and prejudicial view of appellant's state of mind on the day of the crimes, and deprived the jury of highly relevant defense evidence. Second, the parsing allowed the tape to be used not just to show appellant's "state of mind at the scene[,]" as the trial court had found relevant (29 R.T. 5723), but appellant's state of mind well after-the-fact, at the time he gave the statement to Dr. Patterson. This was clearly not relevant.

A. The Admission Of Only A Portion Of Appellant's Statement Violated California Evidence Code Section 356, As Well As Appellant's State And Federal Constitutional Rights To Due Process.

Under California Evidence Code section 356 it was error for the trial

court to admit select portions of appellant's statement, while excluding the majority. California Evidence Code section 356 is clear that, [w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party."

The purpose of section 356 is to prevent the use of only selected portions of a conversation, so as to create a misleading impression on the subjects addressed. (*People v. Pride* (1992) 3 Cal.4th 195, 235.) Thus, if a party's oral admissions in a statement have been introduced in evidence, the party may show other portions of the statement, even if they are self-serving, which "have some bearing upon, or connection with, the admission...in evidence." (*People v. Breaux* (1991) 1 Cal.4th 281, 302 [3 Cal.Rptr.2d 81, 821 P.2d 585]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 [259 Cal.Rptr. 701, 774 P.2d 730]; P*eople v. Arias* (1996) 13 Cal.4th 92, 156 [51 Cal.Rptr.2d 770, 913 P.2d 980].)

1. The excluded statements not only had some bearing upon or connection with the admitted portions, but were highly relevant

The excluded portion of appellant's conversation with Dr. Patterson certainly had some bearing upon or connection with the admissions in evidence. In fact, the excluded portion was highly relevant to the very issue on which the prosecution's portion was admitted: appellant's state of mind at or near the time of the crimes.

It cannot be ignored that the very purpose of the entire interview with Dr. Patterson was to determine appellant's state of mind at or near the time of the crimes. Dr. Patterson was a "forensic" psychiatrist. His purpose in conducting the interview with appellant was to determine appellant's mental status at or near the time of the homicidal event. (10 R.T. 1655.) On this point, both the prosecutor and the defense sought to introduce aspects of the statement to help prove appellant's state of mind at or near the time of the homicidal event. Both sides sought the statement to help prove "why" appellant committed the crimes.

The trial court did not attempt to distinguish this reality. Rather, it excluded the defense's remainder of the whole because it appeared to be self serving to appellant. As the court stated, the remainder related to "[appellant's] subjective evaluation of his own psychological state...." It is of no moment that appellant's proffered portion of the statement is self serving, or "subjective." It is still relevant to the issue at hand.

A careful analysis of appellant's statement to Dr. Patterson reveals that much of his self described criminal history, educational and mental health background, and family history were connected to his explanation of the events surrounding the shooting. Chronologically, the selected portion of appellant's statement that was admitted into evidence came toward the end of Dr. Patterson's evaluation. These later statements presuppose that the hearer – whether Dr. Patterson or the jury -- had the benefit of his

previous statements. Appellant's entire statement made to Dr. Patterson was an explanation of his belief that the shooting was the product of his mental illness. Appellant indicated he believed he had been plagued throughout his life with paranoid delusions that previously resulted in criminal activity much like the events that culminated in the shooting. In addition, appellant pointed out that he suffered from "faulty thinking" and due to his mental illness his "interpretations of the way things were really wasn't (sic) quite correct." (8 C.T. 1999.) Appellant stated his delusions were "triggered" by relationships that were close, such as those of his parents and son (and of moment here, his wife), and previously resulted in homicidal thoughts. For instance, the delusions had him thinking he had to kill his father. (8 C.T. 2005.) Appellant explained that "as its happening, [the delusions are] real, you know, and to me it was like when my parents were poisoning my food," "I totally believed ... that they were Nazi agents and they were trying to reprogram me through chemicals that they were putting in my food." (8 C.T. 2023.) Further, appellant's delusions included the thought that his father "had sexually molested [appellant's son]." (8 C.T. 2024.) These paranoid delusions involving appellant's parents and son bore a connection to the admitted statements in that they illustrate that familial relationships amplified appellant's delusional thinking. Thus they give meaning to appellant's behavior and mental state at the time of the alleged kidnapping, sexual assault and murder. Simply put, appellant's

description of his surrounding mental state – irrespective of the court's belief that it was "subjective" -- helped explain what happened to appellant when he was overwhelmed by the strong emotions due to the separation from his wife. Even the prosecution recognized that the separation from his wife weighed in appellant's state of mind. At one point, the prosecutor argued that, "the separation was overwhelming" and appellant "never wanted to be separated again." (8 C.T. 2035.) Appellant explained only a week before the incident he had considered going to see a psychiatrist because he felt "pretty strong feelings of jealousy, [he] accused [his wife] of cheating on him and she said there's no way I could do that and she told me, she said, 'you're sick, Mike, you're sick in the head, you need treatment, go to the doctor.'" (8 C.T. 2033.) Appellant was in a very intense emotional relationship with his wife which he believed "amplified the delusional thinking." (8 C.T. 2003.) This was directly and highly relevant to his state of mind at the time he allegedly kidnapped and sexually assaulted his wife, and then shot Deputy Aguirre. Appellant's statement that his actions were "not normal behavior" and "the average person wouldn't consider doing something like that" (8 C.T. 2040.), may be subjective or self serving, but they are just as critical and tied to a determination of his mental state at the time of the crimes as those portions admitted by the court.

2. The exclusion of the highly relevant evidence violated due process

Generally speaking, the exclusion of evidence that is "highly relevant" to a defense contravenes due process. (See *Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.CT. 2150, 60 L.Ed.2d 738] (finding a due process violation when testimony excluded at trial "was highly relevant to a critical issue in the punishment phase of the trial" regardless of the state's hearsay rule); *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [35 L.Ed.2d 297, 93 S.Ct. 1038.] (holding that exclusion of third-party testimony that was "critical evidence" violated due process).) In deciding whether the exclusion of evidence violates due process, a court balances the following factors: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. (*Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1004; *Daryden v. White* (9th Cir. 2000) 232 F.3d 704, 711.)

All due process factors are present in the case at bar. The excluded evidence was highly probative to the very issue on which the trial court admitted the portion of the statement: appellant's state of mind. As previously stated, the very purpose of the statement in its entirety was to assess appellant's state of mind at or near the time of the crimes. The

statement was reliable, in that it was the result of an interrogation sought by the prosecution, and was taken and tape recorded by the prosecution's forensic expert Dr. Patterson. Appellant's description of the facts relevant to his state of mind was simple and direct, and thus capable of evaluation by the trier of fact. The statement was not cumulative to any other evidence; appellant did not otherwise testify at trial. Finally, the statement went to the heart of the defense, that appellant did not intend to kidnap and sexually assault his wife, and did not premeditate and deliberate the killing of Deputy Aguirre.

3. The due process violation mandates reversal of the convictions.

Because the exclusion of the evidence amounted to a violation of due process, reversal of the guilt verdicts is warranted if the error had a substantial and injurious effect on the verdict. (See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637 [113 S.Ct. 1710, 123 L.Ed.2d 353].) There could be no greater injurious effect on the verdict, than to permit the prosecution to present evidence on its theory for first degree murder but to deny appellant the opportunity to rebut it.

Appellant's statement was edited in such a way as to "create a misleading impression on the subjects addressed" (*State v. Pride* (1992) 3 Cal.4th 195, 235.) and left the jury with the impression that appellant confessed to shooting Deputy Aguirre in a manner devoid of any mental

health issues. Allowing the prosecution to present only its edited version impermissibly distorted and diluted the meaning of appellant's explanation to Dr. Patterson. The prosecution used the severely edited statement to prove that appellant committed first degree murder and was guilty of both special circumstances. The prosecutor used appellant's edited statements to convince the jury that appellant's actions were premeditated and deliberate. Contrasting appellant's actions with the mitigated mental state heat of passion, the prosecutor stated,

> "Passion. Heat. Ladies and gentlemen, there's no heat in this at all. This is the most cold-blooded execution that one can imagine. Even the defense expert, Mr. Thornton, couldn't help but use words like 'execution' and 'coup de grace.' It's cold. There's no heat here at all. You heard what the defendant had to say about this to Dr. Patterson later that night. You heard exactly how cold and matter-of-fact he is. 'Just a reaction,' he said." (44 R.T. 8141, emphasis added.)

Without the remainder of the statement to add context, the prosecutor was able to argue the redacted statement as showing appellant was a cold blooded killer: "And as I had suggested before, ladies and gentlemen, all you have to do, all you have to do is listen to that tape to hear the cold and to hear the ice." (44 R.T. 8157.) As parsed, appellant's statement came across as cold and factual. Appellant should have been allowed to rebut this argument, by presenting the admissions in the context of the remainder of the statement.

Simply put, the prosecution was allowed to use a slanted portion of

appellant's statement as a sword, but appellant was denied his right (as so simply provided by California Evidence Code section 356) to use the remainder of the statement as a shield. The trial court's error had a substantial and injurious effect on the verdicts. Reversal is required. (*Brecht v. Abrahamson, supra,* 507 U.S. at p. 637.)

B. The Parsing Of Appellant's Statement Allowed The Jury To Use Appellant's Affect In Reconstructing The Events As Evidence Of Premeditation And Deliberation.

The trial court parsed the statement for the purpose of allowing the jury to assess appellant's "state of mind at the scene." (29 R.T. 5723.) However, the parsed statement allowed the jury to consider a much more speculative inference: how cold blooded appellant sounded at the time he gave his statement to Dr. Patterson, well after the shooting. This improper use of the taped statement, made arguing premeditation and deliberation easy. Specifically, when contrasting its theory that the killing was premeditated and deliberate with the mitigated state of mind, heat of passion, the prosecutor was able to argue:

> "Passion. Heat. Ladies and gentlemen, there's no heat in this at all. This is the most cold-blooded execution that one can imagine. Even the defense expert, Mr. Thornton, couldn't help but use words like 'execution' and 'coup de grace.' It's cold. There's no heat here at all. You heard what the defendant had to say about this to Dr. Patterson later that night. You heard exactly how cold and matter-of-fact he is. 'Just a reaction,' he said." (44 R.T. 8141; emphasis added.)

Even more inflammatory, the prosecutor was able to argue that the

jury need not focus on the content of the statement, but on the manner in which appellant delivered it:

> "And as I had suggested before, ladies and gentlemen, all you have to do, all you have to do is listen to that tape to hear the cold and to hear the ice." (44 R.T. 8157; emphasis added.)

Essentially, the parsed tape became evidence of premeditation and deliberation, not because of its content, but because of appellant's lack of affect[29] in making the statements. Yet, there had been no expert foundation presented that appellant's lack of affect in reconstructing the events to the clinical psychiatrist bore relevance to the elements of premeditation or deliberation at the time of the homicide. No foundation was laid that this subsequent lack of affect was the result of appellant being a "cold" blooded killer, with "ice" in his veins. In light of facts now known, some of which were not known to the jury at the time of the prosecutor's argument and its guilt phase deliberation, appellant's lack of affect had many probable sources. Among them were: 1) appellant was indeed suffering from severe schizophrenia, 2) appellant had been shot in the chest, 3) appellant was acting bizarrely shortly after being shot, chanting "hare krishna" while lying naked on the ground, 4) appellant expressed shortly before the statement that he was in shock, 5) appellant had been given medication in

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[29] "Affect" is "[a] feeling or emotion as distinguished from cognition, thought or action." (American Heritage Dict., *supra*, p. 29, col.1.)

preparation for surgery, 6) appellant believed he was speaking to a clinical, treating psychiatrist[30] and 7) appellant was without requested counsel. There was simply no basis to allow the jury to speculate that appellant's manner in later reconstructing events was relevant to his state of mind at the time of the crimes.

1. The misuse of the parsed statement was prejudicial.

After hearing the excised taped statement, and after hearing the prosecutor's argument that appellant's manner of presentation proved premeditation and deliberation, the jury convicted appellant on all five counts and found both special circumstance allegations true. (10 C.T. 2706-2708, 2709-2723.) The misuse of the parsed statement, especially in conjunction with the exclusion of the remaining highly relevant portion of the statement, compels reversal.

While a trial court has discretion to allow relevant evidence, "a court has no discretion to admit irrelevant evidence." (*People* v. *Turner* (1984) 37 Cal.3d 302, 320-321 [208 Cal.Rptr. 196, 690 P.2d 669].) There was no foundation laid that even remotely rendered appellant's affect in reconstructing events relevant to premeditation and deliberation. Even if the admission of the parsed tape for the purpose argued by the prosecutor

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[30] Appellant's recitation could be just as easily spun as "clinical," rather than "cold." It would make sense that appellant would clinically detail the events and his mental history to a clinical psychiatrist.

was within the trial court's discretion, reversal is required because "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124 [36 Cal.Rptr.2d 235, 885 P.2d 1].) Allowing the jury to use appellant's affect in reconstructing the events to satisfy the elements of premeditation and deliberation resulted in a miscarriage of justice. "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." (*Estes* v. *Texas* (1965) 381 U.S. 532, 540 [85 S.Ct. 1628, 14 L.Ed.2d 543].) At a minimum, the admission of the parsed statement for this improper purpose rendered it reasonably probable that, absent the errors, the outcome of the guilt phase would have been more favorable to appellant. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING APPELLANT'S PRIOR CONVICTIONS DURING THE GUILT PHASE, AND FURTHER IN ALLOWING THE PROSECUTOR TO ARGUE THAT APPELLANT'S INTENT AND/OR MOTIVE TO KILL WAS TO AVOID RETURNING TO PRISON FOR A TERM OF TWENTY-FIVE YEARS TO LIFE

During the Prosecution's guilt phase case-in-chief, it sought to admit evidence showing appellant had five felony priors, including two serious felony convictions. The prosecutor argued that appellant's status as a third strike candidate supplied him with the intent and/or motive to kill Deputy Aguirre. Appellant objected to admission of the prior convictions, and to the speculative inference that they were the motive for murder. Although the prosecution provided no foundational evidence that appellant even knew he was a three strikes candidate, nor any corroboration that appellant's motive to kill was to avoid a three strikes sentence, the trial court erroneously permitted the admission of the prior convictions as evidence of motive to kill. The prosecution was further permitted to argue both in opening statement and closing argument that appellant's intent and/or motive in killing Deputy Aguirre was to avoid returning to prison with twenty-five years to life sentence. The admission of appellant's prior convictions during the guilt phase, and the improper argument that appellant killed to avoid returning to prison with a sentence of twenty-five years to life, deprived appellant of due process and a fair trial. (U.S. Const., 5th, 6th and 14th Amends.)

A. Summary Of Facts

1. Pretrial motions

The prosecutor filed a pretrial motion pursuant to California Evidence Code , section 1101(b)[31], to admit appellant's criminal record and previous incarcerations as evidence of motive to support the prosecutor's theory that appellant, with premeditation and deliberation, killed Deputy Aguirre to avoid returning to prison with a twenty-five year to life sentence. (6 C.T. 1666-1683.) The prosecutor's motion characterized appellant's priors as admissible character evidence to prove premeditation and deliberation. The prosecutor claimed:

> If the jury doesn't know that [appellant was a three strikes candidate], then the jury doesn't know the mental process that [appellant] goes through for premeditation and deliberation purposes and it is possible for this jury to be fooled into thinking that this was one quick, spontaneous act.[32] There was no first-degree premeditation and deliberation. And that's why the jury needs to know this, so they can draw the appropriate inference from it. (18 R.T. 2986.)

The prosecution based its position on the prosecutor's personal belief that

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[31] California Evidence Code section 1101(b) states "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[32] This was defendant's position at trial. (32 R.T. 6084-6085.)

appellant's assumed three strikes status had to be a factor in appellant's mental state:

> In this case it seems to me inconceivable that this defendant's three-strikes status did not participate in his decision to take Deputy Aguirre out quickly and try to take Fryhoff out and get out of there. His behavior was extreme and required extreme motivation to justify what he was doing. And that three-strikes status is what does it and what did it. And the jury can infer from his conduct, along with the circumstantial evidence together of his three-strikes status, that those two things are part and parcel of the same mental activity. They're the result of the same mental activity. And that is to kill to avoid the consequences of three strikes. (18 R.T. 2991-2992.)

Appellant opposed the prosecutor's motion, arguing that admission and use of the prior convictions in guilt phase would violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I section 13 of the California Constitution, and California Evidence Code sections 352 and 1101.[33] (7 C.T. 1792-1815.) Appellant argued that his prior convictions and status as a felon were not admissible character evidence, and that its prejudicial effect substantially outweighed any probative value. Appellant argued that the prosecutor was "leapfrogging" from showing that appellant had prior felonies to the inference that appellant knew he was a three-strikes candidate. Defense

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[33] In addition, defense counsel requested bifurcation of the proceedings so that the jury would not be informed of appellant's prior convictions until after the guilt phase of his trial. (18 R.T. 3028.)

counsel pointedly argued that appellant's case was distinguishable from the entire prosecutor's cited authority[34].

> As the Court has already noted, in *Cummings* there was a statement of intent to kill a police officer. So we've got the actual perpetrator making a statement of his intent that he wants to kill the police the afternoon before. In *Heishman*, again, the only relevance of the person's prior prison time was only -- and I believe the quote is it was received only to corroborate the woman Miller's testimony with respect to the defendant's statement that he was going to kill this woman so he would avoid going back to prison for rape. You remember those facts in *Heishman*. Similarly in *Powell*. In that particular case, the person was actually on parole at the time and the court indicated that there was a careful balance struck and that that particular information regarding parole status was necessary for the diminished capacity defense that the defendant had put forward. So on balance they allowed that evidence to go forward both because it went to the defense and to the prosecution. (18 R.T. 2990.)

Defense Counsel summarized appellant's position as follows:

> In this case, No. 1, it's not character evidence that they're admitting or seeking to admit. They want to put on prior felonies -- put on before this jury the defendant has been convicted of two prior felonies that occurred on the same occasion and to somehow leap-frog from that to the inference that the defendant knew he was a three-strikes candidate. In *Cummings* and *Heishman*, the reason the information came out about the defendant's status, if you will, about having been in prison before was because the defendant made a statement. So this particular defendant said the day before the crime or the afternoon before, 'Look, I'm afraid to go back to prison. If I get caught, I'm going to shoot it out with the

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[34] *People v. Cummings* (1993) 4 Cal.4th 1233 [18 Cal.Rptr. 2d 796, 850 P.2d 1], *People v. Heishman* (1988) 45 Cal.3d 147 [246 Cal.Rptr. 673, 753 P.2d 629], *People v. Durham* (1969) 70 Cal.2d 171 [74 Cal.Rptr. 262, 449 P.2d 198], *People v. Powell* (1974) 40 Cal.App.3d 107 [115 Cal.Rptr. 109].

> police.' That would be a completely different statement or completely circumstantial evidence case in which one might infer that that particular intent existed on the day of the crime. But to adopt [prosecutor] Mr. Hardy's reasoning is to simply invite the jury to speculate with very prejudicial information, and we ask the Court to disallow that. (18 R.T. 2990-2991.)

Despite recognizing that the evidence was speculative and "terribly prejudicial," the trial court allowed admission of appellant's prior convictions and status as a felon in order to allow the prosecution to prove a motive for shooting Deputy Aguirre. (18 R.T. 2993.) The trial court reasoned that "understanding that the People's theory is this is a motive-driven killing," the evidence is "significant circumstantial evidence that runs to motive." (18 R.T. 2994.) "The People will be permitted to show that [appellant] had suffered unspecified convictions, which made his status one of a person who, if convicted of being a person in possession of firearms, would be eligible for commitment to prison for 25 years to life."[35] (18 R.T. 2995.)

The trial court's justification for its questionable finding was based in part on its acknowledgement that "how much Mr. Johnson knew, what he knew, is to some degree speculative, ... [b]ut I think it is not unreasonable for us to infer that people know, particularly somebody who,

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[35] The trial court applied a balancing test, and relied on *People v. Anderson* (1987) 43 Cal. 3d 1104 [240 Cal. Rptr. 585; 742 P.2d 1306], in finding motive was an issue. (18 R.T. 3071.)

as [prosecutor] Mr. Hardy points out, has worked at the edges of the criminal justice system for as long as Mr. Johnson has, understood there were grave and profound consequences to his being in possession of firearms." (18 R.T. 2997.) "I believe the People have the right to have that evidence in as sanitized and non-prejudicial form as possible presented to the jury. I may be rebuked for saying that this is to some degree speculative as to how much of a consequence would flow to him." (18 R.T. 2998.)

2. The prosecutor's use of uncharged crimes as evidence in its guilt and penalty cases in chief.

In his guilt phase opening statement, the prosecutor previewed for the jury the evidence of the prior convictions, appellant's status as one who would receive a twenty-five years to life sentence, and the presumption of motive the jury should draw from the evidence:

> The reason we're here is because on [July 17, 1996] that man made a decision, and that decision simply was that he would rather blow Peter Aguirre's brains all over the corner of a house in Meiners Oaks, California, than go back to prison.[36] (32 R.T. 6059.)
>
> This was a decision long time coming, and it was the culmination for Mr. Johnson of a lot of decisions and of his life situation, as he called it. (32 R.T. 6060.)
>
> As was read in the Information and as will be proved to you,

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[36] The prosecutor's arguments in opening statement and closing argument will be discussed in more detail in the section on prosecutorial misconduct. (See Argument VII, below.)

by July 17th, 1996, the defendant had suffered five felony convictions. In 1973, conspiracy to distribute drugs. In 1996[37], burglary. Again, convicted felon. In 1987, robbery with a firearm. Convicted of a felony and sent to state prison. By the way, he went to the federal prison for the 1973 conviction. 1987, assault with a deadly weapon, a firearm. Convicted of a felony, went to prison. And in 1987, convicted of a burglary, a felony. What did that mean for Michael Johnson? The next time up, the next felony, is 25 to life. On his parole he signed a piece of paper saying you can't possess firearms, because that's the next felony. (32 R.T. 6060.)

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Because on July 17th, 1996, the defendant made some new decisions, and they were indeed very ominous new decisions. And the most ominous new decision he made was to possess firearms. Now, remember this was no -- this was no light decision that he made. The decision for Michael Johnson to possess firearms meant that if he was caught by the police, he was going back to prison, 25 to life. Despite that he decided to arm himself. And not just arm himself, but arm himself to the T. (32 R.T. 6061.)

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That's how Michael Johnson, that man, went courting to see his wife on July 17th, 1996. Armed and ready. Ready, knowing the consequences of having a gun. Ready to react with deadly force to any situation that posed a threat to his freedom. Ready to react with deadly force, deadly force, to any situation that threatened his freedom. (32 R.T. 6062-6063.)

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Unfortunately, what the defendant knew, which was all of those things, knew that the police were coming, knew that he

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[37] The prosecutor misstated the year appellant was convicted of burglary. The correct year is 1986. (31 R.T. 6024.)

> was armed to the teeth, had made the decisions he'd made -- he'd made -- what the defendant knew tipped him off, caused him to take those guns with him even into the shower because he was ready to react to any situation with deadly force and made him get ready to kill. Unfortunately, what Peter Aguirre didn't know caused him to walk into an ambush because that was the next decision that the defendant came to as part of this whole decision process, decision to kill Deputy Peter Aguirre. (32 R.T. 6067.)
>
> ***
>
> And remember, he put himself in a position to react with deadly force to any situation that threatened his freedom. (32 R.T. 6070.)
>
> ***
>
> The defendant, Michael Johnson, had decided to kill or be killed. That's why he had armed himself with that mini-arsenal. Because that's the decision he had made in his life and the decision that killed Peter Aguirre and almost killed Jim Fryhoff. (32 R.T. 6074-6075.)
>
> ***
>
> At the end of this case the evidence will show that on that date [appellant] armed himself, even though he knew he wasn't allowed to. (32 R.T. 6078.)

In order to support its theory that appellant's motive for killing Deputy Aguirre was to avoid a sentence of twenty-five years to life, the prosecution called Robert Humphrey and Terence Kilbride to testify.[38]

Robert Humphrey was appellant's parole agent in 1991. (36 R.T. 6719.) He testified that it was his customary practice to advice parolees of

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[38] Defense counsel renewed objections to the proposed testimony of Mr. Humphrey and Mr. Kilbride before they took the stand. (36 R.T. 6711-6712, 6686-6687.)

the conditions of parole prior to their release from prison. Mr. Humphrey explained that six months before a parolee was released from prison, the parolee was given an arrest and statement program package. (36 R.T. 6720.) The package contained a form 1515 (Notice and condition of parole), which includes the parolee's signed acknowledgement of the conditions of parole, including Condition 5 which is an advisement that parolees cannot possess a firearm . Condition 5 provides:

> You should not own, use, or have access to or have under your control any type of firearm or instrument or device which is -- which a reasonable person would believe to be capable of being used as a firearm or any other ammunition which could be used in a firearm; any weapon as defined in the state or federal statute or listed in the California Penal Code § 12020 or any instrument or device which a reasonable person would believe to be capable of being used as a weapon, as defined in Penal Code 12020; any knife with a blade longer than two inches, except kitchen knives, which must be kept in your residence, and knives related to your employment, which may be used or carried only in connection with your employment. (36 R.T. 6721-6722.)

Normally a parolee signs form 1515 six months before his release. Mr. Humphrey's customary practice was to review form 1515 with parolees when they checked-in with him upon their release. (36 R.T. 6720.) Mr. Humphrey also testified that in 1991 he saw a form 1515 with appellant's signature on it. (36 R.T. 6726.) However, the prosecution was unable to produce either the original form, or a copy of the form, with

appellant's signature.[39]

Terence Kilbride, based on his many years of experience as a Deputy District Attorney and his knowledge of sentencing, testified as an expert witness for the prosecution. (36 R.T. 6726-6729.) Mr. Kilbride examined prosecution exhibits 18A-E,[40] and opined that appellant had suffered five previous felony convictions. (36 R.T. 6731-6735.) Mr. Kilbride further opined that appellant had suffered two serious felony convictions as defined by California Penal Code §§ 667 and 1170.12, and was therefore subject to twenty-five years to life for any new felony conviction.[41] (36 R.T. 6742-6743.)

At the conclusion of Mr. Kilbride's testimony the trial court instructed the jury that they may consider Appellant's prior felony convictions as evidence of motive. The Court instructed as follows:

> The evidence that has been introduced concerning the purported history of the defendant has been introduced for the purpose of showing that the defendant has suffered certain

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[39] According to the prosecutor appellant's records had been lost. (36 R.T. 6712.)

[40] Prosecution exhibits 18A-E included documents produced by the: United States District Court for the Southern District of Illinois; the municipal and superior courts of Los Angeles and Ventura County; and the California Department of Corrections involving the prosecution and containment of Mr. Johnson.

[41] Although not mentioned in front of the jury, Mr. Kilbride told the trial court that in his expert opinion appellant's status was that of a fourth striker. (36 R.T. 6739.)

> felony convictions, to which you have now heard evidence. The evidence of prior felony convictions, if believed, may not be considered by you to prove that defendant is a person of bad character or that he may have a disposition to commit crimes. You are only permitted to use this evidence for the limited purpose of deciding the following issues. One, whether in fact the defendant did suffer the felony convictions. And I may mention to you in passing that question will be asked you at the close of the case because that's one of the things you're going to be asked to respond to, if you recall when the Information was read to you. **Second, whether the felony conviction of robbery and assault with a deadly weapon in 1987, if true, establishes an intent or motive to commit the crime of murder.** And, three, whether such felony convictions, if true, establish that the defendant was a convicted felon within the meaning of Count 5 of the Information, felon in the possession of a firearm. That's one of the elements of the charge, and therefore you'll have to make that finding, and that evidence was brought for that purpose. These three reasons that I have just read to you are the exclusive purposes for which you may consider the evidence of prior convictions. For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. (36 R.T. 6744-6745, emphasis added.)

During the prosecutor's closing arguments, the prosecutor emphasized its theory of premeditation and deliberation via intent and/or motive to avoid a sentence of twenty-five years to life: "[Appellant] signed something saying: I know I can't possess firearms. The consequence is to go back to prison, a consequence of 25 to life." (44 R.T. 8144.) The prosecutor, in fact, was wrong. The clause in Form 1515 that Appellant allegedly signed contained no such statement. In fact, such a statement would have been a factual impossibility. If Appellant indeed signed a parole form, he did so in 1991, almost three years before the enactment of

the three strikes law. (California Penal Code §§ 667, 1170.12.)

Nevertheless, during the penalty phase of appellant's trial the prosecutor continued to argue that appellant knew it was a felony to possess firearms, and knew the consequences for his actions were twenty-five years to life. "In 1991 his parole agent told him you can't possess guns or you're going back to the joint. Twenty-five to life." (54 R.T. 10054.) The prosecutor also argued "If he was willing to take responsibility and suffer the consequences for being a felon in possession of firearms, he could have not killed Peter Aguirre. But he made that self-centered decision to cause all this harm because he is simply a self-centered, cold-blooded, rotten human being." (54 R.T. 10061.) The egregious error by the prosecution was compounded by its deliberate concealment of the opinion of its designated but uncalled expert, Dr. Martel, that appellant indeed suffered from paranoid schizophrenia. (See Argument VIII.) As demonstrated here and in other arguments, the prosecution committed multiple instances of misconduct that had an additive effect on the trial court's erroneous rulings.

B. Prior Crimes Evidence Is Inadmissible Absent Sufficient Relevance To Prove Motive Or Intent

1. Admissibility of prior crimes evidence.

Evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. (*People v. Westek* (1948) 31 Cal.2d 469, 476

[190 P.2d 9]; *People v. Dabb* (1948) 32 Cal.2d 491, 499-500 [197 P.2d 1]; *People v. Peete* (1946) 28 Cal.2d 306, 314-315 [169 P.2d 924]; *People v. Albertson* (1944) 23 Cal.2d 550, 576 [145 P.2d 7].) However, under certain limited circumstances, when the evidence is sufficiently relevant, it may be admitted even though it embraces evidence of the commission of another crime. Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. (*People v. Durham* (1969) 70 Cal.2d 171, 186 [74 Cal.Rptr. 262, 449 P.2d 198].)

California Evidence Code Section 1101(a) and (b) provide, in their pertinent parts, that:

> (a) Except as provided in this section..., evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime ... when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) ... other than his or her disposition to commit such an act.

Admissibility of California Evidence Code Section 1101(b) evidence depends upon three principle factors: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime

evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson* (1980) 27 Cal.3d 303, 315 [165 Cal.Rptr. 289, 611 P.2d 883].)

The first two factors (materiality and probative value) described in *Thompson* address the basic fundamentals of evidence. The third factor is guided by California Evidence Code section 210, which deems evidence irrelevant unless it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "[T]he general test of admissibility of evidence in a criminal case is whether it tends logically, naturally, and by reasonable inference, to establish any fact material for the people or to overcome any material matter sought to be proved by the defense." (*People v. Kelley* (1967) 66 Cal.2d 232, 239 [57 Cal.Rptr. 363, 424 P.2d 947].)

Because prior crimes evidence can be so damaging, "'[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' (*Id.* at p. 316.)" (*People v. Daniels* (1991) 52 Cal.3d 815, 856 [277 Cal.Rptr. 122, 802 P.2d 906.) "Such evidence should be scrutinized with great care ... in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived. (*People v. Durham* (1969) 70 Cal.2d 171, 187.) While the trial court is generally vested with wide discretion in determining whether evidence shall be admitted or

excluded (*People v. Green* (1980) 27 Cal.3d 1, 19 [164 Cal.Rptr. 1, 609 P.2d 468]), it "has *no discretion* to admit *irrelevant* evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69, 755 P.2d 253], emphasis added.)

Where the connection between the uncharged acts and the charged act can be sustained only by "speculative inferences," or where the connection between the uncharged offense and the charged offense cannot be clearly perceived, the evidence should be excluded. (*People v. Allen* (1976) 65 Cal.App.3d 426, 434 [135 Cal. Rptr. 276]; *People v. Guerrero* (1976) 16 Cal.3d 719, 724 [129 Cal.Rptr. 166, 548 P.2d 366]; *People v. Daniels* (1991) 52 Cal.3d 815, 856 [277 Cal. Rptr. 122, 802 P.2d 906].) The California Supreme Court has held that "[a]s long as there is a direct relationship between the prior offense and an element of the charged offense, introduction of that evidence is proper. [Citations.]" (*People v. Daniels*, *supra*, 52 Cal.3d at p. 857.)

If there is a direct relationship between the prior offense and an element of the charged offense, the third *Thompson* factor comes into play; the trial court judge then has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. (*People v. DeRango* (1981) 115 Cal. App. 3d 583, 589 [171 Cal.Rptr. 429], citing *People v. Matson* (1974) 13 Cal.3d 35, 40 [117 Cal.Rptr. 664, 528 P.2d 752]; Cal. Evid. Code § 352.) A trial court's decision admitting or

excluding evidence is reviewed on appeal for abuse of discretion. (*People v. Waddle* (2000) 22 Cal.4th 690, 724 [94 Cal. Rptr.2d 396, 996 P.2d 46].)

In the case at bar, the relevance of the prior crimes evidence was highly suspect. The prosecutor's guilt and penalty phase arguments that appellant's intent or motive was based on his desire to avoid a sentence of twenty-five years to life, and the prosecutor's emphasis that this proved appellant was a "self-centered, cold-blooded, rotten human being," was not only highly prejudicial but also irrelevant especially when viewed under the heightened scrutiny afforded to capital cases. (54 R.T. 10061.) (See, e.g., *Ring v. Arizona* (2002) 536 U.S. 584, 606 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 [180 Cal.Rptr. 489, 640 P.2d 108].) "[I]n striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (Citations omitted.)" (*Id.* at p. 431.)

2. The prior convictions and parole form evidence had no relevance to motive.

The prior convictions and parole form evidence were irrelevant to the purported motive of killing in order to avoid an enhanced three strikes sentence of twenty-five years to life as suggested by the prosecution. The prosecution's evidence did not establish this motive, nor did it provide the circumstantial foundation upon which this motive could reasonably be

inferred. The prosecution presented no evidence that appellant knew he was a "three-striker" facing a sentence of twenty-five years to life, nor that this status was the reason for his actions.

Robert Humphrey's testimony did not support the motive theory advanced by the prosecution. He testified only that in 1991 -- three years ***before*** the three strikes law was passed – appellant signed a form stating that, "You should not own, use, or have access to or have under your control any type of firearm...." There was no testimony that a violation of this provision would cause appellant to suffer a sentence as severe as twenty-five years to life, because of course, that was not the legal consequence at the time appellant signed the form. Defense counsel correctly pointed out to the court that, rather than a reasonable inference, the prosecution was speculatively "leapfrogging" to an inference that appellant's parole status and conditions imbued him with a realization that he was facing twenty-five years to life, and he therefore killed in order to avoid this sentence.

Terence Kilbride's testimony did not support the prosecution's motive theory. His expert testimony was limited to appellant's current status; specifically, that appellant suffered two serious felony convictions and was subject to a sentence of twenty-five years to life on his new felony

conviction.[42] Again, defense counsel properly argued that it was "leapfrogging" relevance to infer that appellant had knowledge of this legal significance. Missing, but critical to a relevance determination, was any evidence that appellant had knowledge of the legal status he would be facing. Therefore, also missing, was any evidence from which a jury could logically and reasonably infer that appellant could have formed motive based on his three-strike status.

The prosecutor, himself, recognized there was a link missing to establish relevance, because he continually conflated the testimony. He misrepresented, that "[appellant] signed something saying: I know I can't possess firearms. The consequence is to go back to prison, a consequence of 25 to life." The prosecutor fabricated the very foundational link that would have made the evidence relevant to its motive.

Motive is a cause, reason, or inducement that leads or tempts the mind to indulge in a criminal act. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017 [80 Cal.Rptr.2d 676].) The cases cited by the prosecution at trial as legal support for admission of appellant's prior convictions as evidence of motive pointed to either proximity or connection between prior

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[42] This testimony, itself, was inadmissible, as it improperly expressed an opinion concerning the guilt or innocence of appellant on the enhancements. (See, e.g., *People v. Brown* (1981) 116 Cal.App.3d 820, 829 [172 Cal.Rptr. 221]; *People v. Clay* (1964) 227 Cal.App.2d 87, 98-99 [38 Cal.Rptr. 431].) It is the subject of a separate argument in this Brief.

acts and the current charges, or evidence which linked or corroborated the theory of motive with the prior acts. Thus, unlike the facts presented in appellant's case, each case offered by the prosecution presented a factual scenario of cause, reason or inducement linking the prior acts to the crimes charged. These cases, *People v. Cummings*, *People v. Heishman and People v. Durham* do not rely on speculation to admit the prior acts evidence but rather, provide a proximate link between the prior acts and the charged crime(s). To the contrary, in appellant's case the evidence was admitted based on speculation and any proximate link was noticeably absent.

For example, in *People v. Cummings* (1993) 4 Cal.4th 1233 [18 Cal.Rptr. 2d 796, 850 P.2d 1], the facts offered a link between the prior acts and the charged crime. On the day before the murder of a police officer, the defendant brandished a handgun and made a threat, that he would kill anyone who got in his way, even the police. Thus, the Court found the prior act relevant to defendant's motive for later shooting a police officer. As this Court said:

> The evidence was not, however, offered as evidence of Cummings's character or to prove his conduct at the time of the murder, and it was highly relevant. Evidence that Cummings was in possession of a handgun and had threatened to kill any policeman who got in his way went to his motive for shooting Officer Verna and thus to the elements of intent, premeditation and deliberation. It was also relevant to the purpose element of the special circumstance of killing to avoid arrest. The time frame was such that a jury

> could reasonably infer that the intent to kill police officers stated at that time still existed at the time of the killing.

(*Id.*, at pp. 1266, 1288-1289, citing *People v. Lang* (1989) 49 Cal.3d 991, 1014, and *People v. Karis* (1988) 46 Cal.3d 612, 636-637 [250 Cal.Rptr. 659, 758 P.2d 1189].) In addition to the link present in *Cummings* and not present in appellant's case, the prior act in *Cummings* occurred a day before the charged crime. Here, the prior crimes were not even remotely close to the proximity in nature or time found acceptable by the *Cummings* court. Appellant's prior convictions spanned a period of nine to twenty-three years prior, and the interview with parole agent Humphrey was approximately five years before the current crimes.

In *People v. Heishman* (1988) 45 Cal.3d 147 [246 Cal.Rptr. 673, 753 P.2d 629], admission of the defendant's prior rape conviction was found relevant to prove motive as there was evidence of a direct link to the charged crime. The defendant's prior conviction for rape was introduced at his trial for murdering his then current rape victim to prevent her from testifying against him. The prior conviction became relevant to prove motive and intent because the defendant had asked for and obtained from a confederate a gun, telling the confederate that he feared going back to prison if the victim testified against him. Moreover, the defendant, himself, had told the confederate that he had a prior rape conviction that was a "setup," just as was the current charge. (*Id.*, at pp. 158, 169.) In *People v.*

Durham (1969) 70 Cal.2d 171 [449 P.2d 198], among other things, the evidence showed that defendant, while on parole, and in the several weeks leading up to the murder of a police officer, went on a crime spree with a confederate, during which the confederate brandished a firearm similar to that used in the murder, threatened to shoot a cashier and said he "meant it," and actually shot at an occupant of a car. (*Id.* at pp. 178-179.) Unlike the instant case, in *Durham*, there were proximate crimes, identity of weapons, prior threats and shooting, all of which bore relevance to at least the motive for the parolees to shoot an officer arresting them.

The courts have regularly required some additional fact or evidence to prove that the motive of a defendant's prior convictions support the motive evidence in the charged offense, and are not merely speculative. For instance, in *Roldan*, the jury was allowed to infer that the defendant had the motive to eliminate a security guard not simply because in the uncharged offense the security guard provided key prosecution evidence against the defendant but because the defendant told a witness, Barrios, that he killed the security guard to eliminate a witness. (*People v. Roldan* (2005) 35 Cal.4th 646, 706-707 [27 Cal.Rptr.3d 360, 110 P.3d 289] ["Jude Barrios later testified that defendant told her he killed Teal to eliminate a witness to the crime, indicating the theory was not so speculative as defendant would have us believe."] Compare appellant's facts and circumstances to those that existed in *People v. Daniels*, (1991) 52 Cal.3d

815 [277 Cal.Rptr. 122], where this Court allowed evidence of a prior robbery because it suggested the defendant had a motive to kill the officers. This Court found a direct relationship between the police previously rendering defendant a paraplegic and defendant murdering the officers in retribution. "This is particularly true when coupled with other admitted evidence of defendant's antipathy toward the police." (*Id.*, at p. 857.)

Simply put, there was no direct relationship between the prior offense and an element of the charged offense, such that introduction of that evidence is proper. (*People v. Robillard* (1960) 55 Cal.2d 88, 100 [10 Cal.Rptr. 167].) The facts that almost ten years prior appellant had been convicted of serious felonies, was now in-fact subject to a sentence of twenty-five years to life, and had probably signed a form that he should not possess handguns, in and of themselves, bore no relevance to appellant's motive in committing the instant crimes. Without at least foundational evidence that appellant knew he was a three strikes candidate, had made some statement or threat, or otherwise indicated that he would be willing to harm or kill to avoid a three strikes sentence, any such inference of motive would not be "logical, natural, and reasonable," but purely speculative. (*See People v. Kelley*, *supra*, 66 Cal.2d at p. 239.)

The trial court's admission of appellant's prior convictions and parole form evidence to prove motive violated appellant's rights to due process, a fair trial, and a reliable determination of his death sentence.

(U.S. Const., 5th, 6th, 8th, and 14th Amends.)

3. The prior convictions and parole form evidence had no relevance to intent.

The facts that almost ten years prior to the current charges appellant had been convicted of unrelated crimes, and that he had been required to sign a parole form acknowledging he could not possess handguns was irrelevant to appellant's intent at the time of the current charges.

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [27 Cal.Rptr.2d 646, 867 P.2d 757].) Further, where the issue in question is intent, the similarity between the charged and uncharged offenses must be substantial. (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1246 [23 Cal. Rptr. 2d 888].)

In *People v. Roldan* (2005) 35 Cal. 4th 646 [27 Cal. Rptr. 3d 360, 110 P.3d 289], this Court allowed 1101(b) evidence of prior crimes for the purposes of proving intent because the crimes bore striking similarities and were only minutely different. (*Id.* at p. 704.) The Court recognized:

> 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.'

(*Id.* at p. 706 citing *People v. Gallego* (1990) 52 Cal.3d 115, 171 [276 Cal.Rptr. 679, 802 P.2d. 169].)

In *Roldan*, in both the charged and uncharged crimes : (1) the perpetrators robbed a swap meet; (2) there were three participants, one who grabbed the money, one who stood behind him with a gun, and one in the getaway car; (3) the robbers stole readily available cash, not merchandise; (4) the robbers used an Uzi-like weapon or machine gun; (5) the weapon was obscured by clothing (in the Sun Valley crime, a coat was draped over the gun; in the San Fernando crime, the shooter wore a long coat to hide the weapon); and (6) the getaway car was owned by either a participant or a friend. The defendant intended to permanently deprive the victim of the previous crime of his money; therefore the jury could legitimately infer he harbored the same intent with regard to his actions toward the current victim. (*People v. Roldan*, *supra*, 35 Cal. 4th at p. 706-707.)

In appellant's case, the prior offenses bore no similarity to the current crime. In a comparison of the charged and uncharged offenses the only similarity is that appellant used a firearm in both offenses. The offenses – a robbery/assault and a murder – are not similar. The circumstances – the robbery of a restaurant followed by the assault of a woman waiting in her car in the parking lot and the shooting of a police officer in appellant's home – have no similarity. The victims – a restaurant manager and a woman waiting in a car in the prior offense, and a sheriff's

deputy in the current offense – have no clear connection. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 316.) To use the prior convictions for the purposes of establishing that appellant harbored the same intent in the charged offense is unreasonable and illogical. According to appellant's own statement, in the 1986 robbery/assault his intent was to rob the McDonald's because he was out of money, and his intent in the assault was to steal the woman's car to escape. (7 C.T. 1806.) There are no facts sufficiently similar to the charged offense of killing Deputy Aguirre to support the inference that appellant harbored the same intent when he committed the 1986 robbery/assault as he did when he shot and killed Deputy Aguirre.

In a case cited by the prosecution, *People v. Powell* (1974) 40 Cal.App.3d 107, [115 Cal.Rptr. 109], because the evidence was relatively sterile and reasonably tended to prove that the defendant killed to avoid revocation of his parole, this Court allowed evidence that the defendant was on parole as being relevant to the issue of intent. The facts of appellant's case clearly distinguish it from the Court's holding in *Powell*. First, in *Powell* the defendant was actually on parole at the time of the then current crimes. In the case at bar, there was no evidence that appellant was still on parole at the time of the crimes charged. Second, in *Powell* this Court found the evidence relevant not only to the prosecution's theory of premeditation and deliberation, but also to rebut the then permissible

defense of diminished capacity. In the case at bar, of course, there was no guilt phase defense of diminished capacity. Moreover, whether or not the prior crimes and parole form evidence would have been relevant to rebutting the issues of intent cannot be considered in a vacuum. At the time of the penalty phase, the prosecution was aware of, and had purposely concealed, its designated expert's opinion that appellant was suffering from paranoid schizophrenia. Any relevance of the prior crimes evidence should have been weighed in conjunction with the admission by the prosecution that appellant had been suffering from a debilitating mental illness during the time of the prior crimes and the parole form signing.

In addition, while prior acts consisting of threats to do the very behavior that occurred in the charged offense, can supply the connection, appellant had not made any such threats prior to the charged offense. For example, in *People v. Rodriguez* (1986) 42 Cal.3d 730, 756-758 [230 Cal.Rptr. 667, 726 P.2d 113], testimony that on prior occasions the defendant had stated his hatred of police officers, and had threatened to kill police officers was admissible to show his intent in actually killing police officers.

Appellant's charged and uncharged offenses were not sufficiently similar to allow their admissibility to prove intent. There was no connection between these prior crimes and the current charges. The parole form provision was likewise not relevant on the issue of intent. Therefore,

the trial court's admission of appellant's prior convictions and parole form evidence to prove intent violated appellant's rights to due process, a fair trial, and a reliable determination of his death sentence. (U.S. Const., 5th, 6th, 8th, and 14th Amends.)

C. Even If Remotely Relevant, The Prejudice Of Admitting The Prior Acts Substantially Outweighed The Probative Value.

In the case at bar, evidence of appellant's prior convictions had no probative value on any element in issue. Therefore, the trial court had "no discretion to admit irrelevant evidence." (*People v. Babbitt*, 45 Cal.3d at p. 681.) However, even if the evidence had some remote probative value, it certainly did not have "substantially probative value;" thus, the trial court abused its discretion in admitting it. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1445 [121 Cal.Rptr.2d 627]; *People v. Balcom*, *supra*, 7 Cal.4th at p. 422; *In re Jones*, *supra*, 13 Cal.4th at p. 581-582.)

Further, assuming arguendo the prior acts evidence met the sufficiently probative value threshold, its admission was still improper, as the probative value was not substantially outweighed by its prejudicial effect. California Evidence Code allows for the exclusion of evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Cal. Evid.

Code § 352.[43]) Evidence subject to exclusion under section 352, is "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. Kari* (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189].) Where the probative value is insignificant and the prejudicial impact quite substantial, abuse is apparent. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22 [180 Cal.Rptr. 266, 639 P.2d 908].)

In appellant's case the trial court's own findings reveal that it abused its discretion. The trial court conceded that the evidence concerning appellant's criminal history was "terribly prejudicial," and speculative. (18 R.T. 2993, 2997.) This is exactly the type of evidence that section 352 assumes will provoke the judge to exercise discretion.

In finding the evidence "terribly prejudicial," the trial court recognized that admission of appellant's prior convictions served to prey on the juror's emotions, encouraging them to disregard the relevant facts and focus on punishing appellant for his status as a convicted felon. By acknowledging that the motive and intent inferences sought by the prosecution were "somewhat speculative," the trial court, in effect,

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[43] California Evidence Code section provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

recognized the prosecution's case lacked evidence to substantiate its claim that appellant when committing the instant offense knew of the three-strikes repercussions of his prior convictions.

The facts of appellant's case substantiate the court's recognition. California enacted California Penal Code §§ 667 and 1170.12 in 1994 which provides for an enhanced sentence when a defendant had previously been convicted of a serious felony. Appellant was released on parole in 1991, almost three years before these provisions were enacted. Appellant's last prosecuted offense was committed in 1987. As the trial court must have been aware, the three strikes laws are very complex and have caused a significant amount of debate since their enactment including: whether retroactive application is constitutional, and whether the prior felony convictions must have been brought and tried separately (*People v. Fuhrman* (1997) 16 Cal.4th 930 [941 P.2d 1189]); the effects of plea agreements (*Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957 [2006 U.S. App LEXIS 10464], [Ninth Circuit held that counting defendant's previous conviction as eight strikes violated the terms of the defendant's plea agreement.[44]]); whether a trial court had discretion to dismiss prior strikes (see *People v. Superior Court* (Romero) (1996) 13 Cal.4th 497 [53

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[44] In *Davis* the defendant was sentenced to 25 years to life in prison under California's Three Strikes Law, counting as eight strikes a 1986 California conviction that involved eight robberies.

Cal.Rptr.2d 789, 917 P.2d 628], *People v. Fowler* (1999) 72 Cal.App.4th 581 [84 Cal.Rptr.2d 874]. There was no reason to logically or reasonably infer that appellant was somehow able to navigate through this morass and determine that he was facing a twenty-five year to life sentence based on his prior crimes. Therefore, admission of the prior crimes evidence that the prosecution used to depict appellant as a sophisticated career criminal, who understood the law and developed a motive based on that law, surely evoked an emotional bias against appellant. (*People v. Kari*, *supra*, 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189].)

While general prior acts evidence under California Evidence Code section 1101, subdivision (b) has been recognized as prejudicial, evidence of prior serious or violent felony convictions has been deemed particularly prejudicial. The particularly prejudicial nature of the prior violent crimes may necessitate they be bifurcated from the guilt determination of a defendant's trial. Having a jury determine the truth of a prior conviction allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice. "Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense. (*People v Thompson* (1988) 45 Cal.3d 86, 109 [246 Cal.Rptr. 245, 753 P.2d 37].)

In *People v. Bracamonte* (1981) 5 Cal.4th 580, 585 [20 Cal.Rptr.2d 638, 853 P.2d 1093], this Court found that a defendant who denies an alleged prior conviction is entitled to have the determination of the truth of an alleged prior conviction bifurcated from the jury's determination of the defendant's guilt of the currently charged offense. Under *Bracamonte* the jury was not informed of defendant's prior conviction, either through allegations in the charge or by the introduction of evidence, until it had first found the defendant guilty.[45] (*Id.* at p. 654.) California Penal Code § 1044 provides authority to bifurcate trial issues and vests the trial court with broad discretion to control the conduct of a criminal trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75 [36 Cal.Rptr.2d 333, 885 P.2d. 83].)

"Denial of a defendant's timely request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt is an abuse of discretion where admitting, for purposes of sentence enhancement, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant. (*People v. Calderon*, *supra*, 9 Cal.4th at p. 77.) In appellant's case, defense counsel

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[45] As noted above, and as is argued separately below, at the time of the guilt phase, the jury's understanding that appellant had been convicted of prior felonies should not have been considered by the jury in light of the prosecution's expert's opinion that appellant was debilitated by paranoid schizophrenia.

filed a timely motion to bifurcate directly citing *Bracamonte*. (18 R.T. 3028-3029.) Implicit in the trial court's ruling, allowing the prosecutor to prove appellant suffered prior convictions which made his status one if convicted of being a person in possession of firearms would be eligible for commitment to prison for 25 years to life, was a de facto denial of appellant's motion to bifurcate. (18 R.T. 3028-3029.)

D. The Prosecutor Was Improperly Allowed To Use The Evidence To Argue Disposition To Commit Murder

In addition to the error in admitting the prior crimes and parole form evidence, the trial court erred in allowing the prosecutor to improperly use the evidence to prove appellant's disposition and propensity to commit murder. The prosecutor so much as admitted to the court that it was introducing evidence of appellant's prior convictions to prove appellant's disposition. The prosecutor told the court: "We are introducing the evidence of the fact of his felony convictions leading to a 25-to-life potential sentence for the purpose of proving his motive and **disposition** to commit the crime of murder in this case." (18 R.T. 3068-3069.) This was clearly an improper use. (*People v. Westek* (1948) 31 Cal.2d 469, 476 [190 P.2d 9]; *People v. Dabb* (1948) 32 Cal.2d 491, 499-500 [197 P.2d 1]; *People v. Peete* (1946) 28 Cal.2d 306, 314-315 [169 P.2d 924]; *People v. Albertson* (1944) 23 Cal.2d 550, 576 [145 P.2d 7].)

Notwithstanding its admission, the prosecutor was allowed to argue

to the jury: "If [appellant] was willing to take responsibility and suffer the consequences for being a felon in possession of firearms, he could have not killed Peter Aguirre. But he made that self-centered decision to cause all this harm because he is simply a self-centered, cold-blooded, rotten human being." (54 R.T. 10061.) The prosecutor also argued "That's how Michael Johnson, that man, went courting to see his wife on July 17th, 1996. Armed and ready. Ready, knowing the consequences of having a gun. Ready to react with deadly force to any situation that posed a threat to his freedom." (32 R.T. 6062.)

These particular uses of appellant's prior convictions were clearly meant to show appellant had a propensity to commit the crime charged, and therefore violated appellant's rights to due process, a fair trial, and a reliable determination of his death sentence. (U.S. Const., 5th, 6th, 8th, and 14th Amends.)

E. The Trial Court Erred In Prohibiting Appellant From Arguing That There Was No Evidence Appellant Signed A Form Advising Him He Was Facing A 25 Years To Life Sentence.

Appellant attempted to minimize to some extent the prejudicial impact of the admission of the irrelevant evidence and improper and false argument offered by the prosecutor, but was prohibited by the trial court. This was error. During defense counsel's closing argument, the following occurred:

The prosecution has advanced, ladies and gentlemen, the theory that Michael Johnson's motive for killing Deputy Aguirre on July 17th, 1996 was because as a previously convicted felon who was in possession of firearms that he knew that he could go back to prison for 25 years to life. So what they say, then, is that Michael Johnson killed Deputy Aguirre and attempted to murder Deputy Fryhoff to avoid that consequence of 25 years to life in prison. But again, all that really is just a theory, ladies and gentlemen. It was never established that is what Michael Johnson thought. There was never any evidence that that was his motive.

Where was the evidence, I ask you, that Michael Johnson knew of that consequence of 25 to life? Does it say on that parole form he signed when he last got out of prison with regards to being unable to possess firearms that "If you do possess those firearms, you're going back to prison for 25 to life?" Does it say that on that document?[46] Did anybody get up on the witness stand –

[Prosecutor Harvey]: I'm going to object to this line as arguing based on a prior ruling of the Court.

[The Court]: Counsel approach for a moment. Counsel, please.

(The following proceedings were held at the bench.)

[Prosecutor Hardy]: It's improper to refer to the evidence we had of the three strikes or the use of the term "three strikes" from which an inference would be anybody would know it or to argue the absence of that evidence.

[The Court]: The problem -- I understand your concern -- my problem based on that is the way it is framed -- in the way it's framed, it's almost commenting on the defendant would have testified to that had he been called, and it suggests –

[Prosecutor Hardy]: We can't get into that at all.

[The Court]: I know that. That is my concern. Also, I'm

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[46] There was, indeed, no such reference.

> concerned and I deliberately kept out the issue of the three strikes, that everybody and his brother has read about or heard about that, so I will sustain the objection and ask you to move to another area on that basis." (45 R.T. pp. 8225-8227.)

Preventing appellant from arguing there was no evidence to support the prosecution's theory that appellant's motive for murder was to avoid returning to prison for twenty-five years to life, defied logic. There was, in fact, no evidence to support that theory. The trial court specifically allowed the prosecution to argue the theory, based merely on the fact that appellant suffered two strikes and presumably signed a parole form prohibiting appellant from possessing firearms. By its own words, the trial court recognized the "speculative" nature of this inference. Thus, as a matter of due process, it was essential that appellant be allowed to address the prosecution's theory as being one based on nothing more than speculation.

The trial court's reasons for prohibiting appellant from countering the prosecution's argument fail. The first, that defense counsel's argument was nearly a comment on what appellant would have testified to regarding a lack of such motive, had no basis. Nothing defense counsel said suggested he was referring to appellant's would-be testimony. Rather the argument pointedly referred to the prosecution's evidence (the parole form) and the prosecution's failure to provide sufficient evidence to support its claim. ("[w]here is the evidence, I ask you that Michael Johnson knew of that consequence of 25 years to life?")

Just before he was interrupted, defense counsel had started, "Did anybody get up on the witness stand –." However, nothing about this partial sentence implied that defense counsel was referring to appellant taking the stand. The use of the word "anybody" logically suggest defense counsel was speaking about other witnesses. There were witnesses who defense counsel could have spoken about who testified about appellant's state of mind. For instance appellant's wife, the prosecution's witness, testified to appellant's statements and his state of mind throughout the events in issue and nowhere in her testimony did she offer any support for the prosecution's theory that appellant knew he was facing twenty-five years to life, or that he thus harbored such a motive to kill Deputy Aguirre. Additionally, the prosecution presented the testimony of Dr. Patterson as to statements appellant made after the homicide. Nowhere in those statements was there any evidence that appellant knew he was facing twenty-five years to life, let alone harbored a desire to avoid it such that he would kill Deputy Aguirre. Thus, defense counsel' argument properly sought to attack the speculative nature of the prosecution's evidence. It was erroneous for the trial court to find that it was offered for the purpose of stating what appellant would have said had he testified.

The second reason given to prohibit defense counsel's argument was that the trial court had kept out the "issue" of three strikes. This reason was just plain wrong. While the court may have kept out the words "three

strikes," over appellant's objection, it had specifically permitted the prosecutor to argue appellant's motive to kill was to avoid a prospective twenty-five years to life (three strikes) sentence. Accordingly, while the court may have appropriately prohibited defense counsel from using the words "three strikes," it was clearly improper to deny him the opportunity to rebut the substance and consequences of the three strikes law as offered and argued by the prosecution. Also of significance, is that the court's ruling prevented appellant from countering the misconduct of the prosecutor in arguing that the parole form contained an admonition that appellant would be facing a sentence of twenty five years to life. By sustaining the objection to defense counsel's argument on this point, the trial court was in essence endorsing the false argument and misrepresentation of the evidence.

The trial court's ruling admitting the prior crimes evidence was in error. Further, the error was compounded when the trial court prevented appellant from addressing the issue and thereby denied him the opportunity to mitigate the harm caused by admission of the evidence and cemented in the jury's mind by the prosecution's argument.

F. The Prejudice In Admitting The Prior Crimes, Parole Form Evidence And Improper Argument Compels Reversal.

The terrible prejudice the trial court recognized from the admission of the prior crimes and parole form evidence rose to the level of a violation

of appellant's fundamental rights both directly and as incorporated in the due process clause of the Fourteenth Amendment. (U.S. Const., 5th, 6th, and 14th Amends.; Cal. Const., art. I, § 13.) The erroneous admission and argument by the prosecutor infected both the guilt and penalty phases of trial. Similarly, they violated appellant's right to a reliable determination that death was the appropriate sentence. (U.S. Const., 8th Amend.; Cal. Const. art. I, §17; see *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [97 S.Ct. 2978, 49 L.Ed.2d 944] (plur. Opn. of Stewart, J.).)

The unwarranted use of character evidence is among the few evidentiary errors considered so egregious that it amounts to a violation of due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381-1382.) As then Chief Justice Harlan of the United States Supreme Court stated in a concurring and dissenting opinion in *Spencer v. Texas* (1967) 385 U.S. 554 [87 S.Ct. 648]:

> Recognition of the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.

(*Spencer v. Texas*, *supra*, 385 U.S. at p. 575.)

The United States Supreme Court has ruled that the Due Process Clause mandates proof beyond a reasonable doubt for criminal convictions. (*In re Winship* (1970) 397 U.S. 358, 362 [90 S.Ct. 1068, 25 L.Ed.2d 368].) It has also ruled that criminal laws that punish a person for his mere status violate the Due Process Clause of the United States Constitution by imposing a cruel and unusual punishment. (*Robinson v. California* (1962) 370 U.S. 660 [82 S. Ct. 1417; 8 L. Ed. 2d 758].) It has further ruled that the admission of evidence which is unnecessarily suggestive and conducive to irreparable mistake amounts to a denial of due process of law. (*Stovall v. Denno* (1967) 388 U.S. 293 [87 S. Ct. 1967; 18 L. Ed. 2d 1199].) Permitting evidence of appellant's prior convictions to show propensity diluted the standard of proof beyond a reasonable doubt and created a grave likelihood that the jury convicted appellant because of his status as a prior offender and upon evidence which was unduly suggestive and conducive to irreparable mistake.

The prosecutor's extensive use of this evidence in both opening and closing argument reveals that the prosecutor was following through with his promise to use the evidence "for the purpose of proving [appellant's] motive and disposition to commit the crime of murder in this case." (18 R.T. 3068-69.) As the prosecutor beseeched the jurors: "If [appellant] was willing to take responsibility and suffer the consequences for being a felon in possession of firearms, he could have not killed Peter Aguirre. But he

made that self-centered decision to cause all this harm because he is simply a self-centered, cold-blooded, rotten human being." (54 R.T. 10061.) There was very little evidence explaining why appellant committed these horrendous acts. Permitting the prosecutor to present speculative evidence, and fabricate argument allowed the jury to make an improper leap from an impulsive act to premeditated and deliberate.

The improper admission and use of the evidence can not be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's defense to the guilt phase was that the homicide was non-deliberate and unpremeditated. The improper use and argument of the prior crimes evidence effectively destroyed this defense. Appellant's defense in the penalty phase was that appellant was suffering from the debilitation of paranoid schizophrenia. The improper admission and use of the evidence – in light of the prosecution's concealment that appellant was in fact suffering from paranoid schizophrenia, while also denigrating the defense expert on this subject and arguing to the jury that appellant was not suffering from paranoid schizophrenia – utterly destroyed the defense. Under the *Chapman* standard, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Ibid.*) This familiar rule is a reiteration by the United States Supreme Court of the standard in *Fahy v. Connecticut* (1963) 375 U.S. 59 [84 S.Ct. 178, 11 L.Ed.2d 128]: "The question is whether there is a

reasonable possibility that the evidence complained of might have contributed to the conviction." The court has formulated the inquiry as "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S. Ct. 2078, 124 L. Ed. 2d 182].) Under any of these formulations, one cannot declare that the error in this case was harmless beyond a reasonable doubt as to both the guilty verdicts and the penalty of death.

Alternatively, even if the errors are found to have violated appellant's rights under state law, reversal is nonetheless compelled. If the trial court had correctly ruled to exclude appellant's prior convictions to prove motive or intent, it is reasonably probable that one or more of the jurors might have found merit in the defense's argument that this was not a premeditated or deliberate killing. On the critical issue before the jury, whether the murder was premeditated or deliberate, the prosecution's case was speculative.

It is also reasonably probable that, if excluded, the prosecutor would have lacked the necessary evidence to necessitate the death penalty. Thus, it is reasonably probable that, but for the erroneous rulings, a result more favorable to appellant would have been reached in the guilt phase or, at minimum, in the penalty phase. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; Cal. Const., art. VI, § 13.

Appellant's judgment of conviction and penalty of death must be reversed.

VII. THE PROSECUTION COMMITTED MULTIPLE ACTS OF MISCONDUCT RESULTING IN APPELLANT RECEIVING A TRIAL DEFECTIVE UNDER BOTH THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

The prosecution engaged in profound and prejudicial misconduct from the very beginning of appellant's proceedings to the very end of trial. The multiple instances of misconduct, themselves, or in combination with other instances of error, resulted in a prejudicial and defective trial under both the California and United States Constitutions.

The pretrial proceedings began with the prosecution making ad hominem attacks on defense counsel. Following this were vociferous accusations of fraud and conspiracy against the Public Defender's Office and County Counsel. The misconduct continued through the guilt phase of the trial which closed with the prosecution committing misconduct by both mischaracterizing the state of the evidence and by arguing facts not in evidence. The penalty phase produced the most destructive misconduct, with the prosecution illiciting Deputy Fryhoff's guilt and frustration at not having killed appellant. In further aggrevation of the misconduct, the lead prosecutor made disparaging gestures towards the jury during the defense psychologist's expert opinion.

A. Beginning In Pretrial Motions, And Throughout The Trial, Prosecutor Hardy[47] Engaged In *Ad Hominem* Attacks On Defense Counsel.

Outside the presence of the jury, the prosecution engaged in a series of *ad hominem* attacks against defense counsel. This created a toxic atmosphere that pervaded the proceedings from pretrial motions through trial. Not every instance of intemperate or abusive behavior by the prosecution is set forth herein. Nor was every instance, in and of itself, prejudicial under the federal and state constitutions. However, as a whole, the instances allowed the prosecutor to prejudicially affect the proceedings by affecting the integrity of the trial court's rulings.

A first instance, took place early in the pre-trial proceedings. On July 3, 1997, the trial court heard appellant's motion to "discover the grand jury transcript." (10 R.T. 1550.) Following defense counsel's argument, prosecutor Hardy attacked the defense's veracity. Hardy said of the defense motion, "it's actually specious. There is actually no basis for

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[47] As will become apparent, almost exclusively, the abusive misconduct came from first chair prosecutor Matthew Hardy. Not only was his behavior a problem for appellant, defense counsel, the trial court and the jury, but for the Office of the District Attorney. During a motion to continue sentencing, prior to the argument on appellant's motion for new trial, Mr. Hardy became "intemperate" and both the trial court and Supervising District Attorney Holmes attempted to control Hardy's behavior. (R.T. 10146, 10152-10153, 10156-10158.) Holmes asked for a recess, Hardy interjected, "No, Mr. Holmes doesn't want me to speak. May I be excused?" After the court granted a recess, Holmes replaced Hardy as lead counsel for the remainder of the proceedings. (55 R.T. 10157.)

making any honest argument." (10 R.T. 1551.)

There was no spontaneous objection to this by defense counsel. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground - the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [25 Cal.Rptr.2d 867, 864 P.2d 40].) However, an objection and admonition are not necessary to preserve the issue for appeal, where they would be futile or not practicable. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638 [15 Cal.Rptr.2d 400, 842 P.2d 1160].)

In this case, an immediate objection and admonition were not necessary to preserve the issue for appeal. First, because the misconduct occurred outside of the presence of the jury, no admonition was necessary. Second, the trial court, itself, recognized the misconduct. After ruling on the merits of the motion, the court sua sponte noted: "I will add as a footnote: I don't doubt your bonafides in making the motion. You represent your client, you brought your motion, and that's not an issue. I take the motion at face value that's presented to me." (10 R.T. 1553.) Moreover, during the hearing on appellant's motion for new trial, the trial court recounted: "... July 3, 1997 saying defendant's argument was specious was not an honest argument by Mr. Hardy in my opinion." (55

R.T. 10258.)

A second instance occurred during the pre-trial hearing on appellant's *Miranda* motion to exclude the statements made to Dr. Patterson. Defense counsel was examining Sheriff's Commander Wade, when Mr. Hardy objected, and offered a "comment" on defense counsel's professionalism. The following colloquy occurred:

> "Mr. Hardy: Your Honor, I just want to make a comment and interject a 352 objection here. I suspect that we will have the integrity of every law enforcement person who testifies in this case attacked by Mr. Howeth.
>
> "If we want to talk about agendas, I think there's one going on here along that line as well. They have been called. They're here. A lot of people are going to be testified -- testifying in the next -- God knows how long, who are subject to some pretty cheap shots.
>
> The Court: Well, I --
>
> Mr. Hardy: And I'm -- I'm sorry.
>
> The Court: I have nothing from Mr. Howeth yet that has been any cheap shot or even approaching one. If it comes up, it will be the first, it will be the last. And I'm sure that you'll be quick to point out to me that we've hit that level.

It was not necessary for defense counsel to have objected to the prosecutor's ad hominem attack, since the trial court immediately addressed the charge and attempted to defuse the allegation.[48] (*People v. Arias,*

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[48] As will become more evident below, rather than admonish and nip in the bud prosecutor Hardy's abusive behavior, the trial court tended to defuse Hardy's ill-temper by placating him. Thus, the offer that "I'm sure you'll be quick to point out to me that we've hit that level;" i.e., when defense

supra, 13 Cal.4th at 159; *People v. Noguera* , *supra*, 4 Cal.4th at 638.) The trial court also referenced the impropriety of Hardy's comments at the motion for new trial, noting that Hardy's claim, "Mr. Howeth took a "cheap shot" on July 31, the Court's finding he did not, all evidence Mr. Hardy's dislike for the defense counsel." (55 R.T. 10251.)

A third incident also occurred during the pre-trial hearing on appellant's *Miranda* motion. Hardy was examining his supervisor, District Attorney Holmes. The subject area was Holmes' advice to Commander Wade to not allow the Public Defender in to see appellant while he was in custody in the hospital. During this examination, Hardy asked Holmes about a belief by the District Attorney's Office that in a prior trial the Public Defender had targeted prosecution witnesses for intimidation and harm, and that the Public defender's Office had been advising witnesses not to talk with District Attorneys. Defense counsel objected on relevance. The trial court overruled the objection, finding it relevant on the limited

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counsel has actually taken a cheap shot. This contributed to embolden Hardy, whose misconduct became more bizarre and severe as the trial progressed. It was not until just prior to appellant's Motion for New Trial, that the trial court first and finally admonished Hardy. It came after the court became troubled by another of Hardy's unwarranted "accusations addressed to the general ethics of the Public Defender's office." (55 R.T. 10171.) As is clear from the admonition, and the misconduct set forth below, it was far too little far too late. The court ordered: "Mr. Hardy is admonished not to do that again, to have no personal direct conversation in this courtroom with defense counsel whom it is clear he does not like. He just doesn't." (55 R.T. 10172.)

issue of whether Holmes' state of mind was affected by this information at the time he advised Sheriff Commander Wade to deny access to appellant. The following colloquy occurred:

> "[Hardy]. Regarding your decision to tell Commander Wade, based on the state of the evidence as you -- the state of the facts as you knew them at the time, not to allow Public Defender Briles to contact the defendant, did you have in your mind at that time any concerns regarding whether that contact could -- could involve such things or result in such thing as witness intimidation?
>
> "A. There -- there have been considerable disputes, at least I'm certainly far more aware of them, in the last several years as to things that the public defender investigators have done that I find absolutely appalling. And -- and I -- I would certainly want to avoid witness intimidation or witnesses -- witnesses being shot at, which has happened in the past, et cetera.
>
> "Q. And are you -- were you –
>
> "A. I'm certainly aware of that at that time. I've been the one that's complained about it considerably to upper management, that is, management above me.
>
> "Q. And are you -- were you –
>
> "A. I'm certainly aware of that at that time. I've been the one that's complained about it considerably to upper management, that is, management above me.
>
> "Q. Did that include situations in which it appeared that the public defender had provided information that had allowed witnesses to be targeted?
>
> "A. Yes.
>
> "Mr. Howeth: Objection, your Honor, relevance.
>
> "The Court: I'll allow a motion to strike if in fact that was not the fact operative on his mind at the time the decision was made. If it was, it's relevant. If it wasn't, it's irrelevant.

"The Witness: No. I certainly have a case in mind where a witness of yours got the hell kicked out of them. Somebody was holding a transcript, which would be a fantastic thing for somebody to do, which only people who are involved in the court -- immediate court system would have access to. I believe it was the Bolo case you tried, and I certainly remember that rather vividly.

"Q. I believe that was a felony, Alfonso Cortez, who was actually chased by gang members; is that right?

"Mr. Howeth: Objection; relevance.

The Witness: I don't remember the name of the man. I do remember the case.

"The Court: Again, the only issue I'm concerned with was his state of mind at the time he gave Wade the order on the 18th. And please indicate if that was a factor that preyed on his mind at that time.

***

[Hardy]: Were you aware on the 17th of a practice in the Public Defender's office of telling witnesses not to talk to us?

"Mr. Howeth: Objection, your Honor.

What's the relevance?

"The Court: The issue's been raised as to why he told or had a discussion with Commander Wade concerning accessibility of the public defender to --

"Mr. Howeth: An attorney.

"The Court: -- to the defendant. No, specifically, public defender to the defendant. And my -- this has been put in issue. And I believe the questions are nothing more, nothing less than an exposition of why he did what he did, which has been made issue." (R.T. 2096-2098.)

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"Q. Specifically, in fact, are you aware of any information

> regarding this case in which Christina Briles told witnesses or gave witnesses advice that had to do with not talking to us?
>
> "Mr. Howeth: Objection; relevance, if it's this case, if it happened afterwards.
>
> "The Court: If it predates the conversation with Wade, I'll overrule it. If it's a question that concerns incidents that occurred after the conversation --
>
> Mr. Hardy: I'm sorry. Is the Court saying that any suspicions he might have had, to the extent they played out in this case, are not relevant?
>
> "The Court: Yes. I think his state of mind is what his state of mind is. (12 R.T. 2099-2100.)

Although defense counsel's objection was to relevance, not to misconduct, it is clear an objection on the basis of misconduct would have been futile. (*People v. Arias, supra*, 13 Cal.4th at 159; *People v. Noguera, supra*, 4 Cal.4th at 638.) In allowing the testimony over the relevance objection, it is clear the trial court would not have found the question and answer by the prosecution to be misconduct. However, while the trial court allowed the evidence only for the limited purpose of Holmes' state of mind in giving advice – a very limited issue – prosecutor Hardy clearly presented it to somehow show that the Public Defender's actions had "played out in this case." Even as late as in his Points and Authorities in Opposition to a Motion for new Trial, Hardy argued as true that Public Defender Christine Briles had attempted to dissuade appellant's wife from testifying and appellant's mother from speaking with the prosecution's office. (13 C.T. 3301-3302.)

Addressing the question whether Hardy's accusations were misconduct, at the hearing on the motion for new trial the court found:

> "The Bolo trial has been cited by both sides as evidence of the presence or absence of wrongdoing on the part of the defense. I have read the entire transcript which I have been provided. It is fairly standard fare and wholly wanting in demonstrating any justification in my eyes for the accusations leveled at Mr. Howeth by Mr. Hardy. Once again, the Court was not privy to this before these proceedings." (R.T. 10250-10251)

A fourth incident occurred during a pretrial hearing on appellant's motion to have sheriff's officers who would be observing the trial not wear uniforms. During his argument, prosecutor Hardy added a non sequiter, accusing defense counsel of "pretty nasty attacks on [a prior judge hearing] the case." (18 R.T. 3074.) The trial court immediately interrupted Hardy, thus there was no need for an objection by defense counsel. (*People v. Arias, supra,* 13 Cal.4th at 159; *People v. Noguera*, *supra*, 4 Cal.4th at 638.) Moreover, the trial court acknowledged the impropriety of this conduct at the motion for new trial:

> "Pretty nasty attacks on Judge O'Neill"; I don't know what he was talking about in that case, referring to Mr. Hardy's allegation of some pretty nasty attacks on Judge O'Neill. That was improper, out of the presence of the jury." (55 R.T. 10260.)

A fifth incident occurred during the penalty phase, with prosecutor Hardy calling defense counsel "a rat." At a bench conference following an objection to appellant's mother showing a picture of appellant (which the

trial court ultimately found admissible, 53 R.T. 9831), the following exchange occurred:

> "The Court: I'd like her to take it down.
>
> "Mr. Hardy: I don't want to make a scene --
>
> "The Court: So why don't you --
>
> "Mr. Hardy: I want to know whether or not he knew she had it when she went up there and she was gonna flash it. I want to know that.
>
> "Mr. Boles: I did not know she was going to prop it up like she's had it propped up.
>
> "Mr. Hardy: Did he know she was gonna show it to the jury?
>
> "Mr. Boles: I did not know she was gonna show it to the jury. I knew –
>
> "Mr. Hardy: Why didn't you think she was gonna show it when she's carrying it with her?
>
> "Mr. Boles: Because she wanted to hold onto it while she testified.
>
> "Mr. Hardy: **I smell a rat**. Nothing I can do about it.
>
> "The Court: Stop. I will have it --
>
> "Mr. Hardy: There's nothing to do about it now. It's been done." (50 R.T. 9314-9315.)

Here too, because the trial court immediately stopped Mr. Hardy following his disrespectful comment, no further objection by defense counsel was necessary. (*People v. Arias, supra,* 13 Cal.4th at 159; *People v. Noguera, supra*, 4 Cal.4th at 638.)

1. The prosecutor's series of denigrating accusations constituted misconduct.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill* (1998) 17 Cal.4th 800, 832 [72 Cal.Rptr.2d 656, 952 P.2d 673], citing among other references, Witkin & Epstein, Trial, § 2914, p. 3570s ["An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable."].) Likewise, a prosecutor commits misconduct if he denigrates the defense as a sham. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224.)

"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." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [40 Cal.Rptr.2d 456, 892 P.2d 1199].) Even if not sufficient to offend federal constitutional protections, prosecutorial misconduct violates state law if the prosecution employs ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 [64 Cal.Rptr.2d 400, 938 P.2d 2].)

Prosecutor Hardy's continuous *ad hominem* attacks served no purpose other than to denigrate defense counsel in the eyes of the trial

court. In virtually every instance, the trial court recognized that the prosecutor's conduct above was improper. The attacks constituted a pattern of egregious behavior intended to wear down defense counsel and ultimately the trial court. While the attacks constituted misconduct on their own, they merely served as the base point for the more severe misconduct set forth below. In conjunction with the additional instances of misconduct below, the misconduct was designed to influence the trial court and the jury.

2. The continuous *ad hominem* attacks led to a toxic trial atmosphere that ultimately resulted in prejudice.

Where misconduct so infects a trial as to render it infirm under federal constitutional principles, reversal is required if the misconduct cannot be found harmless beyond a reasonable doubt. (*See Chapman v. California, supra,* 386 U.S. at 24.) Where the misconduct is such that it violates only state constitutional privileges, reversal is required if it is reasonably probable that, without the misconduct, a different result would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

It would be premature to isolate the above misconduct and assess prejudice. The misconduct should be viewed in conjunction with the misconduct below, which ultimately, and conclusively, resulted in prejudice. As this Court said in *Hill*: "We need not determine whether any individual instance of misconduct was itself prejudicial, for each

contributed to the general acrimonious atmosphere that threatened defendant's right to a fair trial. We reiterate, however, that such "offensive personality" is not appropriate from a representative of the state's interests." (*People v. Hill, supra*, 17 Cal.4th at 838-839.)

B. Prosecutor Hardy Attempted To Intimidate The Trial Court By Warning That If It Granted Appellant's *Miranda* Motion To Suppress The Statements Made To Psychiatrist Patterson, It Would Perpetrate A Fraud On The Jury.

On July 28, 1997, during argument on appellant's *Miranda* motion to suppress appellant's statements to psychiatrist Patterson, Prosecutor Hardy warned the trial court that it would be perpetrating a fraud on the jury if it granted appellant's motion. Defense counsel immediately objected.

The following is the colloquy:

> "[Mr. Hardy]: What I wanted to do was make sure we put into perspective what this is really about, what we're talking about suppressing here. What we're talking about doing is suppressing evidence that will permit and operate a fraud upon the jury. That fraud is a pretty serious thing to do.
>
> "In what is supposed to be a search for the truth –
>
> "Mr. Howeth: Objection, your Honor.
>
> "Mr. Hardy: -- the Court doesn't want –
>
> "The Court: One second, please.
>
> "Mr. Howeth: I object to the comments by making a legal motion to suppress statements that we are attempting to commit some kind of fraud upon the jury. We make a motion to strike those comments as inappropriate to this motion.

"The Court: It would appear to me the issue is the validity or invalidity of the statements under the law.

"Proceed." (10 R.T. 1576.)

During the hearing on appellant's motion for new trial, the trial court again addressed Prosecutor Hardy's conduct: The court stated:

"July 28th. The Miranda issues. Mr. Hardy argued it would be a fraud on the Court. I told Mr. Hardy the defendant was behaving properly. I said I perceived no fraud and I sustained the defense objection, I believe." (R.T. 10258-10259.)

1. Prosecutor Hardy's Warning was more than an attack on defense counsel. It was an attempt to intimidate the trial court.

Though both defense counsel and the trial court addressed Mr. Hardy's warning as an attack on the integrity of defense counsel, it was, in fact, much more. While, inherently, Hardy was implicating defense counsel as the progenitor of the fraud, he was specifically warning the trial court not to perpetrate a fraud on the jury by suppressing appellant's statements. No one but the trial court would be "suppressing evidence that will permit and operate a fraud upon the jury." Nothing but intimidation can be gleaned from Hardy's added warning: "That fraud is a pretty serious thing to do."

2. In light of the trial court's erroneous ruling on the *Miranda* Motion, prosecutor Hardy's misconduct was prejudicial.

Prosecutor Hardy's warnings that the trial court would be perpetrating a fraud and that fraud was a serious thing to do, were

reprehensible and were designed to specifically "persuade" the court. (*People v. Samayoa, supra,* 15 Cal.4th at 841.) The intimidation likely persuaded the trial court. As more fully discussed in Argument IV, above, appellant's statements were taken in violation of the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. (*Edward v. Arizona, supra,* 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378].) Therefore, reversal is required because the misconduct cannot be found harmless beyond a reasonable doubt. (*See Chapman v. California, supra,* 386 U.S. at 24.) Further, in light of the trial court's erroneous ruling, it is reasonably probable that, without the misconduct, a different result would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. In Attempts To Intimidate The Trial Court, Prosecutor Hardy Stated That A Significant Gallery Presence Of Uniformed Officers Was Necessary To Ensure Law Enforcement Received Justice, That The Court Needed To Make Sure Law Enforcement "Trusted" How The Trial Was Being Conducted, And That Hardy Would Keep Law Enforcement Apprised.

Appellant brought pre-trial motions to limit the number of uniformed sheriff officers attending the trial, and to preclude persons attending the trial from wearing visible signs of mourning.

During his argument against limiting the number of uniformed officers, prosecutor Hardy issued the following out-of-context warnings:

> "I don't want to get into it today, but the fact of the matter is that I think that it is wholly appropriate for officers to be here to make sure that the atmosphere in this courtroom is such

> that is conducive to the ascertainment of justice. And it seems to me that if an officer feels that he wants to wear his uniform or if he's on duty and he wants to come to court, that's his choice. And I don't know what authority the Court has to order otherwise.
>
> ***
>
> "I think the atmosphere is such that the need -- that we have to make sure that the law enforcement community trusts that what happens here isn't going to exist in an atmosphere of prejudice, an atmosphere of pressure, an atmosphere that's inappropriate and that the 12 people chosen from this community to decide what happens to the killer of Peter Aguirre really got a fair shake at what they had a right to hear. I think based on that this motion should be denied. I don't know what authority you'd have to enforce it anyways" (R.T. 3073-3075.)

The import of Hardy's warning was dire and frightening: a significant presence of uniformed officers was necessary to insure justice for their fallen comrade. Why, other than to intimidate defense counsel, the court and the jury, would such a presence be necessary? Hardy's implication couldn't have been clearer. A large presence of uniformed officers would assure that law enforcement "got a fair shake at what [the jury] had a right to hear." Hardy's comments were evincing his plan to intimidate counsel, the court and the jury.

Though defense counsel did not directly object to the misconduct, counsel did appropriately respond, stating: "... in light of Mr. Hardy's comments, in line with those, I can't think of what could be more of an atmosphere of pressure or prejudice to a jury than looking behind them and

seeing a sea of police officers." (18 R.T. 3075.) Because the prosecutor's comments were out of the presence of the jury, this response made any further objection unnecessary.

The trial court agreed with defense counsel that there could be an extreme case where the number of uniformed officers became coercive and unfair, however, it ultimately demurred to setting a preemptive limitation. (18 R.T. 3076-3077.)

Following argument on the symbols of mourning, the trial court granted the motion, finding that the symbols would be "victim-impact evidence being offered before the jury during the guilt phase." Apparently frustrated, the prosecutor responded:

"For the record, we also, so you know, communicate with the various law enforcement agencies consistently about – and we do it frankly and we do it honestly, because we consider – at least I consider law enforcement to be family for me – exactly how we think this case is going on. We'll continue to do that as well." (19 R.T. 3078.)

The trial court immediately responded, thus making any objection by defense counsel unnecessary. (*People v. Arias, supra,* 13 Cal.4th at 159; *People v. Noguera*, *supra*, 4 Cal.4th at 638.) The trial court expressed its concern at the implication of Hardy's comment, but harkened back to its decision not to limit the number of uniformed officers. The court stated: "I'm not sure exactly what the intention of that was, but my only response

is that to the extent anything is presented in court which appears to -- might influence the jury in its decisions, the Court would not allow it. I do not make any orders limiting who can attend my courtroom, and I'll leave it at that." (19 R.T. 3078.)

During the motion for new trial, the trial court revisited Hardy's latter statement:

> "October 28, 1997 I granted the defense motion on visible symbols of mourning which I subsequently tempered by saying the victims and I think even sheriff's deputies could wear small badges that had black across them but any other visible signs of mourning would be prohibited. Mr. Hardy made some comment. I attributed nothing to it. Maybe I should have. I didn't." (55 R.T. 10260.)

1. The prosecutor's statements were specifically designed to intimidate and influence the trial court.

The prosecution's warnings were shocking and disgraceful instances continuing the pattern of egregious behavior that infected the trial. (*People v. Gionis*, *supra*, 9 Cal.4th at 1214.) The fact that they occurred out of the presence of the jury is of no moment. A prosecutor is not afforded "carte blanche just because the jury is not present." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 693 [273 Cal. Rptr. 757].) Moreover, the very purpose of such reprehensible intimidation was to influence or "persuade" the court. (*People v. Samayoa, supra,* 15 Cal.4th at 841.)

2. This instance of misconduct, in conjunction with the remaining instances of misconduct, resulted in prejudice to appellant.

The prosecutor's comments were an insidious attempt to persuade the trial court to begin ruling in favor of the prosecution. As will be seen below, the prosecutor's behavior did ultimately so persuade the trial court. Thus, this misconduct was "'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal. Rptr. 2d 682, 838 P.2d 204].)

D. Prosecutor Hardy Verbally Assaulted And Physically Intimidated An Assistant County Counsel Appearing For A Hearing On The Subpoena Of Records.

On October 14, 1997, just prior to a hearing on records subpoenaed from the Ventura County Mental Health Department, prosecutor Hardy verbally assaulted and physically intimidated Assistant County Counsel Patricia McCourt, who was appearing on behalf of the Mental Health Department.

The following testimony from Ms. McCourt, elicited at the motion for new trial, best describes what occurred:

> "[Ms. McCourt]. As a preliminary matter, I would want to clarify one thing and that is the understanding under which I appeared in this courtroom in the first place.
>
> "I think you've spelled out the basic reason that I was involved in this case at all. As an Assistant County Counsel, I represent the former Mental Health Department.

"Approximately a week before I appeared in this courtroom, however, I had received a call from the co-prosecutor on this case, Maeve Fox. Maeve had explained to me that apparently -- and I think you had spelled this out, Mr. Quinn -- that after the release of Mr. Johnson's file to all parties, there had been some kind of a rescission.

"I was not aware there had been a rescission certainly but there was some kind of a rescission and then subsequent to the rescission it was my understanding there was another psychological evaluation that had been performed by Dr. Kus. There was a question as to whether or not the release signed by Mr. Johnson would in fact cover that psychological evaluation.

"I explained to Miss Fox that I took a fairly conservative view when it came to the release of otherwise confidential mental health records and it would be my preference to merely come in and ask for a court order authorizing the agency to hand it over, thereby getting around any potential liability to the county.

"She said, "No problem, that's understandable, I think your position is reasonable," asked when I could appear in court and we agreed I would come into court I think it was the following Tuesday to do so.

"So that I think I need to clarify that's really why I was here that morning."

"[Defense Counsel Quinn]. All right. In terms of the conduct of Mr. Hardy that morning, did he use other words other than I have described in addressing you that morning that were offensive and impugning your integrity?

"A. Yes, he did.

"Q. What were they?

"A. I should first say that it was not just the words Mr. Hardy used to me; it was his general manner that he used while he was saying the things he said.

"Maybe I can just describe it briefly. I came in and sat in back of the People's table. About a minute later, Mr. Hardy

came in. I greeted him, as I have known Mr. Hardy for years. Immediately he came over to me -- and I again should clarify I was seated at the time.

"He leaned over me in a very angry way, sort of leering down at me, and said, "Well, is it your intention to bring in perjured testimony like you always do?

"That was how he greeted me.

"For approximately the next I would say five to seven minutes, Mr. Hardy involved himself in a series of what I would call rounds, where he would come up to me and accuse me of things such as you've said, being sleazy, being unethical.

"I should also mention as well as on the record later -- it was off the record -- that he accused me of being involved in the obstruction of justice in this case. He accused me of conspiring -- his word -- with my client to make up lies about this case, he accused me of conspiring with my client to hide information, failed to disclose information from the Court, from the prosecution.

"Again, this went on for about five to seven minutes. He would come up, make accusations at me, walk away from me, circle around, come back at me again. All of this was being done in a loud, angry tone of voice. There were a lot of people in the courtroom. And again, his physical presence was at all times angry, intimidating, imposing and I have no doubt intending to intimidate me.

"[Prosecutor] Holmes: I move to strike the last portion as speculation.

"The Court: What his intent was is sustained. The description will stand.

"[Defense Counsel]: Do you recall whether family members of the victim were present in the courtroom at the time?

"A. I'm not familiar enough with this case to know. I don't know. I was just aware there were a lot of people in the courtroom, some of whom I did know from working in the court system.

"Q. In the courtroom occasionally there are flare-ups and words and tempers in court.

"A. That's correct.

"Q. Are you aware of --

"A. I've been an attorney for 17 years and I've certainly seen flare-ups in the courtroom.

"Q. Can you compare this particular incident to other courtroom behavior you have witnessed or been subject to?

"A. I've never seen anything like it. It was the most outrageous conduct in a court that I've ever seen. In fact, when it started, I was so taken aback I didn't even know what was happening, it was so incredible.

(R.T. 10214-10218.)

After the trial court took the bench, an unapologetic Hardy continued his barrage of unsubstantiated accusations against the Ventura County Mental Health Department's employees and County Counsel. The following exchange with the trial court occurred:

"[Mr. Hardy]: Your Honor, let me address this point. What happened was -- and this has happened with County Mental Health and County Counsel before on previous cases. We showed up with a valid consent. The psychologist, who had in 1994 interviewed Mr. Johnson and who I believe is the first psychologist ever to diagnose him with any type of a problem, went into those records after Peter Aguirre was died -- or had died and before we got over there with the consent and pulled some of the raw data.

"She then wrote a report, basically covering her butt, and then in the interim we had taken what records they had. We were never advised -- ever advised that those things were taken out until Ms. Fox interviewed a psychologist I believe about a week ago. From that point on they've refused to talk to us. That's obstruction of justice. I don't know what I can prove,

but there is no way in hell that that was anything but -- pulling those records were to cover herself and the failure of County Counsel or Mental Health. As I said, they've done this before. They did this in the Pedersen case.

"The Court: I don't know anything about the Pedersen case.

"Mr. Hardy: The failure to notify us of the of those critical records, critical to this case, is an absolute aberration. This is disgraceful. What happened now is delay has allowed people to get their stories straight and we're never going to get to the truth.

"This is just plain wrong. And I'm sorry that County Counsel didn't bother to read the declaration filed in this case to find out what was going on. But that's what's going on here, and it's just plain wrong." (18 R.T. 2926-2927.)

Hardy's tirade against County Counsel continued:

"I think we have more than one issue here. I believe County Counsel represents Mental Health for the -- represents the Department of Mental Health. Issues regarding misconduct by various employees there that could rise to conspiracy to obstruct justice is a different issue. I don't think they have any business at all dissuading our witnesses. We're in a position right now where because of advice given by County Counsel, that effectively blocked our ability to do a criminal investigation regarding the cover-up by a critical psychologist in the case. Because of that conduct, we're in position where these people basically had time to get their stories straight." (18 R.T. 2933.)

Prosecutor Hardy's verbal assault on Assistant County Counsel McCourt occurred outside the presence of the trial court. Thus, an objection was not possible (*People v. Arias*, *supra*, 13 Cal.4th at 159; *People v. Noguera*, *supra*, 4 Cal.4th at 638.) Additionally, as set forth below in subsection E, the trial court itself addressed the issue of Hardy's conduct.

1. The prosecutor's egregious behavior was designed to intimidate witnesses, the defense and ultimately the trial court.

Even on the most superficial level, the prosecutor's behavior was outrageous and inexcusable. "A prosecutor who engages in rude or intemperate behavior, greatly demeans the office he holds and the People in whose name he serves. (*People v. Bain* (1971) 5 Cal.3d 839, 849 [97 Cal. Rptr. 684, 489 P.2d 564].) As this Court observed in *Hill*: "It is the duty of every member of the bar to 'maintain the respect due to the courts' and to 'abstain from all offensive personality.'" (*People v. Hill, supra,* 17 Cal.4th at 820, citing, Bus. & Prof. Code, § 6068, subds. (b) and (f).)

Beyond the basic violation of integrity and collegiality expected of an attorney during trial, the prosecutor's attack was an attempt to intimidate potential witnesses and impose his force and will upon the court and parties to the proceedings. As recognized by this Court in *Hill:*

> "Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution. [Citations.] [¶] The forms that such prosecutorial misconduct may take are many and varied. They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.]" (*In re Martin* (1987) 44 Cal.3d 1, 30 [241 Cal.Rptr. 263, 744 P.2d 374].) Threatening a defense witness with a perjury prosecution also constitutes prosecutorial misconduct that violates a defendant's constitutional rights. (*People v. Bryant* (1984) 157 Cal.App.3d 582 [203 Cal.Rptr. 733].) (*People v. Hill, supra,* 17 Cal.4th at 835.)

The Ventura County Mental Health witnesses County Counsel

McCourt represented included Dr. Kus, who testified in the trial. Among other things, Hardy accused County Counsel of obstructing the District Attorney's "investigation regarding the cover-up by a critical psychologist [Kus] in the case." Therefore, Hardy was not only accusing Dr. Kus and other potential witnesses of crimes, he was accusing their counsel as well.

The conduct was so extreme and so egregious, leaving no doubt that it infected the trial with such unfairness as to make the conviction a denial of due process." (*People v. Gionis, supra,* 9 Cal.4th at 1214.)

2. The prosecutor's egregious behavior pushed the misconduct over the threshold of prejudice.

The prosecutor's conduct here reached another level of indignity, and pushed the proceedings over the threshold of prejudice. While Ms. McCourt herself said that Hardy's abuse did not cause her to alter her advice to her clients (55 R.T. 10218), she did not actually testify at trial. Kus did. And Kus' testimony that appellant did not suffer from paranoid schizophrenia was a lynchpin of both the prosecution's arguments to the jury and the trial court's decision not to modify the jury's verdict of death. (54 R.T. 9996-9998, 10277-10278; see, more comprehensively, sub argument J, below.) Although no evidence has yet been adduced that the prosecution's threats of an investigation affected Kus' testimony, one has to presume that McCourt would at least have advised her clients of the prosecution's threats. Irrespective of the actual effect of the intimidation,

this Court in *Hill*, stated that it cannot be "emphasize[d] enough that ... it was improper to have threatened [a witness] in advance of" trial. (*People v. Hill, supra,* 17 Cal.4th at 835.)

In light of the prosecution's other misconduct, this intimidation could not be found to have been harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.)

E. Prosecutor Hardy Threatened The "Case May Get Very Ugly," After The Court Failed To Directly Address Hardy's Conduct Against County Counsel

The trial court did not comment on Mr. Hardy's bizarre behavior against Ms. McCourt until the end of the afternoon session. Then, rather than address the issue and Mr. Hardy directly, the court stated it would not pursue the issue, and simply admonished all counsel:

> "For future proceedings -- I say this for myself. I say this for the benefit of all.
>
> "I expect from counsel nothing less than the most vigorous of advocacy. I know that you are good counsel and you are honorable and ethical people. I have no reservations in saying that.
>
> "My bailiff advised me of some unpleasantness that occurred this morning. I choose neither to go into detail or to pursue the matter further, other than to say this courtroom will be a sanctuary for all who appear here, whether counsel, defendant, witness, or spectator.
>
> "You will be by me treated with respect and without angst or hostility, whether I'm present in the courtroom or not. I expect counsel to adhere to that.
>
> "I address it to no one in particular, but that is the standard I want set forth and understood from this point on.

"Thank you." (18 R.T. 3022.)

An unrepentant Hardy seized the moment to further threaten and bully all present. The following exchange occurred:

> "Mr. Hardy: I anticipate this case may get very ugly before it's over.
>
> "The Court: I sincerely hope not.
>
> "Mr. Hardy: There are standards of integrity that I expect of counsel that I will not compromise on." (18 R.T. 3023.)

Unfortunately, instead of then firmly addressing Hardy's misconduct and disrespect of the trial court's authority, the trial court mollified Hardy. The court placated:

> "Mr. Hardy, I have absolutely no quarrel with you telling me that you feel counsel have shortcomings in what they have done, in your opinion. Not only do I invite that, I expect nothing less of you. So that you have an understanding of my view, I consider you to be as ethical a lawyer as anyone I have encountered, who esteems the highest of ethical values of court and counsel.
>
> "I have no quarrel with your substance. Absolutely none. But in this courtroom it will be presented so that no one feels intimidated by it. And I ask counsel to respect each one in that regard. If you feel there are shortcomings, absolutely bring it to my attention.
>
> "There is no more difficult case than the one in which we're confronted. I swear to you I understand that. I think the rulings and the time we've all spent here reflect that.
>
> "And I will respect everything that counsel does, and I will give you every opportunity to present what you believe to be the evidence as you believe it should be presented.
>
> "And if you feel somebody is doing something wrong, absolutely tell me. There's nothing wrong with saying that

you feel somebody fell short of the mark. Never doubt that, please. I'll just leave it at that.

"Thank you. Thank you"

To all of which, Hardy curtly responded: "Excused?" (18 R.T. 3023.)

During the motion for new trial, the trial court lamented:

"When on October 14 Court was made aware of the unpleasantness that occurred in court with County Counsel, it undertook to stem the growing acrimony. Again, I won't go further into that. I have already commented that with the advantages of hindsight, more perhaps ought to have been done." (55 R.T. 10250.)

1. The prosecutor's continuous abusive behavior infected the trial court proceedings such that appellant's federal constitutional rights were violated.

When, following his accusations against defense counsel and his abusive intimidation of Ms. McCourt and witnesses, prosecutor Hardy continued by admonishing the court that the trial could be comported based on his standards or get "ugly", there could be no doubt he had so infected the trial proceedings that appellant's federal constitutional rights were violated. (*People v. Gionis*, *supra*, 9 Cal.4th at 1214.)

At this point, the prosecutor had so intimidated the parties, witnesses and the trial court that he was beyond control. As recognized by this Court in *Hill*, failure to reign in an abusive and out of control prosecutor can result in a violation of the federal right to a fair trial. "By failing to take control of the courtroom, 'the trial judge in the instant case allowed the trial

to be conducted at an emotional pitch which is destructive to a fair trial.'" (*People v. Hill, supra,* 17 Cal.4th at 831; citing *People v. Bain* (1971) 5 Cal.3d 839, 849.)

2. The prosecutor's abusive and intimidating misconduct was prejudicial.

Prosecutor Hardy's misconduct had now reached a point where he was intimidating the trial court and was able to affect its rulings. The best indicator that the prosecution's misconduct actually had an effect on the trial court's handling of the trial, is the series of unfair rulings following the defense's attempt to object to or counter the misconduct.

For example, in sub argument F below, over defense objection, the trial court allowed the prosecutor to examine appellant's police practices expert on an audit that occurred in his department after he left. The trial court admonished the prosecutor several times, the examination was not for the truth of what the prosecutor alleged were the findings of the audit, but merely whether any knowledge the expert had of the audit affected his state of mind. The trial court then specifically instructed the jury of the same. Despite the admonishments and instructions, the prosecutor argued the expert was "too busy falsifying records." The defense objected, yet, inexplicably, the court overruled appellant's well-taken objection. In so doing, the court at worst vitiated its earlier instruction, and at best confused the jury as to what to do with this piece of new "evidence." Either way, as

argued below, the expert's testimony in defense of appellant was improperly damaged.

As further example of the prejudice engendered by the prosecutor's intimidation, the trial court also allowed the prosecutor to engage in unrestrained improper impeachment of a second defense expert. As more fully set forth in sub argument G, below, during cross-examination, the prosecutor improperly accused appellant's prison expert of having prison photographs not authorized by the prison system. The trial court overruled numerous objections by defense counsel, and yet at the motion for new trial, acknowledged the prosecutor's cross-examination was "vitriolic, unnecessary and pointless." (55 R.T. 10233; 10252.)

As a further example, as more specifically argued in sub argument H, below, and in Argument VI above, the prosecutor argued falsely during both guilt and penalty phases that appellant's parole form provided he would receive a sentence of 25 to life for his next felony. When defense counsel attempted to counter this misconduct by arguing that there was no such evidence, the court sustained the prosecutor's ill-taken objection. Not only did this reinforce the implication that there was, in fact, evidence of appellant's knowledge, but it also reinforced the prosecutor's lie that there was a form on which appellant acknowledged he faced a 25 years to life sentence. When asked about this during the motion for new trial, the trial court had no explanation, offering only that the jury had the form to

compare, and therefore could discredit the prosecution's argument. (55 R.T. 10265-10266.)

For further example, by the penalty phase, Hardy was able to intimidate the trial court into reversing sound rulings. As set forth in sub argument I, below, the prosecutor bullied the trial court into reversing its ruling sustaining appellant's objection to Deputy Fryhoff's testimony that he was upset and angry he did not kill appellant. Not only was Fryhoff allowed to present this testimony, but the prosecutor was permitted to argue that Fryhoff would go to his grave regretting that he had failed to kill appellant. Yet, as more specifically set forth in sub argument J, below, when defense counsel asked the innocuous question of appellant's mother whether she wanted her son to receive the death penalty, the trial court reacted to Hardy's explosive objection with equal verve. When Hardy exploded out of his seat, shouting his objection, the trial court cleared the jury from the room and then promptly agreed with Hardy that the question constituted misconduct. The court then followed this with an inquiry of Hardy as to what "remedy" he wanted. Finally, the court issued a most damaging and inappropriate instruction to the jury, singling out the defense as having violated the law.

Prosecutor Hardy's accusatory, abusive, and intimidating behavior, when viewed in light of the trial court's inappropriate rulings in response, renders it impossible for the prosecution to prove beyond a reasonable

doubt that the errors were harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even under a more favorable state standard, in light of the impact of the prosecutor's misconduct it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

F. During Cross-Examination And Closing Argument In The Guilt Phase, Prosecutor Hardy Violated The Trial Court's Instruction By Accusing Appellant's Police Practices Expert Of "Falsifying Documents."

In his guilt phase defense, appellant called retired Los Angeles Sheriff's Lieutenant Roger A. Clark. Clark testified as to issues related to whether Deputy Aguirre was in the performance of his duties, and whether there were exigent circumstances warranting entry into the Encinal home.

During cross-examination, prosecutor Hardy sought to inquire into an audit of Clark's department which had occurred after Clark retired. Over defense counsel's objection, the trial court allowed Hardy to inquire. However, the inquiry was limited to Clark's awareness of the audit, and only for the purpose of determining what impact it had on his state of mind. In this regard, the trial court instructed the jury:

> "Ladies and gentlemen, the next -- the questions will be couched in terms of what the witness heard and it is not to be considered by you as either true or false that in fact certain irregularities, regularities or other things occurred.
>
> "You may well ask me, "Then why do we care?" and the answer is insofar as the events themselves, you don't; what is significant is, a, if the witness has heard of any allegations

> made against him; b, what, if any, feelings he harbors as a result of hearing those matters as it may bear upon your decision concerning his testimony and I'll instruct you as I will concerning every witness concerning the factors that you may consider with respect to someone's testimony.
>
> "Again, you are not to assume that there were irregularities or what the facts are, simply what he has heard and what, if any, impact it has upon his testimony in these proceedings.
>
> "Mr. Hardy, on that understanding, please." (41 R.T. 7597-7598.)

Hardy then asked a series of questions regarding purported findings of the audit, of nepotism and irregularities in keeping time cards. Despite the trial court's admonitions, Hardy attempted to inject truth of the allegations into his examination. He had to be ordered by the trial court to focus on what Clark heard, not on what Hardy purported the audit concluded. (41 R.T. 7598-7599.)

During his closing argument, Hardy disregarded the trial court's clear and focused jury instruction, and the several admonishments of him regarding the limited purpose of the evidence. He argued:

> "There's some group called the Vikings out to get him. They did an audit of his department and found things like nepotism and irregularities in overtime cards." (19 R.T. 3276.)
>
> "And if, like a good paper pusher, which is exactly what Mr. Clark was, you stand there with your thumbs up your well-tailored suit, you're gonna get shot right there. It's stupid.
>
> "Mr. Clark said nothing about the threats, nothing about the danger of retreat. It never crossed his mind 'cause he's never done it. He's too busy falsifying records --. (43 R.T. 8182.)

Defense counsel immediately objected, but the trial court overruled the objection. (43 R.T. 8182.)

1. The prosecutor's mischaracterization of the evidence and reference to unsubstantiated facts outside the record constituted misconduct.

The trial court had specifically admonished the prosecutor and instructed the jury, that the allegations regarding the audit were not to be considered for the truth of the matter asserted. All that was of relevance was whether any of the allegations raised by the prosecution regarding the audit had an effect on Clark's state of mind. Let alone that nothing in Hardy's questioning of Clark revealed that records were actually falsified, Hardy violated the trial court's limitation and instruction to the jury that the questioning regarding the audit was merely to determine whether knowledge of an audit had an effect on his state of mind. Hardy thus committed misconduct by both mischaracterizing the state of the evidence and by arguing facts not in evidence.

The harm the prosecutor engendered in this dual misconduct was best set forth by this Court in *Hill*, when faced with a prosecutor who similarly argued facts not in the record. This Court stated:

> We have explained that such practice is "clearly ... misconduct" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948 [4 Cal.Rptr.2d 765, 824 P.2d 571],) because such statements "tend [] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the

special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*Bolton*, *supra*, 23 Cal.3d at p. 213; *People v. Benson*, *supra*, 52 Cal.3d at p. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People v. Kirkes* (1952) 39 Cal.2d 719, 724, 249 P.2d 1].)" (*People v. Hill, supra,* 17 Cal.4th at 828.)

The prosecutor's deliberate violation of the court's several admonishments and clear instruction circumvented the rules of evidence and constituted misconduct.

2. The prosecutor's mischaracterization and arguing facts not in evidence were prejudicial.

The prejudice in accusing a key defense expert of "falsifying records" – in essence calling him a fraud and a crook – cannot be understated. First, because as recognized above in *Hill*, a prosecutor is a trusted party to the proceedings, the jury was likely to believe his "testimony" that Clark did indeed falsify records. Second, once provided this "fact" from a trusted representative of the people, the jury could not possibly give credence to the defense expert. Who would trust a witness willing to commit fraud in his professional capacity?

"Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.) (*People v. Hill, supra,* 17 Cal.4th at 828.) In this case, reversal is required. Irrespective of all the other instances of misconduct set forth herein, if a key witness for the

defense has been shown to be a fraud, the prosecutor has essentially shown the defense to be a fraud. In this light, the prosecution cannot show that the prosecutor's misconduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if this misconduct falls short of federal standards of prejudice, it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

G. During Penalty Phase Cross-Examination And Argument, Prosecutor Hardy Made Unsubstantiated Accusations Against The Defense's Prison Expert.

In his penalty phase defense, appellant called prison expert James Park to testify that appellant would make a positive adjustment in prison.

At bench prior to his testifying, Prosecutor Hardy immediately began making unfounded accusations against Park. Hardy claimed that while Park was employed at San Quentin he overrode security and allowed an attorney to smuggle a gun to George Jackson who murdered several guards in an escape attempt. Hardy claimed park was "run out of town on a rail." Hardy claimed that because of this incident Park was transferred and eventually had to take a stress retirement. Hardy claimed Park was a pariah in the state prison system. He also argued that Park was going to show photographs of the prison that he was not permitted by the prison system to have. Finally, Hardy implied that Park was dishonest. (51 R.T. 9466-9473.) Hardy then added with hyperbole:

> "I will not have any trouble, if he's allowed to testify in these areas, to get people who knew him back when, who you will have to exercise 352 discretion upon to keep their anger under control as they describe this man. (51 R.T. 9473.)

Other than citing his own memory and that of his colleague Mr. Holmes, Hardy proffered no specific information, names or reports to substantiate his claims against Park.[49] And bizarrely, but in keeping with what was becoming a familiar refrain, Hardy accused defense counsel of failing to provide him with discovery to support these accusations. (51 R.T. 9467, 9471, 9473-9474 ["I can't believe that they didn't know about it, No. 1, and I can't believe and I don't believe they didn't know about it. You want to know it, I just don't believe they didn't know about it. And secondly, I'm offended that we were not provided with any discovery in this area."]

Ultimately, the trial court ruled that Hardy would have a broad brush to impeach Mr. Park, but that he would not be allowed to inquire into the San Quentin incident. (51 R.T. 9484.) Mr. Hardy responded: "Our problem is that this guy's responsible for it. To let this jury operate under

---

[49] This was consistent with Hardy's misconduct. He was quick to make accusations, but was never forthcoming with any actual evidence to substantiate his claims. For instance, when the prosecution subsequently disclosed its rebuttal prison expert, a Mr. Gillis, there was nothing in Gillis' report to substantiate Hardy's wild accusations. At the time of the disclosure, Hardy also did not mention that Gillis would be able to substantiate these allegations. (51 R.T. 9523.)

the misapprehension that this guy's got some credibility I think is wrong." (51 R.T. 9484.)

During cross-examination of Park, the prosecutor immediately began dancing around the San Quentin incident, trying to support his claims that Park was run out on a rail and had to take a stress retirement. The following began the cross-examination, which quickly went south:

> "Q. Now, Mr. Park, you are not suggesting that when you left San Quentin that you were immediately promoted to a job at headquarters, are you?
>
> "A. Yes, I am. I was.
>
> "Q. Isn't it true that you took a stress leave?
>
> "A. No, I did not.
>
> "Q. sn't it true you received a stress retirement?
>
> "A. No, I did not.
>
> "Q. From the time you left San Quentin in 1973, you never worked in a prison again, did you?
>
> "A. You have to define that. I was in and out of prisons many times as part of my headquarters role. I did not do bench work, I did not sit on a classification committee and classify a hundred prisoners, but I did go in for various purposes.
>
> "Q. You were transferred after your time in San Quentin?
>
> "A. I was promoted to a position, as I think I said, of deputy superintendent, deputy warden.
>
> Mr. Hardy: Would you admonish the witness --
>
> Mr. Howeth: Objection, your Honor --
>
> Mr. Hardy: -- to allow me to finish the question?

The Court: One second, Mr. Hardy, one moment.

Yes.

The witness: Yes.

"The Court: Mr. Hardy, if you'd finish your question, please.

"Q. By Mr. Hardy: When you were transferred and you say promoted to the California Department of Corrections headquarters in 1973, from that point on you no longer were assigned to work in a specific prison, were you?

"A. I was not assigned to work in a specific one." (51 R.T. 9529-9530.)

When Park denied that he was involved with attorney visits at San Quentin, but rather dealt with "activist attorneys making unreasonable demands" on the prison, Hardy became frustrated and sought to approach again. The following colloquy occurred:

"We have the following misconception now in the mind of the jurors. 'I dealt with activist attorneys.' Yeah, you sure did, and with one, you had a whole bunch of guards killed. In addition to which he's been allowed to testify before and the indication that somehow he got a promotion after San Quentin which simply is misleading particularly, so I would now like to ask him about George Jackson.

"The Court: You can't do that." (51 R.T. 9537.)

Following this denial, the prosecutor engaged in a contentious exchange with Park, implying that the photographs Park was showing were improperly obtained, and could aid in a prison escape:

"Now, in terms of prisoner -- you have described the prison facility as the towers, the security towers. I believe there are some photographs that are in there of various tiers and things like that.

"Where did you get those photos?

"Mr. Howeth: Objection, your Honor; relevance.

"The Court Overruled.

"The Witness: Some of them I took, with the warden's consent, at Calapatria. The others were taken at Folsom.

"Q. Isn't it, in fact, true that the Department of Corrections has rules that Level 4 facilities in prison facilities are not to be photographed?

"Mr. Howeth: Objection; relevance.

"The Court: Overruled.

"The Witness: Not to my knowledge. They have strict rules about not photographing identifiable prisoners unless they get consent and they currently do not want prisoners photographed or interviewed to where they become notorious in the media.

"Q. By Mr. Hardy: In terms of the prison facilities themselves, isn't it true that photographs of prison facilities themselves could aid in escapes?

"A. No --

"The Court: The answer "no" will stand.

Move on, sir.

The Witness: -- nonsense." (51 R.T. 9549-9550.)

1. The prosecutor's improper attacks on the defense expert continued the pattern of gross misconduct.

Although not fully clear from the cold record during the examination, at the hearing on the motion for new trial, the trial court illuminated the improper vitriol with which Hardy examined Park: "... I thought his conduct toward Park was vitriolic, unnecessary and pointless."

(55 R.T. 10233; 10252 ["[Hardy's] behavior towards James Park ... was inappropriate."].) Hardy's behavior continued his pattern of denigrating counsel and witnesses. His abusive behavior had an additive effect on the infection of the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gioni, supra,* 9 Cal.4th at 1214.) This was also another example of "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Samayo, supra,* 15 Cal.4th at 841.)

2. The inappropriate behavior of the prosecutor had an additive effect on the prejudice.

As did the improper impeachment of defense expert Clark during the guilt phase, the improper impeachment of Park during the penalty phase destroyed a lynchpin of the defense case. Park had provided the jury with insight into how appellant could function appropriately in a prison environment. In painting Park as someone who would disregard the security requirements of the prison system and take unauthorized photographs, the prosecution again painted the defense as a fraud. As such, it cannot be said that the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Moreover, it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

H. During Opening Statement And Closing Argument In The Guilt Phase, And During Closing Argument In The

Penalty Phase, Prosecutor Hardy Argued Falsely That Appellant Had A Motive To Kill Because He Had Signed A Parole Form That Advised Him He Would Face A Sentence Of Twenty-Five Years To Life For His Next Felony.

As is more thoroughly set forth in Argument VI above, the prosecution was allowed to present evidence and argue that appellant had the motive to kill Deputy Aguirre because he was facing a prison sentence of twenty five years to life for the felonies he had committed on the day in issue.

In his opening statement in the guilt phase, prosecutor Hardy told the jury he would prove the following:

> "As was read in the Information and as will be proved to you, by July 17th, 1996, the defendant had suffered five felony convictions. In 1973, conspiracy to distribute drugs. In 19[86], burglary. Again, convicted felon. In 1987, robbery with a firearm. Convicted of a felony and sent to state prison. By the way, he went to the federal prison for the 1973 conviction. 1987, assault with a deadly weapon, a firearm. Convicted of a felony, went to prison. And in 1987, convicted of a burglary, a felony. **What did that mean for Michael Johnson? The next time up, the next felony, is 25 to life. On his parole he signed a piece of paper saying you can't possess firearms, because that's the next felony.**" (32 R.T. 6060; emphasis added)

> "Because on July 17th, 1996, the defendant made some new decisions, and they were indeed very ominous new decisions. And the most ominous new decision he made was to possess firearms. Now, remember this was no -- this was no light decision that he made. **The decision for Michael Johnson to possess firearms meant that if he was caught by the police, he was going back to prison, 25 to life.** Despite that he decided to arm himself. And not just arm himself, but arm himself to the T." (32 R.T. 6061; emphasis added.)

Neither of these statements was true, i.e., appellant's presumed parole form[50] contained nothing about possessing firearms being the "next felony," nor that such possession would result in a sentence of 25 years to life. Moreover, Hardy had to know he was falsely stating the evidence that would and could be produced. First, he had the form which became Prosecution's Exhibit 18C. It contained no such notices. Second, the three strikes law was not passed until 1994, several years after appellant was last paroled.

Subsequently, during its case-in-chief, the prosecution called appellant's parole agent, Robert Humphrey, to state that it was the agent's custom and practice to have parolees, such as appellant, sign a statement six months before their parole that contained a provision stating they should not own, use or control a firearm. (32 R.T. 6719-6726; prosecution Ex. 18C.) The form went no further. The prosecution also called Deputy District Attorney Terrance Kilbride, who reviewed appellant's prior convictions and opined that appellant was subject to a 25 years to life sentence for any new felony. (36 R.T. 6742-6743.)

This evidence offered little, if any, basis for an inference that appellant knew he was subject to the sentence and killed to avoid it. As the

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[50] Although no signed parole form was produced, an unsigned exemplary form was used, and appellant's parole agent said he had seen a form with appellant's signature. (36 R.T. 6726.)

trial court stated, this inference was "to some degree speculative." (18 R.T. 2997.) Despite this, the prosecutor intentionally argued evidence he knew did not exist. The prosecutor argued:

> "[Appellant] signed something saying: I know I can't possess firearms. The consequence is to go back to prison, a consequence of 25 to life." (44 R.T. 8144.)

The argument was, simply, a lie.

During the penalty phase of appellant's trial, the prosecutor continued to argue that appellant knew it was a felony to posses firearms, and further exaggerated the lie, arguing:

> "He did not want to return to prison, where he knew that he was going to spend the rest of his life if he were even caught with those guns in his possession." (54 R.T. 10022-10023.)

The prosecutor then argued that parole agent Humphrey told appellant the consequence of possessing guns was a twenty-five year to life sentence:

> "In 1991 his parole agent told him you can't possess guns or you're going back to the joint. Twenty-five to life." (54 R.T. 10054.)

And, finally the prosecutor argued:

> "If he was willing to take responsibility and suffer the consequences for being a felon in possession of firearms, he could have not killed Peter Aguirre. But he made that self-centered decision to cause all this harm because he is simply a self-centered, cold-blooded, rotten human being." (54 R.T. 10061.)

Although, following the trial court's initial allowance of the inference, defense counsel did not further object, he did attempt to counter the argument. As set forth in the prejudice subsection 2 to this argument,

below, the trial court precluded defense counsel's counter-argument. The rule that a defendant must object and request an admonition at trial in order to preserve the issue for appeal, "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184.) Accordingly, the rule is not applicable where any objection by defense counsel would almost certainly have been overruled. (*Ibid.*) In light of the trial court's preclusion of defense counsel's attempt to counter the prosecution's argument, any objection by defense counsel would almost certainly have been overruled.

1. The prosecution's continued mischaracterization of the evidence and arguing facts not in evidence resulted in a denial of appellant's constitutional rights.

The prosecution knew from the moment it obtained the parole form and spoke with his witnesses, that it did not have the link to prove premeditation and deliberation. The prosecution had no way of getting from the known – that appellant was facing a twenty five years to life sentence for any current felony – to the unknown – that appellant knew he was facing such a sentence, and intended to kill to avoid it. Prosecutor Hardy deliberately chose to fabricate the link.

A similar situation was encountered by the prosecutor in the *Hill* case. Unable to prove intent to kill, the prosecutor mischaracterized the evidence to support her theory. The words this Court stated in *Hill* are apt

to the case at bar:

> "As is clear, [Hardy] again blatantly and categorically mischaracterized the factual record to gloss over an inconsistency in the evidence unfavorable to the prosecution. H[is] actions thus constituted prosecutorial misconduct." (*People v. Hill, supra,* 17 Cal.4th at 826.)

As in the case of the prosecutor's misconduct with Clark's testimony, the prosecutor also testified to supposed facts not in evidence. This was clear misconduct. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948 [4 Cal.Rptr.2d 765, 824 P.2d 571].) Here, however, there could be no argument whether the prosecutor did so deliberately. The prosecutor was solely in control of the prosecution's testimony, and knew the limits. Further, the multiple occasions on which the prosecutor made the identical statement militates against any claim it was an innocent stretch.

2. The prosecution's misconduct was prejudicial; moreover, in prohibiting defense counsel from countering the misconduct, the trial court compounded the prejudice.

Key to both the prosecution's case for first degree murder, and the guilt phase defense, was whether appellant premeditated and deliberated the killing of Deputy Aguirre. On this point, the prosecutor chose to deliberately fabricate a solution to the weakness in his case, and a strength in the defense case. This misconduct was severely prejudicial. It allowed the prosecutor to offer "unsworn testimony not subject to cross-examination," thus becoming "dynamite" to the jury. (*People v. Bolton*

(1979) 23 Cal.3d 208, 213 [152 Cal. Rptr. 141, 589 P.2d 396].)

Moreover, because the jury was allowed to convict on the unsworn, fabricated testimony of the prosecutor, this Court has no way of knowing on what theory the jury found. Thus, this Court should reverse under the holdings of *People v. Green* (1980) 27 Cal.3d 1, 71 and *People v. Guiton* (1993) 4 Cal.4th 1116, 1122 [17 Cal.Rptr.2d 365, 847 P.2d 45], both of which hold that "'[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand."

The prejudice was compounded by the trial court. Defense counsel attempted to expose this lie in his closing argument, but was inexplicably prohibited by the court. The following occurred during defense closing argument:

> "[Defense Counsel]: "Where was the evidence, I ask you, that Michael Johnson knew of that consequence of 25 to life? Does it say on that parole form he signed when he last got out of prison with regards to being unable to possess firearms that "If you do possess those firearms, you're going back to prison for 25 to life?" Does it say that on that document? Did anybody get up on the witness stand –
>
> "[Prosecutor Harvey]: I'm going to object to this line as arguing based on a prior ruling of the Court." (45 R.T. 8226-8227.)

The trial Court sustained the prosecutor's objection and ordered defense

counsel to move to another area. (Ibid.) Thus, appellant was prevented from countering the false arguments. In light of the foregoing, it cannot be said that the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Moreover, it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

I. Prosecutor Hardy Committed Misconduct During The Penalty Phase By Asking Deputy Fryhoff How He Felt Having Not Killed Appellant. Hardy Committed Additional Misconduct, When In Spite Of The Trial Court's Initial Sustaining Of Defense Counsel's Objection, Hardy Bullied The Trial Court Into Allowing Testimony And Argument Emphasizing Fryhoff's Guilt And Frustration At Not Having Killed Appellant.

During the prosecution's penalty phase case-in-chief, prosecutor Hardy committed misconduct by asking Deputy Fryhoff: "How do you feel about the fact you didn't kill [appellant.]?" (47 R.T. 8674.) Defense counsel immediately objected and the trial court immediately sustained the objection. However, Hardy asked to approach, and in another demonstration of intimidation, bullied the court into permitting Fryhoff to testify that he was angry and upset that he didn't kill appellant. (47 R.T. 8678-8679.) Hardy followed up the admission of this testimony with improper closing argument, telling the jury that Fryhoff would "go to his grave feeling guilty because he didn't kill the man who killed his brother officer." (54 R.T. 10058.)

As more fully set forth in Argument X, below, this testimony, offered under the guise of "victim-impact" evidence, was irrelevant and so inflammatory as to render the trial fundamentally unfair. It, and prosecutor Hardy's misconduct in forcing it upon the jury, violated appellant's rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

1. Appellant brought pre-guilt and pre-penalty phase motions seeking to limit victim-impact evidence, and requesting notice prior to its introduction. Yet, the prosecution remained silent on the specific subject matter of Fryhoff's testimony.

Prior to the beginning of the guilt phase, appellant brought a Motion to Limit Victim Impact Evidence (6 C.T. 1417-1432), warning that "characterizations and opinions about the crime, the defendant or the appropriate sentence violate [] the Eighth Amendment," pursuant to the mandates of *Payne v.* Tennessee (1991) 501 U.S. 808, 830, fn. 2 [111 S.Ct. 2597, 2611, 115 L.Ed.2d 720] and *People v. Zapien* (1993) 4 Cal.4th 929, 998 [17 Cal.Rptr.2d 122, 846 P.2d 704]. (6 C.T. 1420.) The motion also demanded, pursuant to *Matthews v. Superior Court* (1989) 209 Cal.App.3d 155, 160 [257 Cal.Rptr. 43], that the prosecution "provide to the defense before trial notice of the actual evidence the prosecution intends to introduce at the penalty phase." (6 C.T. 1428.) However, at the hearing on appellant's motion, the prosecution remained silent, giving no hint of the evidence it intended to elicit from Fryhoff. (18 R.T. 2939-2940.)

Appellant brought a second motion prior to the penalty phase, seeking to exclude any testimony by Fryhoff which opined as to the appropriate sentence. (11 C.T. 2745.) Prosecutor Hardy again gave no hint as to his intention to have Fryhoff testify that he regretted not killing appellant, saying only: "Jim Fryhoff was Pete's training officer. He knew him from that. He also knew him from the fact he's the person who returned fire and shot the defendant. That's a unique position in law enforcement when something like this happens." (46 R.T. 8385.)

2. During its penalty phase case-in-chief, the prosecution called Deputy Fryhoff. Prosecutor Hardy quickly led Fryhoff into to how he felt about not killing Appellant.

Almost immediately upon calling Deputy Fryhoff in his penalty phase case-in-chief, prosecutor Hardy dove into an improper area of inquiry:

> "Q. July 17th, 1996, 122 North Encinal. You shot Michael Raymond Johnson.
>
> "A. Yes, I did.
>
> "Q. How do you feel about the fact you didn't kill him?" (47 R.T. 8674.)

Defense counsel objected immediately, and asked to approach. The trial court waived appellant off and immediately sustained the objection. (47 R.T. 8675.)

3. Fryhoff's anger and guilt in not killing Appellant was improper victim-impact evidence which violated Appellant's rights under the Eighth Amendment and due process clause of the Fourteenth Amendment.

The trial court's ruling on the objection was correct. As more fully set forth in Argument X, below, Fryhoff's testimony regarding his anger and guilt at not killing appellant amounted to an irrelevant and inflammatory opinion as to the appropriate sentence. (*Payne v. Tennessee* (1991) 501 U.S. 808, 831, fn. 2 [115 L.Ed.2d 720, 111 S.Ct. 2597].) Due process prohibits the introduction of victim impact evidence "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.*, at 825.)

This should have been the end of Hardy's improper inquiry. Unfortunately, Hardy assured it was not.

4. Hardy bullied the court into reversing its ruling, permitting Fryhoff to express his anger and frustration in not killing Appellant.

Immediately after the trial court sustained the objection -- before even an admonition could be given to the jury to disregard the inappropriate question --Hardy asked to approach. The trial court, regrettably, granted this request. Hardy once again engaged in intimidation, bullying the trial court into reversing its ruling and allowing Fryhoff to testify to his anger and regret in not killing appellant. Despite defense counsel's entreaties that the prosecutor had committed misconduct, the trial court succumbed to Hardy's pressure. The following exchange among counsel and the court

occurred at bench:

"MR. HARDY: Every cop that ever gets involved in a shooting carries with him a guilt, and this deputy carries with him a guilt, over the fact that he didn't kill Michael Johnson and that is a guilt that haunts him every day of the rest of his life.

"It is not something that's unique to this case. It is something that is a given, that anybody that's ever carried a badge knows about. There isn't a person in law enforcement who doesn't know an officer, who hasn't been close to an officer -- including me -- who doesn't know that they take that to their grave.

"Now, the fact of the matter is that that is a source of enormous guilt for this young man and that source of guilt is what haunts him.

"Now, I know that we're not to get into an opinion as to what should happen to Michael Johnson, and I know we have to make this as antiseptic as possible and we have gone -- worked overtime trying to make this as antiseptic as possible, to tell these people not to cry, not show their emotion, but this is a very real part of what happened out there.

"And if this jury doesn't know about how guilty this young man feels about the fact that he didn't kill Michael Johnson and why he didn't kill Michael Johnson and how he felt about that and how other officers feel about that, they're not gonna get a sense of the real impact here.

"When this young man is dying on his deathbed, I can tell you, because I've been there with other officers, he's gonna think about the fact that he didn't kill Michael Johnson. Now, that's what this is about. If you want to tell me not to do it . .

"The Court: I'm trying to --

"Mr. Howeth: I'm concerned, your Honor. The district attorney just said himself he knows he's not supposed to ask information of this kind.

"I believe it's misconduct to purposely ask the question he's

asked because it's a comment on the ultimate punishment and not proper and it's not allowed and that's the law. And I believe that this should be assigned as misconduct and he should be admonished not to get into this area.

"Mr. Hardy: Well, let me just say about misconduct, with all the stuff that's been covered up in this case already, I'm getting a little tired of the personal attacks. This is really over the line.

"You make whatever ruling you want to make --

"The Court: Mr. Hardy --

"Mr. Hardy: -- but I won't be threatened.

"The Court: -- nobody is being threatened here and I'll make a ruling.

"The impact upon this victim will be permitted and in that context you may say to him, "What are your emotions that have resulted from the events of that day?" not leading him to it and what responses he gives.

"I will admonish this jury, if necessary, that the opinions of any witness as to the ultimate outcome of this case are irrelevant because they are; it is the jury's decision, not that of a witness.

"Mr. Hardy: I'm getting tired of having -- with the misconduct and the abuse that's gone on with the Public Defender's office and Mental Health that's been covered up in this case, to be repeatedly assigned misconduct is offensive. If somebody -- well, we'll handle it. [¶] "I'm ready.

"The Court: I believe this is the second time it was done and it's been denied on both occasions and I have told you what you can do.

"This man has feelings and -- please come here -- the victim impact is being admitted for the very reasons I said. You are allowed to get into the victim impact and what emotions he feels and why he feels them. He's going to be allowed to state that and I will permit that. That is the end of it.

"Mr. Hardy: Thank you.

"Mr. Howeth: If I understand the Court's ruling, is this witness going to be allowed to say that he wishes he would have killed him?

"The Court: This witness is going to be allowed to say that in the context of what his emotions are, and this is a very dramatic piece of business if that's in fact his feeling, but the statement to him, "Do you wish you'd killed him?" I won't let that in.

"On the other hand, what emotions he has, why he's feeling what he's feeling, he'll be allowed to say that, and then I will admonish this jury the question of punishment is not as to any victim or person involved; it is divested in the jury to make a decision." (47 R.T. 8675-8678.)

Prosecutor Hardy took full advantage of the reversal in the trial court's ruling. He simply asked the same question in a non-leading form, and received the exact testimony he had sought originally. The direct examination of Fryhoff continued as follows:

"Q. By Mr. Hardy: Describe your emotions for us regarding that part of the incident, the fact that you shot Michael Johnson.

"A. Um, I'm very upset with myself that I didn't kill him.

"Q. Is that something that you think about often?

"A. That's something I have to live with every day.

"Q. Does it make you feel that somehow you were a failure as an officer?

"A. Yeah. It makes me very hostile that I wasn't able to do it." (47 R.T. 8678-8679.)

During closing argument, the prosecutor emphasized Deputy Fryhoff's guilt in not killing appellant. Hardy argued as follows: "And

what about that law enforcement family? [¶] There is nothing that I could say that could approach being as articulate as the testimony, as what you saw from Jim Fryhoff, who will go to his grave feeling guilty because he didn't kill the man who killed his brother officer." Appellant again immediately objected. However, this time, the trial court responded: "Noted and overruled." (54 R.T. 10058.)

Two key moments reveal where Hardy's tactic of intemperance and intimidation forced the trial court to reverse its ruling and permit constitutionally prohibited evidence and argument. First, just after defense counsel expressed that Hardy had committed misconduct, Hardy warned: "You make whatever ruling you want to make ... but I won't be threatened." Immediately thereafter, the trial court responded, "nobody is being threatened here and I'll make a ruling." That ruling was a complete reversal of its earlier sound ruling, and a virtual abdication of its gate-keeping function. That the ruling was a rushed result of Hardy's intemperate behavior is obvious in light of the illogical reasoning. The trial court essentially ruled that it would 1) allow Fryhoff to opine as to his wanting appellant dead, and 2) subsequently instruct the jury that the opinion was irrelevant.

The second moment occurred just after Hardy had successfully turned the court around. He excoriated the court and counsel, that "I'm getting tired of ... be[ing] repeatedly assigned misconduct ..." Then he

warned, "well, we'll handle it. [¶] "I'm ready." This caused the trial court to plead with Hardy, and ultimately confirm that Fryhoff would be permitted to testify to the full extent of his desires regarding killing appellant.

5. Hardy's intimidation and intemperate behavior continued his pattern of egregious and reprehensible misconduct.

Hardy so intimidated the trial court, that by his behavior he was in control of the courtroom. By this usurpation of control of the courtroom, the penalty phase became infected so as to render it fundamentally unfair. (*People v. Hill, supra,* 17 Cal.4th at 831.) Hardy's behavior also continued a pattern of egregious conduct that denied appellant a fair trial (*People v. Gioni, supra,* 9 Cal.4th at 1214), and continued "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Samayo, supra,* 15 Cal.4th at 841.)

6. Hardy's misconduct in obtaining admission of the evidence was prejudicial; the judgment of death must be reversed and the matter remanded for a new penalty phase

As set forth in Argument X, below, the penalty phase must be reversed because the admission of Fryhoff's testimony and Hardy's argument amounted to a constitutionally infirm opinion that death was the appropriate sentence (*Payne v. Tennessee, supra*, 501 U.S. at 825, 831 fn. 2, and Justice Souter's concurrence, at 836, fn. 1), and because the

prosecution cannot prove beyond a reasonable doubt that the improper admission of the evidence and argument did not contribute to the verdict of death. (*Chapman v. California* (1967) 386 U.S. at 24.) Moreover, even if Hardy's misconduct is analyzed under the State standard, it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

J. During Penalty Phase, Following A Question From Defense Counsel To Appellant's Mother Whether She Would Want Her Son To Receive The Death Penalty, Hardy Exploded Out Of His Seat And Claimed Defense Misconduct.

Shortly after accusing defense counsel of being a "rat" for permitting appellant's mother to display a photograph of appellant to the jury (see sub argument A, above), Hardy again disrupted the direct examination of appellant's mother. The following occurred:

> "[Defense Counsel]: You're acutely aware, I'm sure, of why we're here.
>
> Do you still love your son Michael?
>
> "A. Very much.
>
> "Q. Would you or do you want to see him receive the death penalty?
>
> "A. Of course not.
>
> "Mr. Hardy: Objection --
>
> "[Mrs. Johnson]: Of course not.
>
> "Mr. Hardy: May we approach?
>
> "The Court: One second. Mr. Hardy, please have a seat.

Ladies and gentlemen of the jury, if you'd step out for a moment." (50 R.T. 9316-9317.)

Out of the presence of the jury, Hardy continued, and was able to get the trial court to commiserate:

"The Court: Mr. Hardy.

"Mr. Hardy: That's misconduct --

"The Court: It is. That's an improper question.[51]

"Mr. Hardy: -- that is gross misconduct --

"The Court: It's an improper question.

"Mr. Hardy: -- and --

"The Court: That's correct. The law is clear that that question is not to be asked.

"Mr. Hardy: It's been asked, it's been answered. The damage has been done.

"The Court: What remedy does the prosecution seek at this point?" (50 R.T. 9317.)

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"Mr. Hardy: I would hope that this Court is acutely aware of our concerns on behalf of the People about defense misconduct in this case, much of which is under seal and we have not commented on.

"We have observed here the slipping of a photograph in front of the jury and now the asking of a question that is blatant misconduct.

"We have not tried our side that way; the People are entitled

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[51] In fact, the question was not only not "misconduct," it was proper. The effect of the trial court's improper ruling on the prosecutor's objection is more thoroughly discussed in Argument XI below.

to a fair trial as well.

> "Without entering into other questions of misconduct, this is blatant misconduct and I think misconduct should be assigned and that Mr. Boles -- and I do this with hesitation because I have never done this before in the 20-some years I've practiced law -- I think Mr. Boles should be cited for contempt. (50 R.T. 9317-9318.)

Because the trial court immediately cleared the jury from the room, and agreed with the prosecutor that the question was improper, any objection by defense counsel would have been futile. (*People v. Arias, supra*, 13 Cal.4th at 159; *People v. Noguera, supra*, 4 Cal.4th at 638; *People v. Hamilton, supra* 48 Cal.3d at 1184.) Likewise, there was no opportunity to seek an admonition. (*People v. Green, supra*, 27 Cal.3d at p. 35, fn. 19.)

1. The prosecutor's manner of objecting was inappropriate, leading not only to an overemphasis that the objection was meritorious, but to an inference that the defense had engaged in inappropriate conduct.

While the cold record does not indicate the vociferousness with which Hardy burst out of his seat and objected, the trial court acknowledged Hardy reacted inappropriately. (53 R.T. 9834 ["Mr. Hardy shouted, 'Objection.' It was clear to everybody in this courtroom he was very upset, which is exactly why I told him to immediately sit down. And thankfully he did. And the jury left."]; 55 R.T. 10237; 55 RT. 10172 ["[W]ith the rocket-like incandescence that he objected to the question

posed to Mrs. Johnson..."]; 55 R.T. 10263 ["He came straight up out of his chair and I immediately ordered him to go straight back into his chair, which he did ... [¶] "His behavior was intemperate when he came up."].) Of critical significance, is that the trial court felt there was so much disruption, that "[t]he jury was taken out of the room." (51 R.T. 9372.)

Defense counsel best described Hardy's behavior during the instant objections, and, in fact, during the course of the trial. As defense counsel described, what would normally be handled as a simple objection to the form of the question, Hardy took to abnormal extremes:

> "[Defense Counsel]: ...[while] the Court ... perceived what might have been like a minor traveling call if this was a basketball game, in front of the jury Mr. Hardy perceives it as the most flagrant foul, intentional, like someone brought a knife out on the basketball court and stabbed somebody.
>
> "The Court: He came up very loudly.
>
> "[Defense Counsel]: That was the effect that was also conveyed to the jury because the Court told the jury that something -- the defense had done something very wrong and all that had happened is that there was a normal question and it was just like one little tiny step, it was almost that an objection to the form of the question would have been the proper objection." (55 R.T. 10237.)

The intemperate overreaction by the prosecutor gave the inappropriate indication that defense counsel and appellant's mother had terribly violated some standard of appropriate testimony. The trial court's accommodation of the prosecutor, by clearing the courtroom only added to that perception. Again, this Court's findings in *Hill* can easily be written

here: "The record in this case reveals a rancorous trial, with episodes in which one side (most often the prosecutor) constantly interrupted the other side during the examination of witnesses or closing argument by objections that were marginal at best." (*People v. Hill, supra*, 17 Cal.4th at 833.) This was yet another consistent act of misconduct among a plethora.

2. The prosecutor's behavior alone was prejudicial. However, the trial court's instruction in reaction was equally devastating.

As the jury remained out of the courtroom, the trial court considered an admonition to be given. While the trial court considered this, the prosecutor added insult to injury, stating:

> "As to what you do to Mr. Boles [defense counsel who asked the question], I bear no animosity towards Mr. Boles -- unlike Mr. Howeth, it's probably fairly obvious -- and I seek no punishment of him.
>
> "I would really like to know whether or not he's going to -- I would really like to know from Mr. Boles whether or not he really didn't know that that was an improper question.
>
> "I'd really like to know the answer to that because if he says that he did not know that, I'll accept it. But if he says that he did, I will be even more disappointed with the Public Defender's office for which I have almost no respect.
>
> I would clearly like an answer to that." (50 R.T. 9319-9320.)

The prosecutor's intemperate objection and comments added to the perception the prosecution created that the question and testimony were spurious and inappropriate. But the most prejudicial result of the behavior was the trial court's overreaction to it. As more thoroughly set forth in

Argument XI, below, the question posed by defense counsel was entirely appropriate. Therefore, not only was the objection not well taken, but the trial court should have corrected its initial reaction supporting the objection. Instead, the trial court devastated the defense with the following harsh instruction to the jury as it returned to the courtroom:

> "You are specifically and in the strongest possible terms admonished to disregard the question last asked by defense counsel of this witness and the reply she made to it. The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you on the issue of penalty or punishment. The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less. It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope you receive them in that way. Thank you." (50 R.T. 9322.)

Other than succumbing to the intimidation by the prosecutor, there could have been no reason for the trial court to render such a prejudicial instruction. By instructing the jury that it was "specifically and in the strongest possible terms admonished to disregard the question ... and the reply ...," the trial court was emphasizing the impropriety of this evidence above all else. Moreover, the trial court emphasized that the defense had disrespected the rule of law, and contrasted the defense's misfeasance with the family of Deputy Aguirre's "respect" for the "rule of law." In combination with prosecutor Hardy's gross overreaction to the question, the trial court left no doubt that the defense had committed an egregious violation of law and was not to be trusted. If that was not enough, the judge

further emphasized that his normally even-tempered demeanor had been so inflamed by the impropriety, that he needed to use "strong words," and hoped the jury "receive[d] them in that way." With this devastating instruction, the judicial seal of prejudice had been stamped on the trial. Thus, the prosecution's misconduct can not be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Though of federal dimension, it is also reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

K. During The Penalty Phase Testimony Of Defense Psychologist Hinkin, Prosecutor Hardy Committed Misconduct By Making Disparaging Gestures To The Jury.

A significant focus of the defense penalty phase case, was the testimony of Dr. Hinkin that appellant was suffering from paranoid schizophrenia. In an attempt to disparage Dr. Hinkin while he testified, prosecutor Hardy made improper gestures in view of the jurors.

This was not observed by the judge or other court members at the time. (55 R.T. 10233-10234.) Thus, there was no opportunity to object. (*People v. Arias, supra,* 13 Cal.4th at 159; *People v. Noguera*, *supra*, 4 Cal.4th at 638.) However, in his motion for a new trial, appellant included declarations from two jurors who saw prosecutor Hardy "make eye contact with some of the jurors in the jury box and he was smirking and rolling his

eyes at the testimony of Dr. Hinkin." (13 C.T. 3290-3291.)

Hardy did not deny the allegations in the declarations of the jurors. In fact, his bold confirmation was almost as improper and bizarre as the conduct itself. Hardy responded:

> "Dr. Hinkin's effeminate mannerisms and weak testimony, limited as it was by his failure to ask basic questions of the defendant during his interview of him, caused understandable reaction from the prosecution. Counsel makes no argument explaining how reacting to such testimony constitutes misconduct. Significantly, the jurors who alleged that the eye contact was made to (sic) not allege which jurors the eye contact was made with and how they could have seen both the prosecutor's actions and the jurors with whom the contact was made." (13 C.T. 3308.)

At the hearing on the motion for new trial, the trial court acknowledged the impropriety of Hardy's conduct and defense:

> "The conduct of the prosecutor during testimony by Dr. Charles Hinkin. I have commented on the incident of the eye-rolling. Clearly counsel should not so react. Mr. Hardy has acknowledged what he did. However, the Court cannot remain silent as with respect to his comment alluding to Dr. – Dr. Hinkin's "effeminate mannerisms," end quote, justifying his conduct. This is simply wrong-headed and unacceptable. [¶] No more need be said." (55 R.T. 10252-10253.)

1. The prosecutor's juvenile displays to the jury further infected the trial with unfairness.

In quoting from the American Bar Association's Standards for Criminal Justice, this Court said it best in the context of a death penalty case: "The gravity of the human interests at stake in a criminal trial demands that the proceeding be conducted in an orderly and dignified

manner...." (*People v. Hill, supra*, 17 Cal.4th at 833.) Having confronted a prosecutor in *Hill* who similarly made inappropriate gestures during testimony, this Court admonished that such behavior is "petty and childish, heightening the acrimonious atmosphere in the courtroom and threatening the ability of defendant to receive a fair trial." (*Id.* at 834.)

2. The prosecutor's improper gestures further aggravated the prejudice already engendered by earlier misconduct.

While in a vacuum, the prosecutor's gestures seem merely offensive, in light of the prosecutor's related behavior, it is clear the prosecutor was engaging in an enduring attempt to ensure an unfair trial for appellant. As the trial said in a disappointing assessment of Hardy's trial behavior:

> "Throughout the course of these proceedings, there were three attorneys who never, ever deviated from their professional responsibility. Mr. Howeth and Mr. Boles, and I'll say Mr. Howeth specifically, engaged in conduct which I think appealed to the highest levels of a profession they have called their own. I have never wavered in that notion. [Prosecutor] Fox also was in the same camp. Mr. Hardy was not." (55 R.T. 10225.)

The prosecution succeeded in its attempt to prejudice the trial. Hardy's improper gestures improperly discredit yet another key witness for the defense. As this Court stated in *Hill*, with surprisingly similar behavior, "It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure." (*People v. Hill, supra*, 17

Cal.4th 834.)

Given the many witnesses improperly impaired by the prosecutor's conduct, it cannot be said that the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As an absolute, it is reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S OBJECTIONS TO DR. FACKLER TESTIFYING AND PARTICIPATING IN THE PROSECUTOR'S DEMONSTRATIONS EXHIBITING THE SHOOTING.

To counter the prosecution's theory that appellant administered a *coup de grace* shot, appellant called a wound ballistics expert. On cross-examination, over defense counsel's objection, the prosecutor used the expert as a sort of mannequin to demonstrate the prosecution's theory. The prosecutor did not lay a foundation that the conditions for the demonstration were in any way similar to those at the time of the shooting, or that, if not, there was significance to the difference. Additionally, the prosecution was asking the expert to demonstrate events the expert indicated were subject to firearms expertise, which the expert did not have. The demonstration was not relevant and did not provide helpful evidence to the jury. The admission of the evidence prejudiced appellant in that it allowed the prosecutor to argue its theory using the patina of the defense's expert. Thus, appellant's state and federal rights to due process and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the state constitutional counterparts were violated.

A. Factual Background

Appellant called Dr. Martin Fackler as an expert witness in wound ballistics. (40 R.T. 7287.) Dr. Fackler described wound ballistics as the

science of a projectile's effect on a human body. (40 R.T. 7355.) Dr. Fackler's testimony on direct examination consisted of the effects of the three gunshot wounds on Deputy Aguirre (40 R.T. 7295-7298, 7308), the inability to determine Deputy Aguirre's position at the time of the wounds and whether Deputy Aguirre was in motion or not (40 R.T. 7299-7300, 7308-7310), the inability to determine the sequence of shots and (40 R.T. 7298, 7302-7305, 7306, 7309, 7312), stippling (40 R.T. 7301-7302, 7305, 7309, 7312).

Because of the inability to determine motion and the sequence of shots, Fackler noted there were two possible scenarios of the shooting incident. The first, was as the prosecution theorized: that Deputy Aguirre was lying prone on the floor when appellant fired the last gunshot. The second, was that both Deputy Aguirre and appellant were in motion, when appellant fired the final gunshot. (40 R.T. 7307-7308, 7310-7311.)

Over defense objection, during cross-examination, the prosecutor posed Dr. Fackler, with the murder weapon and a mannequin to demonstrate the prosecutor's theory regarding appellant's position when he shot Deputy Aguirre. The prosecutor led Dr. Fackler through a series of four poses.

In the first pose, the prosecutor had Dr. Fackler simulate the shot to the forehead that caused stippling. (40 R.T. 7339.) The only information the prosecutor supplied Dr. Fackler at that time was to assume a position

"at the 12-inch area." (40 R.T. 7339.)

In the second pose, the prosecutor instructed Dr. Fackler to assume a position based on James Roberts' ejection testimony, and the trajectory as shown by a rod placed in a mannequin. (40 R.T. 7346.) Dr. Fackler complained that, "[e]jection patterns are not something in my field of expertise." (40 R.T. 7341.) He further explained that he understood what right-ejecting meant, but "how far to the right, I don't know." (40 R.T. 7341.) Dr. Fackler expanded on his concern: "I'm a little ignorant of this. When [ejection and trajectory expert James Roberts] says 'to the right,' I think he means upward and to the right." "I would possibly want a firearms expert in the room to indicate which -- which -- you know, how much upward, how much to the right." (40 R.T. 7345.) Reluctantly, Dr. Fackler submitted to the prosecutor's continued questioning and agreed to pose. "Yes, I can try and give what I think is -- knowing that this is not my field of expertise, and I'll give it a try." (40 R.T. 7346.)

During this time, appellant objected seven times based on the lack of foundation. (40 R.T. 7342-7347.) The trial court initially sustained appellant's objections. (40 R.T. 7342-7343.) The prosecutor then requested to approach the bench and the trial court reversed itself. The following colloquy occurred outside the presence of the jury:

> "The Court: I don't believe he has expertise to discuss ejections. Recall Roberts, have him discuss ejection patterns.

"The Prosecutor: I'm asking him to assume.

The Court: You're asking him what any juror could answer, any person could answer. I'm not sure what the question is. I apologize, but I don't understand it.

"The Prosecutor: I want him to -- two factors here, ejection pattern and the trajectory[52].

"The Court: Sure.

"The Prosecutor: I want him to place the gun in the position which is consistent with both, assuming that the ejection pattern --

"The Court: If he can testify he understands the ejection pattern. If you have evidence --

"The Prosecutor: Can't I ask him to assume it, as I just did?

"The Court: You can ask him to assume a position, what we have heard the ejection pattern was.

"The Prosecutor: That's what I'm going to do.

"The Court: That's fine. (40 R.T. 7344-45.)

The trial court then instructed the jury as follows:

The Court: The jury -- I'm going to take a moment. Ladies and gentlemen, the question asks the witness to assume earlier testimony from Mr. Roberts. You heard that testimony. The witness is asked to plug that in to what he's doing, the things he knows. And he's been asked if, based upon the confluence of what he has heard through the hypothetical, the assumption of what Mr. Roberts testified to and what he personally knows concerning the line, as he's testified to -- whatever you may find that to be. I'm not telling you what that is. He's being asked to position the gun on those assumptions, and I'll permit him to do that over the objection of the defense. (40 R.T. 7347.)

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[52] Neither of which were within the ambit of Dr. Fackler's expertise.

Back in front of the jury, in a third pose, the prosecutor instructed Dr. Fackler to move to the other side of the mannequin, and again pose assuming the general ejection pattern and trajectory from the prone mannequin. (40 R.T. 7348-7349.)

In a fourth pose, the prosecutor had Dr. Fackler demonstrate a shot into the left forehead. (40 R.T. 7351-7352.)

The demonstrations were not hypothetical questions. In fact, the only opinion offered by Dr. Fackler exposed the irrelevance of the demonstration; during the third pose, Fackler expressed that a "range of positions" would have yielded the same result. Thus, the instruction was of no help. The prosecutor was not asking Dr. Fackler to package a hypothetical based on the 'confluence" of "what he kn[ew]," with "the assumption of what Roberts testified to." Rather, as the court acknowledged at the end of the instruction, Dr. Fackler was merely being "asked to position the gun on those assumptions."

B. It Was Error To Allow The Demonstrations

The admission of the prosecution's demonstration evidence was error. Demonstration Evidence is admissible only 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; essentially, the determination whether the evidence is "of any value in

aiding the jury." (*People v. Terry* (1974) 38 Cal.App.3d 432, 445 [113 Cal.Rptr. 233].) (*People v. Bonin* (1989) 47 Cal.3d 808, 847 [254 Cal.Rptr. 298, 765 P.2d 460].) The party offering the evidence bears the burden of showing that the foundational requirements have been satisfied. (*Id.* at p. 847.)

The trial court is, of course, given discretion in this determination. (See, e.g., *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-566 [271 Cal.Rptr. 738].) However, the trial court "has no discretion to admit irrelevant evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

In appellant's case all three conditions of admissibility were missing. The trial court abused its discretion in allowing the evidence.

1. The demonstration evidence was irrelevant.

Evidence is irrelevant unless it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The posing by Dr. Fackler had no testimonial relevance to his field of expertise. He was not a firearms expert, an ejection expert or trajectory expert. Dr. Fackler was not asked to give an opinion on whether the poses were sound in light of the ejection or trajectory. As he posed, Dr. Fackler explained these failings. In addition, Dr Fackler was disadvantaged by not being privy to the full body of

Robert's testimony.[53] Furthermore, the assumptions of prosecution expert Roberts, on which the prosecutor had Fackler pose, were of questionable value to the demonstration.

Roberts had already testified for the prosecution regarding ejection patterns and trajectories. (36 R.T. 6647-6707.) He testified that he personally test fired the murder weapon to determine the ejection pattern, and that he found the pattern was "erratic."[54] (36 R.T. 6668, 6690.) Roberts explained that based on his ejection pattern tests, the firearm was ejecting cartridges anywhere from 45 to 90 degrees and four to twelve feet behind it. (36 R.T. 6694, 6670.) Roberts further explained that due to the small area the shell casings "probably bounced off of something before they came to rest." (36 R.T. 6695.) In addition, Roberts stated that casings occasionally get moved at a crime scene, and that there was a possibility the casings could have "skitter[ed] across the floor" and that this would be untestable. (36 R.T. 6697.) Roberts further explained that based on all the above possibilities and variations that it was "impossible" to determine the actual position of the person operating the firearm. (36 R.T. 6678, 6694.) In sum, Roberts, the prosecution's expert testified that there was no way of

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[53] Although, Roberts testimony had been furnished to Dr. Fackler he did not concentrate on it because ejection patterns were outside his area of expertise. (40 R.T. 7341.)

[54] Roberts defined erratic as unpredictable. (36 R.T. 6690.)

telling the actual position of the person operating the firearm. (36 R.T. 6678, 6694.)

Dr. Fackler was not asked to add any information for the jury to consider. Dr. Fackler had not done any testing and was not qualified to render an opinion based on ejection patterns. (40 R.T. 7287-7293.) The trial court had it right the first time. The prosecutor should have recalled Roberts if he wanted to pose relevant hypotheticals based on ejection.

2. The prosecution failed to establish that the conditions of the demonstration and alleged occurrence were substantially similar.

The prosecutor failed to lay any foundation that the conditions of the demonstration and the shooting were substantially similar. The prosecutor failed to establish that whatever angle he had Fackler hold the gun, was similar to the angle the gun was held when fired; or if not, whether there was no significance to the difference. (36 R.T. 6668, 6689.) The prosecutor failed to establish whether the final shot was made with a gun in the same hand as that he had Fackler use. The prosecutor failed to account for the comparative heights of Fackler and Johnson,[55] and lay foundation whether there was any significance to the difference. Specifically, with

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[55] Dr. Fackler testified he is 5'9" tall. (40 R.T. 7352.) It was stipulated that appellant is 6'1". (40 R.T. 7399.) Based on the trajectory patterns determined by Mr. Roberts the firearm was fired at different heights. (36 R.T. 6679.)

respect to this condition, Dr. Fackler expressed a concern and difficulty demonstrating the angle of the shot due to his height. (40 R.T. 7352.)

Simply put, the prosecution did not establish that the demonstrations and the shooting were substantially similar.

C. The Demonstration Was Designed To Mislead The Jury.

The prosecutor proffered he wanted to examine Dr. Fackler to demonstrate "two factors," ejection pattern and the trajectory. (40 R.T. 7344.) However, Dr. Fackler was not qualified as an expert in either of these fields. In fact, that expert, Mr. Roberts, had already testified. The trial court should exercise great caution in having the jury hear an expert's testimony outside of that expert's field of expertise. (Calif. Evid. Code, § 720, subd. (a); see e.g., *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1522 [3 Cal.Rptr.2d 833] [error to allow mechanical engineer to testify about usual plumbing maintenance practices of hotels when he admitted subject was outside his area of expertise].)

Because the demonstration provided no relevant testimony, and the prosecution did not establish any similarity in circumstances as foundation, the demonstration was misleading. More insidious, however, the demonstration was designed to be misleading; it did not employ any expertise of Dr. Fackler, and thus there was no purpose other than implying that Fackler supported the theory demonstrated by the poses. The prosecution was merely employing the defense's expert's patina to

demonstrate the prosecution's argument. As the trial court first found, the examination of Dr. Fackler was what "any juror could answer, any person could answer." (40 R.T. 7344.) Thus, the demonstration was designed to mislead the jury into believing that the defense's expert was supporting the prosecution's case.

D. The Insignificant Probative Value Of The Demonstrations Was Outweighed By Its Prejudicial Value.

The prosecutor's use of an expert merely to pose for its theory added little if any relevant information. But it certainly added unfair prejudice. Expert evidence has become "increasingly important in modern litigation." (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 472, p. 444.) Unquestionably, expert witnesses can be very persuasive to jurors on topics unfamiliar to the layperson. (Cal. Evid. Code, § 801, subd. (a).) It is this very persuasiveness that requires experts be used for the limited purpose for which they qualify. The prosecutor repeatedly requested Dr. Fackler stay in a position while describing his position and then making sure the entire jury had taken notice of every last detail. (36 R.T. 7340, 7347, 7349, 7352.) The repeated demonstrations of appellant firing fatal shots were likely to inflame the passions of the jurors and cause them to vote guilty regardless of any lack of criminal intent. (see *People v. Garceau* (1993) 6 Cal. 4th 140, 178 [24 Cal.Rptr.2d 664, 862 P.2d 664].)

Where the probative value of the evidence is insignificant and the

prejudicial impact is quite substantial, abuse is apparent. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22.) Here, the probative value of the demonstration was insignificant and substantially outweighed by the prejudicial effect. The trial court abused its discretion in admitting the evidence.

E. The Improper Admission Of The Demonstration Mandates Reversal.

The error in admitting the demonstration was highly prejudicial. By using Dr. Fackler to pose its theory, the prosecution was able to give the appearance that a defense expert supported ~~to~~ its argument. This is exactly what the prosecutor did. In its closing argument the prosecutor bragged:

> "Dr. Fackler. Mr. Boles described him as "absolutely beyond reproach." We agree. Dr. Fackler has all the credentials, all the experience, all the expertise, he has an amazing background and we completely agree and would submit to you that his opinion was excellent. And the ironic thing is if you listen to Dr. Fackler's testimony, Dr. Fackler became the People's witness on cross-examination." (45 R.T. 8269 - 8270, emphasis added.)

The demonstration, and the prosecution's argument, could only have misled the jury into believing that appellant's theory of premeditation (the coup de grace shot) was supported by the defense's own expert. This pernicious prejudice resulted in the denial of appellant's state and federal constitutional rights to due process and a fair trial. Therefore, reversal is compelled as this error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if not of

constitutional prejudice, it is reasonably probable that, but for the admission of the demonstrations the jury would have reached a different verdict. Therefore, appellant's convictions must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

IX. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DEPUTY DISTRICT ATTORNEY KILBRIDE TO TESTIFY CONCLUSIVELY THAT APPELLANT HAD SUFFERED PRIOR CONVICTIONS AND STRIKES, AND ON THE MEANING OF THE ENHANCEMENT AND STRIKE LAWS WITH RESPECT TO THE SENTENCE APPELLANT WAS FACING.

During the Prosecution's guilt phase case-in-chief, the prosecutor called Deputy District Attorney Terence Kilbride as an expert witness to establish that appellant had suffered five felony convictions, including two serious felony convictions, and was a three strike candidate. Kilbride then interpreted Penal Code, sections 667 and 1170.12, opining that the minimum sentence for appellant if he incurred another felony conviction would be a prison sentence of twenty-five years to life.

Admission of this evidence violated appellant's rights to due process and a fair trial under the state and federal constitutions. (U.S. Const., 5th, 6th and 14th Amends.)

A. Factual Background

Over defense counsel's motion and objection (36 R.T. 6686-6687)[56], the prosecutor was permitted to call Deputy District Attorney Terence Kilbride as an expert witness during the guilt phase of appellant's trial. (36 R.T. 6727.) Mr. Kilbride's testimony included describing the documents

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[56] In addition to defense counsel's objection to Kilbride testifying, defense counsel also objected to the subject matter upon which Kilbride testified. (See Argument VI, supra.)

contained in a 969(b) prison packet, People's Exhibits 18 A-E. (36 R.T. 6729-30.)

Based on the exhibits, Mr. Kilbride opined that appellant had been convicted of five felonies: on October 23rd, 1973, appellant was convicted of the conspiracy to possess and distribute methamphetamine, a felony. (36 R.T. 6731-32.) On January 14, 1986, appellant was convicted of second degree burglary, a felony. (36 R.T. 6733-34.) On February 11, 1987, appellant was convicted of two felonies, robbery with the use of a firearm and assault with a deadly weapon. (36 R.T. 6734-35.) On September 17, 1987, Appellant was convicted of a felony, second-degree burglary. (36 R.T. 6735.) Appellant served a term in prison for the burglary, robbery, and assault. (36 R.T. 6736.)

Mr. Kilbride then explained that California Penal Code §§ 667 and 1170.12 were "enhancement schemes" that had a substantial effect on the sentencing term as the result of a conviction of another felony. (36 R.T. 6741-42.) Kilbride testified that appellant's convictions for robbery and assault with a deadly weapon were serious felonies. (36 R.T. 6742.) Kilbride concluded his testimony by explaining that once someone was convicted of two serious felonies, the minimum sentence for any new felony conviction is twenty-five years to life. (36 R.T. 6743.)

At the conclusion of Mr. Kilbride's testimony, the trial court instructed the jury as follows:

The evidence that has been introduced concerning the purported history of the defendant has been introduced for the purpose of showing that the defendant has suffered certain felony convictions, to which you have now heard evidence. The evidence of prior felony convictions, if believed, may not be considered by you to prove that defendant is a person of bad character or that he may have a disposition to commit crimes. You are only permitted to use this evidence for the limited purpose of deciding the following issues. One, whether in fact the defendant did suffer the felony convictions. And I may mention to you in passing that question will be asked [of] you at the close of the case because that's one of the things you're going to be asked to respond to, if you recall when the Information was read to you. Second, whether the felony conviction of robbery and assault with a deadly weapon in 1987, if true, establishes an intent or motive to commit the crime of murder. And, three, whether such felony convictions, if true, establish that the defendant was a convicted felon within the meaning of Count 5 of the Information, felon in the possession of a firearm. That's one of the elements of the charge, and therefore you'll have to make that finding, and that evidence was brought for that purpose. These three reasons that I have just read to you are the exclusive purposes for which you may consider the evidence of prior convictions. For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other

evidence in this case. (36 R.T. 6744-6745.)

B. Kilbride's Testimony Usurped The Constitutional Requirement That The Jury Determine The Prior Convictions.

California Penal Code § 1025, subdivision (b), specifically provides: "The question of whether or nor the defendant has suffered the prior conviction shall be tried by the jury." Additionally, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, appellant had a right to have his criminal convictions rest upon a jury determination that he was guilty beyond a reasonable doubt of every element of the charged crime. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Duncan v. Louisiana* (1970) 391 U.S. 145 [20 L.Ed. 2d 368, 90 S.Ct. 1068].)

The trial court allowed Kilbride to give expert testimony that appellant was "guilty" of having suffered the prior convictions, and, further, what affect the law gave to that guilt. Kilbride opined that appellant had, in fact, suffered five previous felony convictions (36 R.T. 6731-6735.), had suffered two serious felony convictions as defined by California Penal Code §§ 667 and 1170.12, and was subject to twenty-five years to life for any new felony conviction (36 R.T. 6742-6743.) Irrespective of whether Kilbride was correct in his opinion, he usurped the right of appellant to have the jury make these determinations.

Though the admissible evidence may be very strong that a defendant

has indeed suffered the conviction. California Penal Code § 1025 anticipates the jury determines such questions as: Is there a prior conviction? When did it occur? Was the defendant sentenced to prison based on the conviction and/or was the defendant incarcerated in prison? How long has the defendant been out of custody since suffering the conviction? (*People v. Gonzalez* (1999) 73 Cal.App.4th 885, 892 [87 Cal.Rptr.2d 28].)

Once Kilbride provided his expert opinion on guilt and effect, there was nothing for the jury to do but follow his direction. The testimony amounted to an unconstitutional "conclusive presumption." A conclusive presumption is an irrebuttable direction that unconstitutionally shifts the burden of persuasion to the defendant to disprove an element of the crime charged. (*Sandstrom v. Montana* (1979), 442 U.S. 510, 517 [99 S.Ct. 2450, 61 L.Ed.2d 39].) Kilbride's testimony instructed the jury to find appellant suffered the felony convictions. And, the prosecution encouraged the jury to do nothing other than follow Kilbride's instruction. During closing argument the prosecutor assured the jury:

> "But I submit to you if you listen to Mr. Kilbride's testimony, which is uncontested in the case, you will find that every one of these priors and all the appropriate findings are laid out very, very well in that testimony." (44 R.T. 8137.)

It was fundamental error to allow Kilbride to usurp the right to have the jury determine whether appellant had suffered the prior convictions, and

the effect of those priors as serious or strike priors.

C. Kilbride's Testimony Interpreting The Statutes, And Opining That Appellant Was Facing A Sentence Of Twenty-Five Years To Life Under The Statutes, Usurped The Trial Court's Role In Instructing The Jury.

It was error to allow a Deputy District Attorney to interpret California criminal statutes for a jury, and opine on the issues of punishment facing appellant. "[T]he calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts. [Citation.]" (*Downer v. Bramet* (1984) 152 Cal. App. 3d 837, 841-842 [199 Cal.Rptr. 830].)

Early in our state's judicial history this Court held the meaning of a statute is a matter of law on which the court should instruct the jury; it is not a subject for opinion testimony. (*People v. Carroll* (1889) 80 Cal. 153 [22 P. 129]; *People v. Rose* (1890) 85 Cal. 378, 382 [24 P. 817]; *People v. Gosset* (1892) 93 Cal. 641, 645-646 [29 P. 246].) More recently, it has been affirmed that experts may not opine on the law. "'[I]t is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide.' [Citation] Consequently, the 'opinion of a witness on a question of law is obviously incompetent.' [Citations]" (*Adams v. City of Fremont* (1998) 68 Cal. App. 4th 243, 266 [80 Cal.Rptr.2d 196]; *Willimas v. Coombs* (1986) 179

Cal.App.3d 626, 638 [224 Cal.Rptr. 865].) As the Court of Appeal has succinctly stated: "It is the court and not the witness which must declare what the law is, it not being within the province of a witness, for example, to testify as to what constitutes larceny or burglary." (*People v. Clay* (1964) 227 Cal.App.2d 87, 98 [38 Cal.Rptr. 431].)

There are two excellent reasons why opinion evidence on the meaning of a statute is inadmissible. First, as noted in *People v. Carroll* (1889) 80 Cal. 153 [22 P. 129], leaving the definition of statutory terms to be proved or disproved in every case "would lead to great uncertainty in the administration of justice." (*Id.* at p. 158.) Second, opining on the law is essentially instructing the jury, and it is the duty of the trial judge to instruct the jurors on the general principles of law pertinent to the case (*People v. Daniels* (1991) 52 Cal.3d 815, 885 [277 Cal.Rptr. 122, 802 P.2d 906].),

It goes without saying, that it would be unconstitutional to allow the prosecutor to also act as judge. That is exactly what happened here. Kilbride opined on the meaning of California Penal Code § 667 and 1107.12, the definition of a "serious felony," that appellant had suffered five felonies, two of them serious felonies, and that he was facing minimum sentence for any new felony conviction with two serious felony prior convictions. (36 R.T. 6741-43.) Kilbride's opinions functioned as judicial instructions, and thus a prosecutor acted as judge while his colleague was prosecuting appellant.

It is not significant whether Kilbride's instruction was substantially correct; it was simply not admissible as evidence. (*People v. Carroll*, *supra*, 80 Cal. at pp. 157-158.) The testimony explicitly instructed a legal standard to the jury, and further instructed the jury how it should resolve the standard. This was error. (See, *Andrews v. Metro N. Commuter R.R.* (2d Cir. 1989) 882 F.2d 705, 709; *FAA v. Landy* (2d Cir.) 705 F.2d 624, 632, cert. denied, 464 U.S. 895 [104 S.Ct. 243, 78 L.Ed.2d 233 (1983).] While the prosecution might argue that Kilbride was uniquely qualified by experience to assist the trier of fact, he was not qualified to compete with the judge in the function of instructing the jury. As the court stated in *Marx & Co. v. Diners' Club Inc.* (2d Cir. 1977) 550 F.2d 505, stated:

> "The danger is that the jury may think that the 'expert' in the particular branch of the law knows more than the judge--surely an inadmissible inference in our system of law." (*Id.*, 512; see also *Specht v. Jensen* (10th Cir. 1988) 853 F.2d 805, 808-09 (in banc), cert. denied, 488 U.S. 1008 [102 L.Ed.2d 783, 109 S.Ct. 792 (1989)].)

> The inadmissible inference in the case at bar, that Kilbride might know more than the judge on this issue, carried another lurking danger. The jury would use this instruction as confirmation of the prosecutor's theory that appellant's motive to kill was to avoid the twenty-five year to life sentence.

Kilbride should not have been allowed to usurp the trial court's function to instruct the jury, and he should not have been allowed to supply the judicial shine to the prosecution's lacking theory. It was error to allow his testimony.

D. The Prejudice In Admitting Dr. Kilbride's Instruction On The Law And Legal Conclusions Compels Reversal.

As to the prior conviction enhancements, admission of Kilbride's conclusive instruction to the jury compels reversal of the true findings. (10 2709-2723.) The instruction eliminated the right to have the jury decide the truth of the allegations. Therefore, the admission of the testimony amounted to a "structural defect affecting the framework within which the trial proceeds." Its admission was thus prejudicial per se and requires reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

In addition, Kilbride's instruction was used to support the prosecution's first-degree murder theory that appellant killed to avoid a sentence of twenty-five years to life. Therefore appellant's conviction of first-degree murder was, at least in part, the result of inadmissible evidence. The error in admitting the evidence must be deemed prejudicial because the prosecution cannot show beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Even under the state standard of *v. Watson* (1956) 46 Cal.2d 818, 836, reversal is required. The prosecution's speculative theory that appellant killed to avoid a sentence of twenty-five years to life, was based in too great a part on Kilbride's testimony. It would be unreasonable to

assume that the jury would not deem Kilbride's conclusive direction an endorsement of his colleague's theory. Had Kilbride's testimony not been admitted, it is reasonably probable a different result would have been obtained. (*Ibid.*)

Admission of this evidence violated appellant's rights to due process and a fair trial under the state and federal constitutions. (U.S. Const. 5th, 6th, and 14th Amends.) Appellant's conviction for first-degree murder and the true findings of the prior conviction enhancements must be reversed.

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DEPUTY FRYHOFF TO TESTIFY THAT HE WAS ANGRY HE DID NOT KILL APPELLANT.

Deputy Fryhoff was one of the four deputies who responded to the North Encinal residence on July 17, 1996. Fryhoff and Sparks went to the rear of the house, while Aguirre and Sagely went to the front door and knocked. Shortly there after, Fryhoff heard shots fired and called for backup. Fryhoff saw appellant and then followed him to the front of the residence. Fryhoff and appellant engaged in repeated gun fire, which culminated in appellant being shot and falling to the ground. Immediately after arresting appellant, Fryhoff entered the residence to assist Aguirre.

Deputy Aguirre's death was especially difficult on Deputy Fryhoff because they were close friends, and car pooled to work together. (48 R.T. 8672-8674.) Fryhoff had trouble sleeping and eating and was unable to return to work for almost six weeks. (48 R.T. 8685-8686.)

During the prosecution's penalty phase case-in-chief, prosecutor Hardy asked Deputy Fryhoff: "How do you feel about the fact you didn't kill [appellant.]?" (47 R.T. 8674.) Although the trial court sustained defense counsel's objection to this question, the trial court subsequently allowed Fryhoff to testify that he was angry and upset that he didn't kill appellant. (47 R.T. 8678-8679.)

This testimony was offered under the guise of "victim-impact" evidence. The testimony, however, was irrelevant and so inflammatory and

prejudicial that it rendered the trial fundamentally unfair, violating the appellant's Eighth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution and corresponding state rights. (U.S. Const., 5th, 8th, and 14th Amends; Cal. Const. art. I §§ 15 and 17.)

A. Factual Background

Prior to the beginning of the guilt phase, appellant moved to limit victim impact evidence (6 C.T. 1417-1432), warning that "characterizations and opinions about the crime, the defendant or the appropriate sentence violate[] the Eighth Amendment." (6 C.T. 1420; citing *Payne v.* Tennessee (1991) 501 U.S. 808, 830, fn. 2 [115 L.Ed.2d 720, 111 S.Ct. 2597, 2611; and *People v. Zapien* (1993) 4 Cal.4th 929, 998.) Appellant further advised the court that the prosecution had an obligation to inform appellant's counsel of the evidence it intended to elicit. Specifically, appellant's motion noted that pursuant to *Matthews v. Superior Court* (1989) 209 Cal.App.3d 155, 160.), "the prosecution has a duty to comply with both the spirit and the letter of the statutory mandate of section 190.3[57], i.e., to

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[57] California Penal Code § 190.3, provided in pertinent part: "If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, ... [i]n the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, ... and the defendant's character, background, history,

provide to the defense before trial notice of the actual evidence the prosecution intends to introduce at the penalty phase." (6 C.T. 1428.)

The October 14, 1997, hearing on appellant's motion provided the prosecution with ample opportunity to divulge the evidence it planned on eliciting from Deputy Fryhoff at appellant's penalty phase trial. During this motions hearing, the court offered its opinion of what it anticipated the prosecution would present and appellant's counsel expressed his legitimate concern that he was operating in the dark because the prosecution had provided him with nothing more than a list of potential witnesses. Yet, the prosecution failed to offer even a hint of the evidence it knew it would be eliciting from Deputy Fryhoff. (18 R.T. 2938-2940.)

On January 30, 1998, prior to the penalty phase, appellant filed a second motion to exclude victim witnesses, incorporating by reference the earlier motion to limit testimony. (11 C.T. 2737-2750.) Appellant specifically argued: "Although Deputy Fryhoff was present at the scene of the victim's death, his opinions as to what should happen to the defendant by way of punishment should be excluded." (11 C.T. 2745.)

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mental condition and physical condition. [¶][¶] Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation."

At the motions hearing on February 9, 1998, initially the trial court provided its view that Deputy Fryhoff and Officer Sparks's victim-impact evidence would cover the impact of the crime on Fryhoff and Sparks as cops on the beat and the impact it had on them wanting to do their job. (46 R.T. 8384.)

Prosecutor Hardy responded to the trial court's initial assessment stating his intended offering was as follows:

> "[w]hat we've attempted to do with all these officers is present people who have a different perspective on the impact, something special, something different to say about the impact. [¶] Jim Fryhoff was Pete's training officer. He knew him from that. He also knew him from the fact he's the person who returned fire and shot the defendant. That's a unique position in law enforcement when something like this happens. (46 R.T. 8385.)

Other than this offering, prosecutor Hardy gave no indication that the "unique position" he referenced would include asking Deputy Fryhoff how he felt having not killed appellant.

Ultimately, the trial court determined the following two aspects of Deputy Fryhoff's testimony would be allowed.

> "One aspect is, 'This is what impacted me.' 'I was there, this unfolded, and I was in the zone of danger. Me, this is how I've been terrorized and terrified by this' is permissible. 'And I'm also his training officer. This is the kid I trained and this is the loss this has meant to me' seems to me to be perfectly permissible. So both aspects." (46 R.T. 8405.)

Despite clear statements from the court as to what was admissible during Deputy Fryhoff's testimony, prosecutor Hardy immediately

ventured into impermissible waters soon after Deputy Fryhoff was called to testify in the state's penalty phase case-in-chief. In a brazen gesture of defiance prosecutor Hardy solicited from Deputy Fryhoff his feeling of regret in failing to kill appellant. The specific exchange between prosecutor Hardy and Fryhoff was as follows:

> [Hardy] "Q. July 17th, 1996, 122 North Encinal. You shot Michael Raymond Johnson.
>
> [Fryhoff] "A. Yes, I did.
>
> [Hardy] "Q. How do you feel about the fact you didn't kill him?" (47 R.T. 8674.)

Upon hearing the improper question and answer, defense counsel objected immediately, and the trial court without delay sustained the objection. (47 R.T. 8675.)

Once the trial court sustained the objection, prosecutor Hardy asked to approach the bench. (47 R.T. 8675.) Following an exchange among counsel and the court, the trial court reversed its ruling, stating:

> "The impact upon this victim will be permitted and in that context you may say to him, "What are your emotions that have resulted from the events of that day?" not leading him to it and what responses he gives.
>
> "I will admonish this jury, if necessary, that the opinions of any witness as to the ultimate outcome of this case are irrelevant because they are; it is the jury's decision, not that of a witness. (47 R.T. 8677.)

Defense counsel sought clarification as to whether Fryhoff would be allowed to testify that he wished he would have killed appellant. The trial

court plainly ruled he would not allow the question, "Do you wish you'd killed him?" (47 R.T. 8677.) However, the court noted it would allow testimony concerning "what emotions he has, why he's feeling what he's feeling... ." Further, the court informed counsel it would admonish the jurors that "the question of punishment is not as to any victim or person involved; it is divested in the jury to make a decision." (47 R.T. 8677-8678.)

The court's ruling was all for naught as immediately upon resuming his examination, the prosecutor elicited from Fryhoff that he wished he would have killed appellant.

> "Q. By Mr. Hardy: Describe your emotions for us regarding that part of the incident, the fact that you shot Michael Johnson.
>
> "A. Um, I'm very upset with myself that I didn't kill him.
>
> "Q. Is that something that you think about often?
>
> "A. That's something I have to live with every day.
>
> "Q. Does it make you feel that somehow you were a failure as an officer?
>
> "A. Yeah. It makes me very hostile that I wasn't able to do it." (47 R.T. 8678-8679.)

Getting this improper and prejudicial statement out of Deputy Fryhoff's mouth was important to the state's case and played an important role in its closing argument. The prosecutor's closing argument emphasized this very answer to the question the court previously ruled was

not allowed. Prosecutor Hardy argued as follows: "And what about that law enforcement family? [¶] There is nothing that I could say that could approach being as articulate as the testimony, as what you saw from Jim Fryhoff, who will go to his grave feeling guilty because he didn't kill the man who killed his brother officer." Appellant's immediate objection was noted and overruled by the trial court. (54 R.T. 10058.)

A. Fryhoff's Testimony Was Irrelevant And Inflammatory, And Amounted To An Opinion As To Death As The Appropriate Sentence. This Rendered The Trial Fundamentally Unfair, Violating Both The Eighth Amendment And The Due Process Clause Of The Fourteenth Amendment.

The fact that Deputy Fryhoff was angry and felt guilty at not being able to kill appellant was not relevant, and unduly inflammatory to, the jury's consideration of the circumstances of the capital offense. It amounted to an improper opinion that death was the appropriate sentence.

Evidence of the impact of a defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense. (See, e.g., *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [5 Cal.Rptr.2d 230, 824 P.2d 1277]; *People v. Clark* (1990) 50 Cal.3d 583, 629 [268 Cal.Rptr. 399, 789 P.2d 127]; *People v. Haskett* (1982) 30 Cal.3d 841, 863-864 [180 Cal.Rptr. 640, 640 P.2d 776].) Victim-impact evidence "is not without limits, however, and 'only encompasses evidence that logically shows the harm caused by the defendant.'" (*People v. Brown*

33 Cal.4th 382, 396, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 835, and citing to *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [115 L.Ed.2d 720, 111 S.Ct. 2597] [due process prohibits the introduction of victim impact evidence "so unduly prejudicial that it renders the trial fundamentally unfair"].)

In *People v. Haskett,* this Court warned that "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." (*People v. Haskett, supra,* 30 Cal.3d at p. 864.) As eloquently stated by Justice O'Connor in her concurring opinion in *Payne v. Tennessee, supra,* 501 U.S. at 835: "If, 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." In his concurrence in *Payne,* Justice Souter cautioned: "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." (*Payne v. Tennessee, supra,* 501 U.S. at p. 836; citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328, [109 S.Ct. 2934, 2947-2952, 106 L.Ed.2d 256].), that capital sentence should be imposed as a "'reasoned *moral* response,'" quoting *California v. Brown* (1987) 479 U.S. 538, 545, [107 S.Ct. 837, 841, 93 L.Ed.2d 934], and *Gholson v. Estelle* (5th Cir.) 675 F.2d 734, 738 ["If a

person is to be executed, it should be as a result of a decision based on reason and reliable evidence".].) Also noted by the Court in *Payne* – and argued by appellant in his motion and acknowledged by prosecutor Hardy and the trial court at bench -- it is impermissible for a victim to opine about the appropriate sentence. (*Payne v. Tennessee, supra*, 501 U.S. at p. 831, fn. 2, and Justice Souter's concurrence, at p. 836, fn. 1.)

The relevance of victim-impact evidence is that it informs the jury of the circumstances of the capital crime. "[T]he injury inflicted is generally a circumstance of the crime as that phrase is commonly understood. We need not divorce the injury from the acts." (*People v. Edwards* (1991) 54 Cal.3d 787, 835 [1 Cal.Rptr.2d 696, 819 P.2d 436].) Deputy Fryhoff's anger and guilt in not having killed appellant when he had the chance were not an "injury" as understood in the case law interpreting permissible victim impact evidence. Rather Fryhoff's emotions, though undoubtedly sincere and deeply felt, were feelings to exact revenge on the killer of his friend and partner. This tangential perspective is irrelevant with respect to informing the jury of the effect of appellant's conduct. It is certainly human nature for the victim's family and friends to desire revenge. Merely, because Fryhoff was in a position to exact it, does not make his desire relevant.

What is relevant under this Court's and the United States Supreme Court's holdings in *Payne, Clark, Haskett, Mitchell* and *Edwards*, is

evidence that demonstrates the impact of a defendant's acts on the victims. "As a direct result of defendant's crimes, such effects are plainly relevant." (*People v. Brown* (2004) 33 Cal.4th 382, 397 [15 Cal. Rptr. 3d 624].) Of significance is that the harm must be "a direct result of defendant's homicidal conduct." (*People v. Mitchum, supra*, 1 Cal.4th at 1063.) Thus, what is not relevant, and certainly not within the contemplation of the above holdings, is evidence that demonstrates what impact a victim wishes he could have inflicted on a defendant. This violates the fundamental proscription set forth by the United States Supreme Court in *Payne v. Tennessee, supra*, 501 U.S. at 831, fn. 2, and *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], that victims cannot testify as to their opinions about the appropriate sentence. Fryhoff's expression of guilt and regret at not killing appellant is irrelevant, because rather than informing the jury of the conduct of appellant, it informs them of an impermissible opinion about the appropriate sentence. Before he testified, the trial court, recognized Deputy Fryhoff's emotional expression could enter the realm of impermissible opinion if he stated he wanted to kill appellant, as evidenced by the court's remarks to counsel at the bench that the court would "admonish this jury, if necessary, that the opinions of any witness as to the ultimate outcome of this case are irrelevant because they are." (47 R.T. 8677.)

The testimony was also so inflammatory as to prevent a "reasoned

moral response" by the jury. The testimony was Deputy Fryhoff's impassioned entreaty to the jury to end his suffering and kill appellant, because he had passed up the chance to do so himself. In Deputy Fryhoff's testimony elicited by prosecutor Hardy, Fryhoff told the jury he lived every day of his life regretting his failure to kill appellant. In no uncertain terms, Fryhoff's testimony -- and the prosecutor's argument that he would carry the guilt to his grave -- beseeched the jury to: 1) not regret for the rest of their lives, as Fryhoff would, the failure to kill appellant; and 2) end Fryhoff's grief, by imposing a sentence of death. It would be impossible for any juror not to be influenced by the anguished pleas of an officer plagued by the guilt of not killing the man who killed his partner.

Where, as here, victim-impact testimony is irrelevant, inflammatory and amounts to an opinion by a victim that death is the appropriate sentence, the penalty phase was rendered fundamentally unfair. The admission of the testimony was a violation of appellant's rights under the Eighth Amendment, the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution and California Constitution Article I, sections 15 and 17. (*Payne v. Tennessee, supra*, 501 U.S. at 831, fn. 2, and Justice Souter's concurrence, at 836, fn. 1.)

B. The Violation Of Appellant's Rights Was Prejudicial; The Judgment Of Death Must Be Reversed And The Matter Remanded For New Penalty Phase Proceedings.

Federal constitutional errors, including deprivation of federal due

process, are analyzed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, [87 S.Ct. 824, 17 L.Ed.2d 705].) Under this standard, reversal is required unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.*, at 24; see also, *People v. Boyette* (2002) 29 Cal.4th 381, 428 [127 Cal.Rptr.2d 544, 58 P.3d 391].)

In the case at bar, the State cannot prove beyond a reasonable doubt that Fryhoff's testimony and Hardy's argument did not contribute to the verdict of death. This was a tremendously emotional case. The prosecution, itself, noted that several of the jurors had tears as they expressed their verdict of death. (See, 55 R.T. 10243.) Into this emotional cauldron was thrown evidence that was so "extremely and uniquely inflammatory such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (See, e.g., *People v. Albarran* (2007) 149 Cal.App.4th 214, 230 [57 Cal. Rptr. 3d 92] [addressing inflammatory gang testimony].)

How could the jury be expected to limit its consideration to the evidence when Fryhoff tendered emotional expressions of anger and frustration, pleas to do what Fryhoff let pass by (kill appellant), and affirmation by the prosecutor's arguments that, Fryhoff, "will go to his grave feeling guilty because he didn't kill the man who killed his brother officer[?]" As the high Court recognized in *Booth v. Maryland*, and which reasoning resounds particularly to the evidence at issue:

> One can understand the grief and anger of the family caused by the brutal murder[] in this case, and there is no doubt that jurors generally are 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. As we have noted, any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.' (Citation omitted.) 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. (*Booth v. Maryland, supra,* 482 U.S. at 509.)

Further clouding the jury's resolution of the issues were the trial court's instructions to the jury on victim-impact evidence. Following Fryhoff's testimony the trial court gave an admonition to the jury. Additionally, just prior to closing argument, the trial court further instructed on victim-impact evidence. Though the trial attempted to temper the damage done by the emotional expressions of Fryhoff, the instructions were confusing in light of the nature of the testimony.

The trial court initially proposed an admonition to the jury, requesting comment from counsel only as to whether the admonition "conform[ed] to [counsels'] understanding of the comments at bench." (47 R.T. 8690.) Both the prosecution and the defense accepted the court's proposed admonition, and accordingly, the trial court subsequently

admonished the jury as follows.[58] (47 R.T. 8690.)

> "Ladies and gentlemen of the jury: I admonished you yesterday concerning the role that you play in this case. I have a further admonishment to give to you. You have heard an opinion by a witness concerning very strong feelings that he feels about what should happen to the defendant. That is not received as an opinion of what he feels ought to be done in this case. That is offered as what you have heard referred to as victim impact evidence as his subjective feelings.
>
> "The decision concerning the punishment is exclusively yours and is to be measured by the criteria upon which you have been instructed and again will be instructed, that being specifically the factors in aggravation and mitigation that were dwelled on at great length yesterday by both counsel.
>
> "You must remember you are not instruments of one side or the other but, rather, of the law. It is incumbent upon you to apply the rule of law fairly and justly throughout the course of these proceedings." (47 R.T. 8690-8691.)

This admonition was confusing and equivocal. The court advised the jury that Fryhoff's testimony should be considered as his opinion of what he believed should happen to appellant but was not to be considered as opinion testimony of what Fryhoff believed appellant's sentence should be, which, arguably sounds very much like what he believed should happen to appellant. Moreover, the court went on to tell the jury that Fryhoff's testimony was "victim impact evidence as to his subjective feelings." The jurors were, of course, permitted to consider subjective victim-impact

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[58] The trial court had specifically sought only comment on the form, not the substance of the admonition. Thus, objection by counsel to the merits of the admonition would have been futile. (See, e.g., *People v. Welch* (1993) 5 Cal.4th 228, 237.)

feelings under California Penal Code § 190.3, subdivision (a)[59], pursuant to the trial court's closing instructions, in other words, the trial court was now instructing, contrary to the earlier admonition that they could consider Fryhoff's personal opinion of what he believed the sentence should be. The trial court instructed the jurors in closing:

> "To the extent you heard evidence of the impact of defendant's conduct upon others, it was not offered and cannot be considered by you as indicating the desires of the witnesses as to the proper punishment. Such evidence was received as a component of the circumstances of the crime relative to the harm caused by the crime and the blameworthiness of defendant. You are expressly instructed that you are not to in any way consider what you may believe or suspect to be a witness's desire for punishment. [¶] Testimony and other evidence has been received from family members and friends of Peter Aguirre regarding the impact of his death upon them. This evidence is referred to as victim impact evidence. Victim impact evidence may be considered under factor (a), the circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. [¶] The particular weight which you assign to such evidence is the individual decision of each juror." (54 R.T. 9971-9972.)

Unfortunately, given the conflicting admonitions and instructions, and given the lack of clarity as to how the jurors were to view Fryhoff's testimony, the trial court's closing instruction did little to address the confusion created by the testimony and the court's advisements. The

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[59] California Penal Code § 190.3, provides in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding..."

court's instruction only served to add to the confusion.

First, the instruction asks the impossible. It asks the jurors to consider evidence the trial court acknowledged as the desires of a witness as to punishment, as something other than the witness' desired punishment. Second, the instruction does not even apply to this portion of Fryhoff's testimony because his testimony about regretting not having killed appellant was not evidence "of the impact of defendant's conduct." The jury was not given additional instruction that related to the direct effect or trauma of appellant's conduct with the independent desire asserted by Fryhoff, and thus the jury likely was left to misinterpret the above-stated instruction as applying to this specific portion of Fryhoff's testimony.

The trial court's instructional attempt to temper the jury's use of Fryhoff's "very strong feelings that he feels about what should happen to the defendant," was akin to responding to the fire after the house had burned down. The penalty phase was terminally infected once the trial court initially let down its guard, and there was little if anything that could be done to unring the bell. As Justice Souter recognized in his concurrence in Payne, "there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. (*Payne v. Tennessee, supra,* 501 U.S. at 836; citing *Darden v. Wainwright* (1986) 477 U.S. 168, 178-183, [106 S.Ct. 2464, 91

L.Ed.2d 144].)

Further derogating the trial court's instructional attempts to disabuse the jury of Fryhoff's improper opinion as to sentence, was the prosecutor's argument subsequent to the instructions. Because the argument was highly charged and came after the instructions, assuming arguendo the instructions were clear, the prosecutor's argument's appeal was very forceful and likely would have carried the day.

Simply put, the evidence should never have come in, and the argument should never have been allowed. The jury should never have been subjected to the irrelevant, inflammatory testimony and the prosecutor's rhetoric. The trial court failed in its duty as gatekeeper in what should be the most risk-averse arena possible, the penalty phase of a capital case. Once the evidence and argument came in, prejudice was certain. In any event, because death is a "punishment different from all other sanctions," (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304, 305 [96 S.Ct. 2978, 2990-2991, 49 L.Ed.2d 944]), this Court should view the State's attempt to overcome the applicable prejudice standard with a critical eye. Given the extreme and uniquely inflammatory nature of the testimony and argument, the State cannot prove beyond a reasonable doubt that the testimony and argument did not contribute to the verdict of death. (*Chapman v. California* (1967) 386 U.S. at 24.) This Court must reverse the judgment of death and order new penalty phase proceedings.

XI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING TESTIMONY FROM APPELLANT'S MOTHER, THAT SHE WOULD NOT "WANT [APPELLANT] TO RECEIVE THE DEATH PENALTY," AND IN INSTRUCTING THE JURY, "IN THE STRONGEST POSSIBLE TERMS" TO DISREGARD THE TESTIMONY AND THAT THE FAMILY OF DEPUTY AGUIRRE HAD "RESPECTED [THE] RULE OF LAW," IMPLYING APPELLANT'S FAMILY HAD NOT.

During its penalty case-in-chief, the defense called appellant's mother, Wilma Johnson. During her examination, defense counsel asked whether she wanted appellant to receive the death penalty. As Mrs. Johnson answered, "[o]f course not[,]" the prosecutor leaped from his chair and shouted an objection. In response, the trial court asked the prosecutor to sit down, ordered the jury to leave the room, and ultimately fashioned an instruction to "remedy" the question and answer. The instruction admonished the jury "in the strongest possible terms" to disregard the question and answer, and implied that the Aguirre family had "respected" the law, while the defense and Mrs. Johnson had not.

A. Factual Background

Through the examination of appellant's mother, defense counsel was beginning to develop the background and character of appellant. (50 R.T. 9309-9316.) After defense counsel delved into appellant's childhood, education, military service and personality change following his return from Vietnam, the following exchange occurred:

"Q. You're acutely aware, I'm sure, of why we're here. [¶]

Do you still love your son Michael?

"A. Very much.

"Q. Would you or do you want to see him receive the death penalty?

"A. Of course not." (50 R.T. 9316.)

At this point, prosecutor Hardy bolted from his seat shouting his objection. As recalled by the trial court, "Mr. Hardy shouted, 'Objection.' It was clear to everybody in this courtroom he was very upset, which is exactly why I told him to immediately sit down. And thankfully he did." (53 R.T. 9834.)[60]

The court immediately ordered the jury from the courtroom, and the matter was discussed among counsel and the court. Prosecutor Hardy claimed that the question was improper, and in asking it defense counsel committed "gross misconduct." The court responded: "It's an improper question. [¶] ... That's correct. The law is clear that that question is not to be asked." (50 R.T. 9317.)

The trial court asked prosecutor Hardy what remedy he sought. Hardy responded that he wanted misconduct assigned. The trial court asked whether defense counsel wished to respond. On this issue, defense counsel responded, "no, your honor I'll submit it." (50 R.T. 9318.) The

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[60] The issue of misconduct by prosecutor Hardy's outburst and the intimidation that caused the trial court to likewise overreact, have been separately addressed in Argument VII above.

trial court asked prosecutor Hardy what remedy before the jury he sought. As Hardy pondered, the trial court stated: "I can instruct the jury to both disregard the question and answer and admonish them it is irrelevant to these proceedings and simply not to be considered." (50 R.T. 9319.) The trial court and the prosecutor then discussed basing the instant admonition on the admonition given following Detective Fryhoff's testimony, but resolved that the current testimony was improper, where Fryhoff's was proper.[61] (50 R.T. 9319-9320.)

As the trial court pondered an admonition, prosecutor Hardy stated that he sought no "punishment" of defense counsel Boles, for whom he had no "animosity – unlike [co-defense counsel] Mr. Howeth." However, Hardy stated: "I would really like to know from [defense counsel] Mr. Boles whether or not he really didn't know that that was an improper question. I'd really like to know the answer to that because if he says that he did not know that, I'll accept it. But if he says that he did, I will be even more disappointed with the Public Defender's office for which I have almost no respect." (50 R.T. 9319-9320.) The trial court asked defense counsel Boles whether he wished to respond to this. Mr. Boles responded:

"The cases are -- at least the few cases that are available that I

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[61] Ironically, it was Fryhoff's testimony -- that he was angry and upset in not killing appellant (see Argument X, above) -- that was constitutionally improper.

have looked at -- unclear on what's called reverse victim impact and it's unclear to me -- and if I asked that question in an improper manner, I apologize to the Court and counsel. I just don't know for certain from the few cases I was able to find what the proper parameters are for what's called reverse victim impact.

"THE COURT: It is clear to the Court based on the reading I have found in every case that I have been exposed to that discusses the issue squarely and expressly states that the opinion of family and friends of the defendant concerning the outcome of the penalty phase is inadmissible evidence.

I know of no case that is even equivocal on the point. I accept your representation and intend to admonish the jury but it will take me a moment to figure out the admonition." (50 R.T. 9320.)

The trial court subsequently pondered an admonition to the jury with respect to the question asked by Mr. Boles. Ultimately, the court proposed the following:

"THE COURT: I have fashioned an instruction which I think restores balance and I'll hear comment.

'The decision concerning the result of this case is exclusively that of the jury. You are specifically instructed to disregard the question and its answer. The law of this state is clear that the expressed feelings of family of the defendant is not to be considered by you.

'The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less."

MR. HARDY: That sounds very good.

MR. BOLES: Submitted." (50 R.T. 9321.)

As the jury returned, however, the trial court modified its proposed instruction to add an extra flourish:

"Ladies and gentlemen of the jury, you are admonished that the decision concerning the result of this case is exclusively yours, that is, that of the jury. You are specifically *and in the strongest possible terms admonished* to disregard the question last asked by defense counsel of this witness and the reply she made to it. The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you *on the issue of penalty or punishment.* The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less. *It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope you receive them in that way.* Thank you." (50 R.T. 9322; emphasis added.)[62]

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[62] Appellant anticipates that respondent will argue that any error was waived by the failure of defense counsel to incant an objection to the instruction. However, any objection at this point would have been futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Riel* (2000) 22 Cal.4th 1153, 1213.) The trial court had already implied that misconduct had occurred, and had stated its intention to fashion an instruction which it believed would "restore[] balance." (50 R.T. 9321.) The tenor of the court's instruction clearly voices a view that the defense had engaged in misconduct, not merely that the question was objectionable. In appellant's motion for a new trial, defense counsel stated that having been "beaten down" by the "emotional tone" at the time, it believed the trial court was seeking input into only the remedy for misconduct and not the form of the instruction. (55 R.T. 10239-10240.) This is supported by defense counsel's attempt to apologize if, in fact, the question and answer were inadmissible. (50 R.T. 9320.) Additionally, while defense counsel had expressed reservation that the parameters of so called "reverse victim impact" evidence might have allowed his question, the trial court was strident in stating, "I know of no case that is even equivocal on the point." Therefore, at a minimum, the trial court was expressing such certainty in its conviction that it was reasonable for defense counsel to believe that no objection would have been effective. Moreover, given the trial court's unilateral expression to the jury that it was admonishing them in "the strongest possible terms," it is unlikely the court would have considered even tempering its admonition. During a hearing on appellant's subsequent motion for mistrial based on the court's comment, the trial court disagreed, stating: "I indicated that it appeared to me the law was as I still believe it to

As set forth below, the question asked, and the testimony sought, were proper. It was error for the trial court to instruct the jury to disregard the question and answer; the error was compounded by the severe and inflammatory nature of the instruction. The error was prejudicial.

B. The Question Posed, And Mrs. Johnson's Responsive Testimony, Were Proper Under This Court's Established Precedent. Thus The Trial Court Erred In Instructing The Jury To Disregard Them.

The question put, and the answer given, were proper. Thus, the trial court erred in instructing the jury to disregard them.

This Court has repeatedly established that a defense witness with a close relationship to the defendant may testify as to whether the defendant should receive the death penalty: "Citing [Penal Code] section 190.3 and the United States Constitution, we have held that testimony from somebody 'with whom defendant assertedly had a significant relationship, that defendant deserves to live, is proper mitigating evidence as 'indirect

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be, that such an opinion is improper. I made a very strong statement about that and I invited comment. I got nothing. [¶] And when I invited comment, I meant it. I meant, "give me a hand, folks ...." (53 R.T. 9809.) While the trial court may have sincerely felt it was inviting comment on the admonition, in light of its "very strong statement," and the prosecutor's explosive outburst, defense counsel was reasonable in believing that an objection would have been futile. In any event, because no "conceivable tactical purpose" existed for otherwise failing to object, ineffective assistance of counsel would alternatively enjoin waiver of the issue. (*People v. Lewis* (2001) 25 Cal.4th 610, 674-675.) Additionally, because the instruction was not given at appellant's behest, there was no invited error. (See, *People v. Wickersham* (1982) 32 Cal.3d 307, 330.)

evidence of the defendant's character.' (citing *People v. Ervin* (2000) 22 Cal.4th 48, 102; *People v. Mickle* (1991) 54 Cal.3d 140, 194; *People v. Heishman* (1988) 45 Cal.3d 147, 194.) This evidence is admitted, not because the person's opinion is itself significant, but because it provides insights into the defendant's character. [Citing *People v. Ochoa* (1998) 19 Cal.4th 353, 456].)" (*People v. Smith* (2003) 30 Cal.4th 581, 622-623; see also, *People v. Kraft* (2000) 23 Cal.4th 978, 1072 [error in the exclusion of a witness' testimony that the defendant "should not suffer the death penalty."].)

The question and answer in the instant case are very similar to those presented in *People v. Heishman, supra,* 45 Cal.3d at p. 194. In *Heishman,* this Court stated: "...an objection was sustained to a question put to defendant's former wife ... as to whether she thought defendant should receive the death penalty. The question should have been allowed, since the answer would have exemplified the feelings held toward defendant by a person with whom he had had a significant relationship." (*Id.,* at p. 194.) As in Heishman, Ms. Johnson's testimony "exemplified her feelings held toward" appellant. (*People v. Heishman, supra,* 45 Cal.3d at p. 194.) As in this Court's opinions in *Ervin, Mickle, Heishman, Ochoa and Smith*, the testimony provided insight into appellant's character. (*People v. Smith, supra,* 30 Cal.4th at pp. 622-623.)

In reasoning that the instant question and answer were improper, the

prosecutor and trial court misread this Court's opinion in *People v. Sanders* (1995)11 Cal.4th 475. In *Sanders*, the defense counsel engaged in the following colloquy with the defendant's sister: "Q: Do you love your brother? [¶] A: Yes. [¶] Q: Would it mean something to you for him to be alive, even if he's locked in prison for the rest of his life? [¶] A: Yes, it does. [¶] Q: What would it mean to you?" (*Id.*, at p. 544.) The trial court preempted an answer to this question, and further precluded questions directed to the stigma on the family of imposition of the death penalty. The *Sanders'* trial court ruled: "I don't want the defense to offer opinions, nor would I permit the prosecution to present witnesses with opinions as to what penalty should be imposed." (*Ibid.*) However, the trial court permitted Sanders' sister to testify, "[i]t's always a pleasure-it's a pleasure to know I can go and see him and know that he's alive and he's there." (*Ibid.*) The defendant's brother was also allowed to testify that he was there to "plead for [Sanders'] life." (*Id.* at p. 545, fn. 30.) In finding no error in the trial court's rulings, this Court did not deviate from the sound principles expressed in *Ervin, Mickle, Heishman, Ochoa, Kraft, and Smith.* Rather, this Court merely held that, "the trial court did not bar the evidence on the basis that it was irrelevant, but as duplicative and unduly prejudicial." (*Ibid.*) This Court found that Sanders' sister' testimony as to what a life sentence on appellant would mean to her, was duplicative of her testimony that it was a pleasure to know that she could visit Sanders and

know he was alive. This Court also merely found that the proffered "stigma" evidence would have been unduly prejudicial, in that it had nothing to do with the defendant's character. (*Ibid.*) Nothing in this Court's opinion in *Sanders* purported to reverse the clear constitutional precedent that a witness with a close personal relationship to a defendant may be asked whether the defendant should be sentenced to death.

The question put to Mrs. Johnson, whether she wanted her son to receive the death penalty, was constitutionally appropriate and should have been allowed. Mrs. Johnson's testimony, therefore, was constitutionally admissible and should have been allowed. It was error to instruct the jury to disregard the question and answer.

C. Irrespective Of The Propriety Of The Question And Testimony, The Trial Court's Inflammatory Instruction Admonishing The Jury "in the strongest possible terms" To Disregard The Question, And Implying That The Defense And Mrs. Johnson Had Not Respected The Law, Constituted Error.

Even were the question and answer objectionable, the trial court's provocative and inflammatory instruction to the jury was a wholly inappropriate response. Nothing more that a simple sustaining of the objection was necessary. There was nothing striking about the testimony sought, such that the temerity of asking the question required the most extreme castigation.

In admonishing the jury "*in the strongest possible terms,*" the trial

court told the jury that this testimony, above all other testimony, was improper. Moreover, instructing the jury that "the family of Deputy Aguirre did not and could not express its desires and respected that rule of law ...," implied that, comparatively, appellant's mother and the defense did not respect the rule of law. Finally, in admonishing, "*It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope you receive them in that way*[,]" the trial court not only told the jury that defense misconduct had caused the court to move from its position of neutral arbiter to that of advocate, but literally beseeched the jurors to "receive" the admonition as strong advocacy.

A trial court should tread very carefully in commenting on the evidence. While, "... a trial judge is in a position to assist the jurors in determining what evidence has a bearing on the disputed issues in the case and to aid them in weighing the evidence, and comments which will so assist the jury are of substantial value and should not be discouraged[,]" (*People v. Brock* (1967) 66 Cal.2d 645, 650) any comments on the evidence must be judicial and dispassionate. (*People v. De Moss* (1935) 4 Cal. 2d 469, 476-477; *People v. Sturm* (2006) 37 Cal.4th 1218, 1232.) In the case at bar, the trial court specifically emphasized that the court's comments were not to be taken as judicial and dispassionate; rather, they were to be viewed as a passionate reprobation of the defense and appellant's mother

for offering evidence on the issue of whether appellant was deserving of life. As this Court has stated, "'a trial court that chooses to comment to the jury must be extremely careful to exercise its power "with wisdom and restraint and with a view to protecting the rights of the defendant." [Citations.] The court's comments must be scrupulously fair and may not invade the province of the jury as the exclusive trier of fact. [Citations.]'" (*People v. Rodriguez* (1986) 42 Cal.3d. 730, 772) Here, by its comments, the trial court verily invaded the province of the jury and, in the guise of comment on the evidence, directly or by implication, improperly directed the jury toward a particular verdict. (*People v. Brock, supra,* 66 Cal.2d. at pp. 654-655.)

A trial court must also not single out a particular witness and charge the jury how her evidence should be considered. (See, e.g., *People v. McDonnel* (1949), 94 Cal.App.2d 885, 889.) Yet, that is exactly what happened here. The trial court instructed the jury that it must view appellant's mother's evidence on appellant's character as disrespectful of the law.

A trial court may also commit error by disparaging the defense or creating the impression that it is allying itself with the prosecution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm, supra,* 37 Cal.4th at p.

1233.) Here, the trial court told the jurors that, in fact, the court was no longer being fair. Perceiving that the victim's respect for the law had been taken advantage of by the defense, the court admonished the jurors that the court changed its "tone" and "demeanor" specifically to redress the defense's disrespect for the law. The court beseeched the jurors to take to heart not just the court's words, but the tone used. "[A] judge should be careful not to throw the weight of the judicial position into a case, either for or against a defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence." (*People v. Mahoney* (1927) 201 Cal.2d 618, 627.) Having gone so far as to tell the jury it should be swayed by the manner in which the court expressed its disapproval, the court "transcended so far beyond the pale of judicial fairness as to render a new trial necessary." (*Ibid.; People v. Sturm, supra,* 37 Cal. 4th at p. 1233.)

In issuing its provocative and inflammatory instruction, the trial court injected itself as a partial advocate for the prosecution and against the defense. Thus, irrespective of the admissibility of the evidence, the trial court committed error.

D. The Trial Court's Subsequent Attempt To "Clarify" Its Instruction, Only Reinforced The Error Created By The Initial Inflammatory Instruction

After the close of evidence, as it instructed the jury, the trial court attempted to clarify its erroneous admonition Over defense objection (53

R.T. 9907-9908), the trial court instructed:

> "At the time Mrs. Johnson testified, you were instructed to disregard her opinion on the question of penalty or punishment. I wish to clarify that point. The question of penalty or punishment is yours to decide based upon the factors in aggravation and mitigation upon which you are now being instructed. Not included is any perception you may have of the feelings or desires of any witness on that question, including the family of Deputy Aguirre and the family of Mr. Johnson or of any other witness." (54 R.T. 9970-9971.)

The supplemental instruction only served to reinforce the error created by the inflammatory instruction previously given.

Procedurally, the instruction was given more than a week after Mrs. Johnson's testimony. Thus, even had it been meant to correct the error in the original instruction, it would have been stale and ineffective in terms of erasing the passion and prejudice imprinted by the original instruction. Substantively, the instruction only served to reinforce the error of the first instruction. The only phrase that provided guidance, "Not included [as a factor in aggravation and mitigation] is any perception you may have of the feelings or desires of any witness on th[e question of penalty], including the family of Deputy Aguirre and the family of Mr. Johnson..." was incorrect for the same reason as was the original instruction.

The trial court again conflated evidence of the feelings of Deputy Aguirre's family as to penalty, with evidence of the feelings of appellant's family as to penalty. While the former has no relevance to the appropriate factors in aggravation and mitigation, the latter does. "It is clear that the

prosecution may not elicit the views of a victim or victim's family as to the proper punishment." (*People v. Smith, supra,* 30 Cal.4th at p. 622, citing *Booth v. Maryland* (1987) 482 U.S. 496, 508-509 [107 S.Ct. 2529, 2535-2536, 96 L.Ed.2d 440].) However, testimony from someone with a "significant relationship, that defendant deserves to live, is proper mitigating evidence as 'indirect evidence of the defendant's character.' (*People v. Smith, supra,* 30 Cal.4th at pp. 622-623.) Therefore, the jury could consider Mrs. Johnson's testimony that appellant did not deserve to die, as relevant mitigating evidence of appellant's character.

Ironically, the second instruction did serve to "clarify" the point previously made." In the truest sense of the word, the instruction illuminated, elucidated and magnified the error in the original instruction.

E. The Errors Created By The Inflammatory Instruction, Admonishing The Jury "in the strongest possible terms" To Disregard The Question, And Indicating That The Defense And Mrs. Johnson Had Not Respected The Law, Reinforced By The Second Instruction, And Underlying Exclusion Of The Evidence, Were Prejudicial.

This Court has recognized that exclusion of mitigation testimony from a witness with a substantial relationship to the defendant is of federal constitutional import. (*People v. Smith, supra,* 30 Cal.4th at pp. 622-623.) Federal constitutional errors are analyzed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, [87 S.Ct. 824, 17 L.Ed.2d 705].) Under this standard, reversal is required unless the State can prove

beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.*, at 24; see also, *People v. Boyette* (2002) 29 Cal.4th 381, 428.) The State cannot meet this burden.

The exclusion of evidence took from the jury's purview the most important character evidence a defense witness could offer, that appellant was deserving of life in prison. Moreover, the exclusion of Mrs. Johnson's testimony was not in a vacuum. It was preceded by the contrasting inclusion of Deputy Fryhoff's testimony implying that appellant deserved death. Further, the exclusion of Mrs. Johnson's testimony was only the tip of a prejudicial iceberg. The exclusion was compounded by the prosecutor's explosive outburst immediately following the question and answer, the trial court's dramatic decision to clear the courtroom, and the trial court's subsequent inflammatory instruction that the substance of appellant's mother's testimony was more improper than any other evidence heard by the jury. In this respect, the trial court advocated that Mrs. Johnson's opinion was not just legally irrelevant, but morally and ethically wrong. The trial court, further, urged the jurors to follow the court's misguided attempt to punish the defense for the perceived violation. The trial court implied that the defense had disrespected the rule of law, contrasting the defense's misfeasance with the family of Deputy Aguirre's "respect" for the "rule of law." If, as this Court has found, "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of

their views expressed during trials[,]" (*People v. Sturm, supra,* 37 Cal.4th at p. 1233), then with great confidence, this Court should presume the jurors relied on the judge's view that the defense was ethically and morally bankrupt. Once the trial court admonished the jury that the defense had violated the law, it must be presumed that the defense's credibility in the jury's eyes had been destroyed. Finally, to assure that there remained no doubt that the jury would follow its misguided direction; the trial court reinforced its previous errors with a final erroneous instruction.

The jury is presumed to have followed the trial court's instructions and admonitions. (See, e.g., *People v. Powell* (1960) 186 Cal.App.2d 54, 59; People *v. Clair* (1992) 2 Cal.4th 629, 663 ["We presume that jurors treat the court's instructions as a statement of law by a judge."].) Therefore, we must presume that the jurors in the instant case followed the trial court's instructions to, "in the strongest possible terms," disregard evidence that appellant was deserving of life, and to recognize that only Deputy Aguirre's family respected the law. That presumption would also extend to following the tenor of the admonition as well, especially when the trial court beseeches the jury to do so– "[these] are strong words that I have used and I *hope* you receive them in that way."

In determining prejudice, this Court must be cognizant that death is a "punishment different from all other sanctions," (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304, 305, [96 S.Ct. 2978, 2990-2991,

49 L.Ed.2d 944.) The decision by the jurors to impose death was not "open and shut." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) The jurors deliberated for a week before returning their verdict. (54 R.T. 10119, 10134.) "In a close case, such as this, any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." *People v. Zemavasky* (1942) 20 Cal.2d 56, 62.)

In light of the error in excluding the evidence, compounded by the behavior of the prosecutor and trial court, and the trial court's instructions, the State cannot prove beyond a reasonable doubt that the testimony and argument did not contribute to the verdict of death. (*Chapman v. California* (1967) 386 U.S. at 24.) This Court must reverse the judgment of death and order new penalty phase proceedings.

XII. CALIFORNIA'S DEATH PENALTY LAW VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

California's death penalty law is unconstitutional because it permits the arbitrary and capricious imposition of the death penalty by failing to: require a finding of proof beyond a reasonable doubt of the aggravating factors; require the jury to reach unanimity as to the aggravating factors; require the jury to make explicit findings of the factors found in aggravation; require inter-case proportionality review; meaningfully narrow the class of offenders eligible for the death penalty; minimize the risk of wholly arbitrary and capricious action; and provide equal protection to capital defendants. A death sentence that results from such an arbitrary procedure violates the due process, jury trial, and reliability guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments

This Court has found that California's death penalty statute withstands constitutional scrutiny. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1054 [95 Cal.Rptr.2d 377, 997 P.2d 1044]; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263 [133 Cal.Rptr.2d 18, 66 P.3d 1123]; *People v. Cox* (2003) 30 Cal.4th 916 [135 Cal.Rptr.2d 272, 70 P.3d 277]; *People v. Griffin* (2004) 33 Cal.4th 536 [15 Cal.Rptr.3d 743, 93 P.3d 344]; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731 [21 Cal.Rptr.3d 682, 101 P.3d 568]; *People v. Ward* (2005) 36 Cal.4th 186 [30 Cal.Rptr.3d 464, 114 P.3d. 717].) Appellant asks this Court to reconsider the above rulings in light of

the argument below.

A. California's Death Penalty Law

The People of California adopted the state's death penalty law ("DPL") through an initiative measure approved in 1978. (See e.g., California Penal Code §§ 190, 190.1.) The DPL subjects a defendant to the death penalty after he has suffered a first degree murder conviction with at least one special circumstance. (California Penal Code §§ 190.2(a), 190.3.) Once the trier of fact has found that one or more special circumstances exist, the court must hold a separate hearing to determine whether the defendant's punishment will be death or life imprisonment without the possibility of parole. (California Penal Code § 190.2(a), 190.3, 190.4(a).) During the penalty hearing, the parties may present evidence "as to any matter relevant to aggravation, mitigation, and sentence ...."[63] (California Penal Code § 190.3.) In turn, the DPL provides that in determining the appropriate penalty, the trier of fact must take the following factors into account, if relevant:

> **(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 pursuant to

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[63] In California, aggravating factors are defined as "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." *People v. Dyer* (1988) 45 Cal.3d 26, 77 [753 P.2d 1, 246 Cal.Rptr. 209]; CALJIC No. 8.88.)

Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

(California Penal Code § 190.3.)

The trier of fact "shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in" section 190.3,

and impose a sentence of death only if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." (*Ibid.*) If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without the possibility of parole. (*Ibid.*)

Except for unadjudicated criminal acts under factor (b), the DPL does not require that any aggravating factors be proven beyond a reasonable doubt. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 401-402; *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

B. Factual Background

During pretrial proceedings, appellant moved to prohibit the imposition of the death penalty arguing that the DPL was unconstitutional because it permitted arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments of the Constitution. (5 C.T. 1294-1307; 6 C.T. 1656-1664; 17 R.T. 2809-2810.) The trial court denied appellant's motion based on *People v. Carpenter* (1997) 15 Cal.4th 312, 420 [63 Cal.Rptr.2d 1, 935 P.2d 708] and *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], stating: "Upon the cases I've cited, it appears that the issues have been relatively exhaustively examined both at the state and federal level, and this court is bound by the precedent and, expressing no further opinion, denies the motion." (17 R.T. 2809-2810.)

The trial court's instructions to the jury comported with the DPL. At the beginning of the penalty-phase, appellant's jurors were instructed, pursuant to section 190.3, on all factors except (e). (54 R.T. 9967-9969.) With respect to establishing a burden of proof for the finding of aggravating factors, the trial court instructed only on the single prior criminal act evidence introduced by the prosecutor under factor (b). With respect to this, at the close of penalty-phase evidence, and prior to argument, the trial court instructed the jury as follows: "Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant Michael Raymond Johnson did in fact commit the criminal acts. It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt the 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. (54 R.T. 9972; 12 C.T. 3225; CALJIC 8.87.) The jurors were not instructed as to any burden of proof for a finding of any other aggravating factors. At the conclusion of argument, the trial court instructed pursuant to CALJIC 8.88, that: "To return a judgment of death, each of you must be so persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (54 R.T. 10118; 12 C.T. 3240.)

The instructions, in line with the DPL, did not require the jurors to find every aggravating factor proven beyond a reasonable doubt. Each juror may have found aggravating facts to be substantial on the most minimal of proof. Additionally, each juror was permitted to reach a separate finding from other jurors as to which aggravating circumstances were so substantial as to justify death. Each juror may have voted for death in reliance on one or more arguably aggravating facts that only he or she believed existed, and that other jurors may have rejected as a basis for imposing death.

C. The Failure to Require Aggravating Factors Be Proved Beyond A Reasonable Doubt Violated Appellant's Fifth, Sixth, And Fourteenth Amendment Rights.

Other than the single prior criminal act evidence presented under DPL factor (b), the jury was not required to find any aggravating fact proven beyond a reasonable doubt. However, the Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Guadin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [95 S.Ct. 1881, 44 L.Ed.2d 508]; *In re Winship* (1970) 397 U.S. 358, 363-364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) Where proof of a particular fact exposes the defendant to greater punishment that that available in the absence of such proof, that fact

is an element of the crime which the Fifth and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [95 S.Ct. 1881, 44 L.Ed.2d 508]; *Specht v. Patterson* (1967) 386 U.S. 605, 607 [87 S.Ct. 1209, 18 L.Ed.2d 326].)

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) ..."[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citation omitted.)

In re Winship (1970) 397 U.S. 358, 363 [90 S.Ct. 1068, 25 L.Ed.2d 368]; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323] ["the interests of the [criminal] defendant are of such magnitude that historically ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."].)

In *Apprendi*, a factual finding under New Jersey's hate crime statute

that defendant committed the charged possession of a firearm offense with the purpose to intimidate individuals because of race increased the statutory maximum penalty from between five and ten years imprisonment to between ten and twenty years imprisonment. The Court determined that since this factual finding increased defendant's penalty beyond the prescribed statutory maximum, it constituted an element of the offense to be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490-492.) As the Court held: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. *It is equally clear that such facts must be established by proof beyond a reasonable doubt.*" (*Id.* at p. 490 (emphasis supplied), quoting *Jones v. United States* (1999) 526 U.S. 227, 252-253 [119 S.Ct. 1215, 143 L.Ed.2d 311].)

In *Ring*, the Court applied the holding of *Apprendi* to Arizona's death penalty law. Under that law, the maximum punishment for first degree murder was life imprisonment unless the trial judge found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. The Court held that Arizona's death penalty regime violated the rule announced in *Apprendi* since aggravating factors exposing a capital defendant to the death penalty must be proven to a jury beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428,

153 L.Ed.2d 556].) Recalling *Apprendi*'s admonition that the relevant inquiry "'is one not of form, but of effect,'" the Court stated the following rule: "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.[64] (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494; see also *Blakely v. Washington* (2004) 542 U.S. 296, 305 [124 S.Ct. 2531, 159 L.Ed.2d 403] [invalidating Washington state's sentencing scheme to the extent it permitted judges to impose a sentence above the "standard range" or statutory maximum authorized by the jury's verdict by finding the existence of an aggravating factor by a preponderance of the evidence.].)

The procedure for imposing a death sentence under California's DPL violates defendants' due process right to proof beyond a reasonable doubt. Under California Penal Code §§ 190.2(a), 190.3, and 190.4(a), once the trier of fact has found that the defendant committed first degree murder with at least one special circumstance, the court must hold a separate penalty phase hearing to determine whether the defendant will receive a

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[64] The Court's holding in *Ring* did not rest on the heightened protections that the Constitution affords in death penalty cases: "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." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

death sentence or a term of life without the possibility of parole. In considering whether to impose the death penalty, the trier of fact must consider a variety of enumerated circumstances in aggravation and mitigation. (See California Penal Code § 190.3.) Since the trier of fact can only impose a sentence of death where the aggravating circumstances outweigh the mitigating circumstances, it must first find at least one factor in aggravation before imposing death. (*Ibid.*)

Pursuant to *Apprendi* and *Ring*, because the DPL's factors in aggravation operate as "the functional equivalent of an element of a greater offense," the Fifth and Fourteenth Amendments require that they be found by the trier of fact beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, n. 19.) Thus, just as the presence of the hate crime enhancement in *Apprendi* elevated defendant's sentence range beyond the prescribed statutory maximum, the presence of aggravating factors under the DPL elevate a defendant's sentence beyond the statutory maximum of life in prison to a sentence of death. Similarly, as in *Ring*, the maximum punishment a defendant may receive under the DPL for first degree murder with a special circumstance is life imprisonment; a death sentence is unavailable without a finding that at least one statutorily enumerated aggravating factor exists. Consequently, as the Court made clear in *Ring*, since it is the existence of factors in aggravation which expose California's capital defendants to the death penalty, those factors

must be proven beyond a reasonable doubt in order to impose a constitutionally-valid death sentence. Because no standard of proof is required as to those factors upon which a death verdict must rest, the imposition of a death sentence under the DPL -- as in this case -- violates defendant's constitutional guarantee to proof beyond a reasonable doubt.

Despite the similarities between the DPL and the sentencing schemes invalidated in *Apprendi* and *Ring*, the California Supreme Court has repeatedly held that aggravating factors, other than unadjudicated criminal acts, need not be proven beyond a reasonable doubt. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 401-402 [15 Cal.Rptr. 3d 624, 93 P.3d 244]; *People v. Prieto* (2003) 30 Cal.4th 226, 275 [66 P.3d 1123, 133 Cal.Rptr.2d 18].) The court has justified its position under the theory that "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."[65] (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275.) In accord with the California Supreme

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[65] The court in *Black* found that neither *Ring* nor *Blakely* rendered California's Determinate Sentencing Law unconstitutional because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been part of the sentencing process." (*People v. Black* (2005) 35 Cal.4th 1238, 1258 [113 P.3d 534, 29 Cal.Rptr.3d 740].) Subsequently the United States Supreme Court held California's Determinate Sentencing Law unconstitutional in *Cunningham v. California* (2007) 127 S.Ct. 856 [2007 U.S. LEXIS 1324].

Court's precedents in this area, the trial court in this case refused to instruct the jury that it could only consider a factor in aggravation if it found that the evidence established the existence of the factor beyond a reasonable doubt. (17 R.T. 2809-2810; 5 C.T. 1294-1307; 6 C.T. 1565-1664.)

California stands alone in refusing to require the State to prove aggravating factors beyond a reasonable doubt before the trier of fact may impose a death sentence. Of the 37 jurisdictions in the nation with a death penalty, the statutes of 30 states and the federal system specifically provide that such aggravating factors must be proven beyond a reasonable doubt.[66] The statutes of four additional states contemplate the introduction of evidence in aggravation, but are silent on the standard of proof by which the State must prove this evidence to the tier of fact.[67] However, with the

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[66] See Ala. Code § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-703(B); Ark. Code Ann. § 5-4-603; Colo. Rev. Stat. § 18-1.3-1201(1)(d); Del. Code Ann., Tit. 11 § 4209(c)(3)a.1.; Ga. Code Ann. § 17-10-30(c); Idaho Code §19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(a); Ill. Comp. Stat., Ch. 720, § 5/9-1(f); Ky. Rev. Stat. Ann. § 532-025(3); La. Code Crim. Proc. Ann. art.905.3; Md. Crim. Law Code Ann. § 46-18-305; Mo. Rev. Stat. Ann. § 565-032.1(1); Neb. Rev. Stat. § 29-2520(4)(f); New. Rev. Stat. § 175-554(4); N.H. Rev. Stat. Ann. § 630:5-iii; N.J. Stat. Ann. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3; N.C. Gen. Stat. § 15A-2000(c)(1); Ohio Rev. Code Ann. § 2929-04(B); Okla. Stat. Ann., Tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711 (c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws Ann. § 23A-27A-5; Tenn. Code Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071(c); Va. Code Ann. § 19.2-264.4(C); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i); 18 U.S.C.A. § 3593(c).

[67] See Conn. Gen. Stat. § 53a-46a(c); Fla. Stat. § 921-141(1), (2)(a); Ore. Rev. Stat. § 163-150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv).

exception of Oregon's Supreme Court, which has not yet faced the issue, the high courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before using them to impose a sentence of death.[68]

D. The Failure To Require Juror Unanimity As To What Facts Were True And Sufficiently Aggravating To Support A Vote For Death Violated the Fifth, Sixth, Eighth, And Fourteenth Amendments.

This Court has repeatedly rejected the claim that unanimity is required for any decision but the ultimate one. (*People v. Blair* (2005) 36 Cal.4th 686, 753 [31 Cal.Rptr.3d 485, 115 P.3d 1145]; *People v. Ward* (2005) 36 Cal.4th 186 [30 Cal.Rptr.3d 464, 114 P.3d. 717]; *People v. Taylor* (1990) 52 Cal.3d 719, 749 [276 Cal.Rptr. 391, 801 P.2d 1142]; *People v. Miranda* (1987) 44 Cal.3d 57, 99 [241 Cal.Rptr. 594, 744 P.2d 1127]. Appellant will thus honor the request in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [33 Cal.Rptr.3d 397, 118 P.3d 451], and will not brief the issue in full. He will rely on the representation that such claims

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Washington State's death penalty law does not mention aggravating factors, but requires that before imposing a sentence of death, the trier of fact 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). New York declared its death penalty statute unconstitutional in 2004, *People v. LaValle* (N.Y. 2004) 3 N.Y.3d 88 [783 N.Y.S.2d 485, 817 N.E.2d 341], and had not since revived it.

[68] See *State v. Rizzo* (Conn. 2003) 226 Conn. 171, 180 [833 A.2d 363]; *State v. Steele* (Fla. 2005) 921 So.2d 538, 540; *State v. Gardner* (UT 2002) 947 P.2d 630, 647; *State v. Brown* (UT 1980) 607 P.2d 261, 273.

will be deemed "fairly presented" for purposes of federal review even if supported by minimal briefing. (*Ibid.*) He does, however, ask that the Court reconsider its prior decisions based, *inter alia*, on the following:

1. The right to unanimity via a jury trial is applicable to sentencing findings.

In its recent decisions holding the Sixth Amendment jury-trial right applicable to sentencing findings, the United States Supreme Court has noted that unanimity is one of the bedrock requirements underlying the Sixth Amendment right:

> "[T]o guard against a spirit of oppression and tyranny on the part of the rulers," and "as the great bulwark if [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the **unanimous** suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Law of England 343 (1769).

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at 477 (emphasis added; brackets in original). Accord *Blakely v. Washington* (2004) 542 U.S. 296, 313 [124 S.Ct. 2531, 159 L.Ed.2d 403]. See also *People v. Griffin* (2004) 33 Cal.4th 536, 594-595 [15 Cal.Rptr.3d 743, 93 P.3d. 344] ["In Apprendi, the court held that the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's **unanimous** satisfaction, every fact, other than a prior conviction, that increases the punishment for a crime beyond the maximum otherwise

prescribed under state law"; emphasis added].) As the Court explained in *Apprendi*, where a sentencing factor authorizes a punishment beyond the maximum authorized for the underlying offense, "it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.)

Relying on *Walton v. Arizona* (1990) 497 U.S. 639, 647-649 [110 S.Ct. 3047, 111 L.Ed.2d 511], the high Court excepted its holding in *Apprendi* from capital sentencing schemes that required judges to find specific aggravating factors after a jury found the defendant guilty of a capital crime. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 496.) Subsequently in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], the United States Supreme Court overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence. (*Id.* at p. 2443.) *Ring* further held that *Apprendi* was fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. (*Ibid.*)

2. Life without parole was the statutory maximum sentence.

This Court has rejected the applicability of *Apprendi* and *Ring* to California's death penalty law on the ground that, after the jury has found any special circumstance allegations true beyond a reasonable doubt, "death

is no more than a prescribed statutory maximum for the offense." *People v. Prieto* (2003) 30 Cal.4th 226, 263 [133 Cal.Rptr.2d 18, 66 P.3d 1123], quoting *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [106 Cal.Rptr.2d 575, 22 P.3d 347], emphasis deleted; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [132 Cal.Rptr.2d 271, 65 P.3d 749].)

However, in *Cunningham v. California* (2007) 127 S.Ct. 856, 860 [2007 U.S. LEXIS 1324], the United States Supreme Court ruled: "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Citing to *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 [124 S.Ct. 2531; 159 L.Ed.2d 403], (emphasis in original).) Therefore, this Court's finding that death is the prescribed maximum under the DPL is constitutionally incorrect.

In Cunningham, the United States Supreme Court was addressing California's determinate sentencing law ("DSL"). Pursuant to the DSL, the sentencer (in *Cunningham*, the court) was obliged to sentence Cunningham to a prescribed middle term, unless the judge found one or more additional "circumstances in aggravation."[69] In *Cunningham* the judge found six

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[69] The applicable DSL provision, California Penal Code § 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order

aggravating facts and one mitigating fact. Therefore, the judge sentenced Cunningham to the upper term. The California Court of Appeals affirmed. The California Supreme Court denied review. The United States Supreme Court reversed the appeals' judgment because the upper term was the result of additional fact-finding by the judge, which violated Cunningham's right to a jury trial. (*Cunningham v. California, supra,* 127 S.Ct. at p. 860.)

Cunningham is apposite to the case at bar. In appellant's case the jury's guilt-phase verdict left the jurors with two possible penalties, death or life without the possibility of parole. In order to sentence appellant to death the jurors were required to find that aggravating circumstances substantially outweighed mitigating circumstances. (54 R.T. 10118.) An aggravating factor or circumstance was defined as "**any fact**, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (54 R.T. 10117; CALJIC 8.88, emphasis added.) Therefore, unless additional facts were found by the jury that substantially outweighed the mitigating facts, the prescribed sentence was

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imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Court rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. (Cal. Rule of Court, Rule 4.405(d).) Those facts must be established by a preponderance of the evidence. (Cal. Rule of Court, Rule 4.420(b), n. 6.)

life without parole.

Cunningham was merely the logical extension of *Apprendi*. A sentence of death under the DPL is the "functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, fn. 19.) Likewise, *Apprendi* is the logical extension of *Blakely*. Life without the possibility of parole was the "statutory maximum" sentence because it was the maximum sentence that could be imposed based on the jury's verdict alone. (*Blakely v. Washington*, *supra*, 542 U.S. at p. 303.)

3. The federal death penalty statute requires juror unanimity.

The federal death penalty statute provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k). See *United States v. Beckford* (E.D. Va. 1997) 964 F.Supp. 993, 1001.) Nearly two-thirds of the 22 states that vest the statutory responsibility in the jury for the death penalty sentencing do likewise.[70]

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[70] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La Code Crim. Proc. Ann. art. 905.6 (West 1993); Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (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(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37-071 (West 1993).

4. Juror unanimity ensures that real and full deliberation occurs.

Without unanimity, a death sentence can be reached by a plurality of super-minority findings. This is not acceptable under the Sixth Amendment. The United States Supreme Court has found that there is a point below which a jury is not a constitutionally functioning body. (See, e.g., *Ballew v. Georgia* (1978) 435 U.S. 223 [98 S.Ct. 1029, 55 L.Ed2d 234] ["progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Id.* at p. 232]; see also *Brown v. Louisiana* (1979) 447 U.S. 323 [100 S.Ct. 2214, 65 L.Ed.2d 159]; *Burch v. Louisiana* (1978) 441 U.S. 130 [99 S.Ct. 1623, 60 L.Ed.2d 96]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [92 S.Ct. 1620, 32 L.Ed.2d 152] (9-3 acceptable only in non-capital cases).) "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [110 S.Ct. 1227, 108 L.Ed.2d 369] (conc. opn. of Kennedy, J.).) Jury unanimity is necessary to ensure "effective group deliberation," "accurate factfinding" -- *Ballew v. Georgia*, *supra*, 435 US. at 232 -- and "that the majority voices will actually be heard" -- *Brown v. Louisiana*, *supra*, 447 U.S. at 333. (See also *Allen v.*

United States (1896) 164 U.S. 492, 501 [17 S.Ct. 154, 41 L.Ed. 528] ("The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves").)

The High Court has found "that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size [of the jury] to below six members." (*Ballew v. Georgia* (1978) 435 U.S. 223, 239 [98 S.Ct. 1029, 55 L.Ed.2d 234].) Moreover, the verdict of those six members must be unanimous in order to "assure ... [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) If five is an insufficient number for promoting group deliberation, providing a fair possibility for obtaining a representative cross-section of the community, and ensuring accurate fact finding, a jury effectively consisting of one person, as is now the case with respect to aggravating factors and the weighing process under California's death penalty law, is plainly insufficient. The "acute need for reliability in capital sentencing proceedings" -- *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 246, 141 L.Ed.2d 615]-- militates heavily in favor of requiring unanimity with respect to the crucial findings of a capital jury.

5. A greater degree of reliability is required in death penalty cases.

Ensuring the reliability of the jury's fact finding and conclusions is also the core concern of due process and the reliability demand by the

Eighth and Fourteenth Amendments. The Constitution requires "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) Penalty phase procedures which increase the risk of unreliable determinations have been struck down. (*Caldwell v. Mississippi* (1985) 472 U.S. 585, 605-606 [105 S.Ct. 2847, 86 L.Ed.2d 467]; *Gardener v. Florida* (1977) 430 U.S. 349, 360-362 [97 S.Ct. 1197, 51 L.Ed.2d 393].

6. The failure to require agreement and deliberation as to aggravators creates a grave risk of arbitrariness.

Since section 190.3 permits a wide range of possible aggravators -- particularly given the expansive interpretation given to factor (a) -- the failure to ensure agreement and deliberation on which aggravators are to be weighed on death's side of the scale creates a grave risk: (1) that the ultimate verdict will cover up wide disagreement among the jurors about what the defendant did and didn't do; and (2) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from the wide array of proffered aggravators that death must be the appropriate sentence.

7. Juror unanimity is not limited to final verdicts.

The requirement of juror-agreement is not limited to final verdicts. (Cf. *Richardson v. United States* (1999) 526 U.S. 813, 815-816 [119 S.Ct. 1707, 143 L.Ed.2d 985] (jury must unanimously agree on which three drug

violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise conviction under 21 U.S.C. § 848(a)); *People v. Dietrich* (1982) 31 Cal.3d 263, 281-282 [182 Cal.Rptr. 354, 643 P.2d 971] (where the evidence shows several possible acts of extortion, the jurors must be told that, in order to convict, they must unanimously agree on at least one such act).)

8. The denial of a jury trial is reversible per se.

"Capital defendant's, no less than non-capital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 122 S.Ct. at p. 2432.) The failure to require jury unanimity as to aggravating factors, including the circumstances of the crime, before they can be used in the weighing process and unanimity as to their conclusion that aggravators substantially outweigh mitigators is reversible per se. (*Ring v. Arizona*, *supra*, 122 S.Ct. 2443; *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279-281 ["misdescription of the burden of proof ... vitiates all the jury findings"].)

Alternatively, without written findings as to which factors the jury relied upon the State cannot show beyond a reasonable doubt that the error did not contribute to the penalty verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) It also cannot be found that the error had "no effect" on the jury's sentencing determination and

this met "the standard of reliability that the Eighth Amendment requires." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231] (plur. opn. of Marshall, J.).)

If unanimity regarding aggravation governed this case, the effect would have been significant. The prosecutor's case regarding premeditation was speculative. And as set forth in argument X, ante, both the defense and prosecution experts agreed appellant was suffering from paranoid schizophrenia at the time of the killing, murder. A number of jurors -- in a trial untainted by the concealment of the prosecutor's expert's opinion of schizophrenia -- likely would have rejected the view that the murder was intentional. If so, under a unanimity or super-majority rule no juror could have relied on that rationale for imposing death. For that and other reasons, it is reasonably possible that the absence of such a rule contributed to the verdict of death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Hernandez*, *supra*, 30 Cal.4th at p. 877.) As a result, the penalty verdict must be set aside.

E. The Failure To Require The Jury To Make Explicit Findings Of The Factors It Found In Aggravation Violated The Sixth, Eighth, And Fourteenth Amendments.

The DPL does not require explicit findings by the jury showing the aggravating factors relied on to impose death.

Explicit findings are essential to meaningful appellate review -- see e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449 [229 Cal.Rptr. 131, 722

P.2d 905]; *Proffitt v. Florida* (1976) 428 U.S. 242, 250-51, 253, 259-60 [96 S.Ct. 2960, 49 L.Ed.2d 913]. Explicit findings in the penalty phase of a capital case are especially critical because the magnitude of what is at stake -- *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] -- and the possibility of error -- *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [108 S.Ct. 1860, 100 L.Ed.2d 384] -- create a need for a "high [degree] of reliability" in death-sentencing procedures -- *id.* at pp. 383-384. The importance of written findings is reflected in the fact that three-quarters of all state statutory schemes requires them.[71] Moreover, since the sentencer in non-capital cases is required by California law to state on the record the reasons for the sentence choice -- see e.g., *People v. Martin*, *supra*, 42 Cal.3d at p. 449; California Penal Code sec. 1170(c) -- no less can be required in capital cases where defendants are entitled to more rigorous protections -- *Ring v. Arizona* (2002) 536 U.S. 584, 589; *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836], 994;

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[71] See, e.g., Code of Ala., sec. 13A-5-47(d) (1994); Ariz. Rev. Stat., sec. 13-703(D) (1995); Conn. Gen. Stat., sec. 53a-46a(e) (1994); 11 Del. Code, sec. 4209(d)(3) (1994); Fla. Stat., sec. 921.141(3) (1994); Idaho Code sec. 19-2515(e) (1994); Ind. Code Ann., sec. 35-38-1-3(3) (Burns 1995) (per *Schiro v. State* (Ind. 1983) 451 N.E.2D 1047, 1052-53); Md. Code Ann., art. 27, secs. 413(i) and (j) (1995); Miss. Code Ann., sec. 46-18-306 (1994); Neb. Rev. Stat., sec. 29-2522 (1994); N.J. Stat., sec. 2C:11-3(c)(3) (1994); N.C. Gen. Stat., 15A-2000(c) (1994); 21 Okla. Stat., sec. 701.11 (1994); 42 Pa. Stat. sec. 9711(F)(1) (1992); Tenn. Code Ann., sec. 39-13-204(g)(2)(A)(1) (1995); Wyo. Stat., sec. 6-2-102(d)(ii) (1995). See also 21 U.S.C. sec. 848(k) (West Supp. 1993).

Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421.

In short, written findings are required by the due process, equal protection, jury, and cruel and unusual clauses of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has repeatedly held that the absence of such a provision does not render the scheme unconstitutional. (*People v. Davis* (2005) 36 Cal.4th 510, 571 [31 Cal.Rptr.3d 96, 115 P.3d 417]. See also *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1484-85 (reaching same conclusion regarding 1977 law).) Appellant requests that the Court reconsider its position for the reasons stated above.

Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 186 [30 Cal.Rptr.3d 464, 114 P.3d 717], appellant will rely on the representation that claims such as this will be deemed "fairly presented" for purposes of federal review even if supported by very minimal briefing. (*Id.* at pp. 303-304.)

An explicit findings requirement would make appellate review far more precise. Rather than dealing in possibilities and probabilities, appellant would be able to demonstrate conclusively that the errors challenged in the foregoing arguments had prejudicial impact. For instance, the court would know whether the jurors: (1) relied on improper victim-impact evidence; (2) double or triple-counted the offenses; (3) believed and found aggravating the falsehood that appellant was

malingering.

Given the number of serious error that either could have been prevented or would be more easily identified on appeal if an explicit-findings requirement had been part of the penalty-determination process, it is reasonably possible that the failure to impose such a requirement contributed to the verdict of death. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877 [134 Cal.Rptr.2d 602, 69 P.3d 446].)

F. The Failure Of California's Death Penalty Law To Provide For Inter-case Proportionality Review Violates The Fifth, Sixth, Eighth, And Fourteenth Amendments.

Appellant submits that inter-case proportionality review is necessary under California's 1978 death penalty law to prevent the "wanton" and "capricious" imposition of the death penalty and thus to ensure that the state statutory scheme is in compliance with the requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See generally *Proffitt v. Florida* (1976) 428 U.S. 242, 260 [96 S.Ct. 2960, 49 L.Ed.2d 913] (opinion of Stewart, Powell, and Stevens, JJ.).

This Court has repeatedly held that "intercase proportionality review is not required...." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590 [36 Cal.Rptr.3d 340, 123 P.3d 614]. Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [33 Cal.Rptr.3d 397, 118 P.3d 451], appellant will rely on the representation that claims such as this will be deemed "fairly

presented" for purposes of federal review even if supported by minimal briefing.

Appellant requests that the Court reconsider its position in light, *inter alia*, of the following:

1. *Gregg v. Georgia* (1976) 428 U.S. 153, 198 [96 S.Ct. 2909, 49 L.Ed.2d 859] (approving Georgia's adoption of statue mandating proportionality review by state supreme court as a safeguard against the kind of arbitrariness condemned in *Furman*[72]); *Proffitt v. Florida*, supra, 428 U.S. at p. 259 (similarly approving Florida's judicial adoption of comparative review);

2. *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29] ("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");

3. The U.S. 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 -- see *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316 [122 S.Ct. 2242, 153 L.Ed.2d 335]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831 [108 S.Ct.

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[72] *Furman v. Georgia* (1980) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346].

2687, 101 L.Ed.2d 702]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *Coker v. Georgia* (1977) 433 U.S. 584, 596 [97 S.Ct. 2861, 53 L.Ed.2d 982];

4. 29 of the 34 states that have reinstated capital punishment require "inter-case" appellate sentence review;[73] and

5. Comparative appellate review is required in non-capital cases in California -- see former California Penal Code § 1170(f) and present section 1170(d).

Engaging in such review in this case could well lead the Court to

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[73] See, e.g., Ala. Code, sec. 13A-5-53(b)(3) (1994); Conn. Gen. Stat. Ann., sec. 53a-46b(b)(3) (West 1994); Del. Code Ann. tit. 11, sec. 4209(g)(2)(a) (1994); Ga. Code Ann., sec. 17-10-35(c)(3) (Harrison 1995); Idaho Code, sec. 19-2827(c)(3) (1994); Ky. Rev. Stat., sec. 532.0735(3)(c) (Michie 1995); La. Coder Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann., sec. 99-19-105(3)(c) (1994); Mont. Code Ann., sec. 46-18-310(3) (1994); Neb. Rev. stat., secs. 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann., sec. 177.055(2)(d) (Michie 1993); N.H. Rev. Stat. Ann., sec. 630:5(XI)(C) (1994); N.M. Stat. Ann., sec. 31-20A-4(c)(4) (Michie 1995); N.C. Gen. Stat., sec. 16-3-25(C)(3) (Law, Co-op. 1995); S.D. Codified Laws Ann., sec. 23A-27A-12(3) (1988); Tenn. Code Ann., sec. 13-206(c)(1)(D) (1995); Va. Code Ann., sec. 17-110.1C(2) (Michie 1988); Wash. Rev. Code Ann., sec. 10.95.130(2)(b) (West 1994); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Judicially created comparative-review requirements were adopted in: *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Richmond* (Ariz. 1976) 560P.2d 41, 51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121. See also, *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 (comparison with other capital prosecutions where death has and has not been imposed).

reverse the judgment of death. As demonstrated in Argument VIII, ante, both defense and prosecution experts found appellant was suffering from paranoid schizophrenia at the time he killed Deputy Aguirre. Inter-case review would prove that those who are mentally ill are rarely if ever executed in this country and that to do so here would be "wanton" and "capricious" and therefore unconstitutional.

G. The California Sentencing Scheme Failed To Meaningfully Narrow The Class Of Offenders Eligible For The Death Penalty As Required By The Fifth, Eighth, And Fourteenth Amendments.

The Eighth Amendment requires the state's capital sentencing scheme to "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.'" (*Gregg v. Georgia* (1976) 428 U.S. 153, 195 [96 S.Ct. 2909, 49 L.Ed.2d 859], quoting *Furman v. Georgia* (1980) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of White, J.) Factors used for eligibility and/or selection must apply only to a subclass of those convicted of first-degree murder -- not to every defendant convicted of first-degree murder. A state's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." An "individualized determination on the basis of character of the individual and the circumstances of the crime" is required. (*Zant v. Stephens* (1983) 462 U.S. 862, 877, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

The Ninth Circuit summarized Supreme Court Eighth Amendment death penalty jurisprudence in *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439 as follows:

> "The post-*Furman* death penalty jurisprudence frame work can be quickly sketched. Beyond the threshold requirement that death must be a penalty proportionate to the crime for which the defendant is convicted, a statute that includes capital punishment as a possible penalty (1) 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' and, (2) must not 'prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty.'" (*Id.* at p. 1442 (citations omitted).)

California's DPL is a bifurcated system involving separate eligibility and selection proceedings. The eligibility proceeding is the function of the charging and proving of one or more of the special circumstances enumerated in California Penal Code § 190.2. This is purportedly designed to accomplish the constitutionally required narrowing of the class of individuals charged with, and convicted of first-degree murder who are eligible for the death penalty as mandated by *Furman v. Georgia*. (See, *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29].) The eligibility finding is done as part of the guilt phase while the determination of either death or life without the possibility of parole is accomplished in a penalty or sentencing proceeding. The penalty proceeding involves the possible presentation of additional evidence and the weighing by the jury of

factors in aggravation and mitigation as outlined in California Penal Code § 190.3.

California Penal Code § 190.2(a), as it existed on July 17, 1996, failed to "'genuinely narrow the class of persons eligible for the death penalty'" and thus failed "[t]o pass constitutional muster." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [108 S.Ct. 546, 98 L.Ed.2d 568], quoting *Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

This Court has repeatedly rejected this contention. (*People v. Schmeck* (2005) 37 Cal.4th 240, 304 [33 Cal.Rptr.3d 397, 118 P.3d 451].) Appellant will rely on the representation that this claim will be deemed "fairly presented" for purposes of federal review even if supported by very minimal briefing. (*Ibid.*)

Appellant requests that the Court reconsider its position in light, *inter alia*, of the following:

1. The intent of the statute was to make the death penalty applicable "to every murderer" -- 1978 Voter's Pamphlet, p. 34; emphasis added;

2. As of July 17, 1996, there were 21 special circumstances listed in California Penal Code § 190.2;

3. Even before the 1990 amendments, the great majority of murders -- certainly not a "small subclass" -- *Pulley v. Harris* (1984) 465

U.S. 37, 53 -- fell into one or more of the so-called "special" circumstance categories. (See Shatz and Rivkind, *The California Death Penalty Scheme: Requiem For Furman?*, 72 N.Y.U.L.Rev. 1283, 1332 (1997).) In 1990, Proposition 115 considerably expanded the class of eligible murders.

4. Blanket eligibility for the death sentence violates not only the Eighth Amendment but the Fifth and Fourteenth Amendments guarantees of due process. (See generally, *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85 [106 S.Ct. 2411, 91 L.Ed.2d 67] [due process violated if statutory scheme "offends some principle of justice ... ranked as fundamental"].)

The statute under which appellant was found eligible for the death penalty was unconstitutional. Neither the special-circumstance finding nor the judgment of death may stand. (See generally, *Godfrey v. Georgia*, (1980) 446 U.S. 420, 428-429 [100 S.Ct. 1759, 64 L.Ed.2d 398] [judgment of death reversed where state statutory scheme allowed "almost every murder" to be deemed capital murder].)

H. California Penal Code § 190.3(a) Has, In Practice, Lent Itself To Such Arbitrary And Contradictory Applications As To Violate The Fifth, Sixth, Eighth, And Fourteenth Amendments.

An initial procedural safeguard for capital sentencing is the enumeration of aggravating factors so as to limit the penalty jury's consideration of evidence against the accused to penologically germane factors. The purpose of section 190.3 is to inform the jury which factors it

should consider in assessing the appropriate penalty. (California Penal Code § 190.3) Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d 750], 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.

This Court has repeatedly held that "Section 190.3, factor (a), as applied, does not fail to sufficiently minimize the risk of wholly arbitrary and capricious action prohibited by the Eighth Amendment." (*People v. Schmeck* (2005) 37 Cal.4th 240, 304 [33 Cal.Rptr.3d 397, 118 P.3d. 451].) Appellant will rely on the representation that such claims will be deemed "fairly presented" for purposes of federal review even if supported by very minimal briefing. (*Ibid.*) Appellant requests that the Court reconsider its position.

First, certain of the items listed are as ambiguous as to whether they should be considered aggravating or mitigating that the same underlying facts could, in different cases, be used both for and against the imposition of the death penalty. Under factor (a) prosecutors have argued the following are "circumstances of the crime" no matter how objectively conflicting:

a. inflicting many blows and wounds[74] and inflicting a single execution-style wound;[75]

b. killing the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[76] and killing the victim without any motive at all;[77]

c. killing the victim in cold blood[78] and killing the victim during a savage frenzy;[79]

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[74] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, Cal. Sup. Ct. No. S004762, RT 36-38 (same); *People v. Lucas*, Cal. Sup. Ct. No. S004788, RT 2997-98 (same); *People v. Carrera*, Cal. Sup. Ct. No. S004569, RT 160-61 (same).

[75] See, e.g., *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, Cal. Sup. Ct. No. S004761, RT 3026-27 (same).

[76] See, e.g., *People v. Howard*, Cal. Sup. Ct. No. S004452, RT 6772 (money); *People v. Allison*, Cal. Sup. Ct. No. S004649, RT 968-69 (same); *People v. Belmontes*, Cal. Sup. Ct. No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, Cal. Sup. Ct. No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, Cal. Sup. Ct. No. S004309, RT 2553-55 (same); *People v. Brown*, Cal. Sup. Ct. No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, Cal. Sup. Ct. No. S004370, RT 31 (revenge).

[77] See, e.g., *People v. Edwards*, Cal. Sup. Ct. No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, Cal. Sup. Ct. No. S005233, RT 3650 (same); *People v. Hawkins*, Cal. Sup. Ct. No. S014199, RT 6801 (same).

[78] See, e.g., *People v. Visciotti*, Cal. Sup. Ct. No. S004597, RT 3296-97 (defendant killed in cold blood).

[79] See, e.g., *People v. Jennings*, Cal. Sup. Ct. No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. engaging in a cover-up to conceal the crime[80] and not engaging in a cover-up (indicating pride in the commission of the crime);[81]

e. making the victim endure the terror of anticipating a violent death[82] and killing instantly and without warning;[83]

f. killing a person who had children[84] and killing one who had not yet had a chance to have children;[85]

g. killing a person who struggled prior to death[86] and killing one who did not struggle;[87] and

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[80] See, e.g., *People v. Stewart*, Cal. Sup. Ct. No. S020803, RT 1741-42 (defendant attempted to influence witness); *People v. Benson*, Cal. Sup. Ct. No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, Cal. Sup. Ct. No. S004464, RT 4192 (defendant did not seek aid for victim).

[81] See, e.g., *People v. Adcox*, Cal. Sup. Ct. No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, Cal. Sup. Ct. No. S004365, RT 3030-31 (same); *People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3093 (defendant failed to engage in cover-up).

[82] See, e.g., *People v. Webb*, Cal. Sup. Ct. No. S006938, RT 5302; *People v. Davis*, Cal. Sup. Ct. No. S014636, RT 11,125; *People v. Hamilton*, Cal. Sup. Ct. No. S004363, RT 4623.

[83] See, e.g., *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, Cal. Sup. Ct. No. S004767, RT 2959 (same).

[84] See, e.g., *People v. Zapien*, Cal. Sup. Ct. No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[85] See, e.g., *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16,752 (victim had not yet had children).

[86] See, e.g., *People v. Dunkle*, Cal. Sup. Ct. No. S014200, RT 3812 (victim struggled); *People v. Webb*, Cal. Sup. Ct. No. S006938, RT 5302 (same); *People v. Lucas*, Cal. Sup. Ct. No. S004788, RT 2998 (same).

[87] See, e.g., *People v. Fauber*, Cal. Sup. Ct. No. S005868, RT 5546-47 (no

h. killing someone with whom the defendant had a prior relationship[88] and killing a complete stranger.[89]

Second, in the absence of any limitation on factor (a), prosecutors have been able to argue to juries that just about any fact related to the crime falls within "circumstances of the crime." For example, prosecutors have made the following arguments:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was: a child; an adolescent; a young adult; in the prime of life; or elderly.[90]

b. The Method of Killing. Prosecutors have argued, and juries

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evidence of a struggle); *People v. Carrera*, Cal. Sup. Ct. No. S004569, RT 160 (same).

[88] See, e.g., *People v. Padilla*, Cal. Sup. Ct. No. S014496, RT 4604 (prior relationship); *People v. Waidla*, Cal. Sup. Ct. No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[89] See, e.g., *People v. Anderson*, Cal. Sup. Ct. No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, Cal. Sup. Ct. No. S004712, RT 4264 (same).

[90] See, e.g., *People v. Deere*, Cal. Sup. Ct. No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, Cal. Sup. Ct. No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, Cal. Sup. Ct. No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16,752 (victim was 20); *People v. Phillips* (1985) 41 Cal.3d 29, 63 [711 P.2d 423, 444] (26-year-old victim was "in the prime of his life"); *People v. Kimble*, Cal. Sup. Ct. 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*, Cal. Sup. Ct. No. S004518, RT 4376 (victim was 77); *People v. Bean*, Cal. Sup. Ct. No. S004387, RT 4715-16 (victim was "elderly").

were free to find. that it was aggravating under factor (a) that the victim was: strangled; bludgeoned; shot; stabbed; or consumed by fire.[91]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the defendant killed: for money; to eliminate a witness; for sexual gratification; to avoid arrest; for revenge; or for no motive at all.[92]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) 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.[93]

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[91] See, e.g., *People v. Clair*, Cal. Sup. Ct. No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, Cal. Sup. Ct. No. S004784, RT 2246 (same); *People v. Fauber*, Cal. Sup. Ct. No. S005868, RT 5546 (use of an ax); *People v. Benson*, Cal. Sup. Ct. No. S004763, RT 1149 (use of a hammer); *People v. Cain*, Cal. Sup. Ct. No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, Cal. Sup. Ct. No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, Cal. Sup. Ct. No. S004607, RT 14,040 (stabbing); *People v. Scott*, Cal. Sup. Ct. No. S010334, RT 847 (fire).

[92] See, e.g., *People v. Howard*, Cal. Sup. Ct. No. S004452, RT 6772 (money); *People v. Allison*, Cal. Sup. Ct. No. S004649, RT 969-70 (same); *People v. Belmontes*, Cal. Sup. Ct. No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, Cal. Sup. Ct. No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, Cal. Sup. Ct. No. S004309, RT 2553-55 (same); *People v. Brown*, Cal. Sup. Ct. No. S004451, RT 3544 (avoid arrest); *People v. McLain*, Cal. Sup. Ct. No. S004370, RT 31 (revenge); *People v. Edwards*, Cal. Sup. Ct. No. S004755, RT 10,544 (no motive at all).

[93] See, e.g., *People v. Fauber*, Cal. Sup. Ct. No. S005868, RT 5777 (early morning); *People v. Bean*, Cal. Sup. Ct. No. S004387, RT 4715 (middle of the night); *People v. Avena*, Cal. Sup. Ct. No. S004422, RT 2603-04 (late at

e. The location of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was killed: in her own home; in a public bar; in a city park; or in a remote location.[94]

Third, in certain instances, the factors are described in terms such that proof of its existence could only act as a mitigating factor, e.g., "whether or not the victim...consented to the homicidal act" (subsection (e)). However, the introductory phrasing "whether or not" suggests that the absence of the factor could be affirmatively considered in aggravation. Thus, a jury could impose a death sentence supported only by what is in actuality the absence of mitigating factors. Of course, without any requirement of written findings, the error would go undiscovered.

Factor (a), in short, has become a catch-all category with no discernable limitation. In violation of the due process, jury trial, and reliability guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments, it allows the indiscriminate imposition of the ultimate

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night); *People v. Lucero*, Cal. Sup. Ct. No. S012568, RT 4125-26 (middle of the day).

[94] See, e.g., *People v. Anderson*, Cal. Sup. Ct. No. S004385, RT 3167-68 (victim's home); *People v. Cain*, Cal. Sup. Ct. No. S006544, RT 6787 (same); *People v. Freeman*, Cal. Sup. Ct. No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, Cal. Sup. Ct. No. S004723, RT 7340-41 (city park); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, Cal. Sup. Ct. No. S017116, RT 2970 (remote, isolated location).

sanction upon no basis other than a subjective belief "that a particular set of facts surrounding a murder ... warrants the imposition of the death penalty" without requiring "some narrowing principles to apply to those facts...." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct.1853, 100 L.Ed.2d 372] (discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398]).)

Arbitrariness is this at the core of the scheme by which death is meted out under the 1978 law. So tainted, the penalty verdict in this case must be reversed.

I. The California Sentencing Scheme Violates Equal Protection By Denying Procedural Safeguards To Capital Defendants That Are Afforded To Non-capital Defendants.

California's DPL violates the Equal Protection Clause of the Fourteenth Amendment. (See generally, *Bush v. Gore* (2000) 531 U.S. 98, 104-105 [121 S.Ct. 525, 148 L.Ed.2d 388].) The violation rests on a fundamental disparity: while the U.S. Supreme Court has repeatedly said that a *greater* degree of reliability is required when death is to be imposed -- see, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732; *Ring v. Arizona*, *supra*, 536 U.S. at 589, 609; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836] -- California law provides significantly *fewer* procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes.

This Court has repeatedly rejected this contention, holding that "capital and non-capital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th at 590 [36 Cal.Rptr.3d 340, 123 P.3d 614].) Appellant will rely on the representation that such claims will be deemed "fairly presented" for purposes of federal review even if supported by very minimal briefing. (*People v. Schmeck*, *supra*, 37 Cal.4th at 304.)

Appellant requests that the Court reconsider its position in light, *inter alia*, of the following:

1. In non-capital cases where a criminal defendant had been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., California Penal Code §§ 1158 and 1158a.) No such unanimity is required before a juror can find that a particular fact is aggravating and militates in favor of death. (*People v. Davis* (2005) 36 Cal.4th 510, 571-572 [31 Cal.Rptr.3d 96, 115 P.3d 417].) Equal Protection entitles capital defendants to no less. (See *Ring v. Arizona*, *supra*, 536 U.S. at p.589; *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.

2. When a California judge in a non-capital case is considering which sentence is appropriate: "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." (California Rules of Court, rule 4.42, subd. (e).) No such requirement exists in a capital case. (*People v. Davis*, *supra*, 36 Cal.4th at 571-572.)

3. In a non-capital case: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence." (Rule 4.42(b).) There is no standard of proof in the penalty phase of a capital case. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 589.)

4. In non-capital cases, defendants are entitled to disparate-sentence review. California Penal Code § 1170(d). Those sentenced to death are not. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 590.)

No reasonable justifications -- much less extraordinarily compelling ones -- warrant maintaining these discrepancies. The disparity in treatment violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments and mandates reversal of the judgment of death.

CONCLUSION

For the forgoing reasons, appellant respectfully requests this Court reverse his conviction and sentence of death.

DATED: May 26, 2009

Respectfully submitted,

_____

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Appointed Counsel
Tiffany L. Salayer, #226189
Supervised Counsel

Counsel for Defendant and
Appellant Michael Raymond
Johnson

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.630(b)(1)(A))

The text of appellant's opening brief consists of 102,132 words as counted by the Word 2003 word-processing program used to generate the brief.

DATED: May 26, 2009

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People v. Johnson, Michael Raymond
Supreme Court No.: S070250
Superior Court No.: 39376

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, and not a party to the within action. My business address is 530 B Street, Suite 2100, San Diego, California 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. On this 26th day of May, 2009, I caused to be served the following document(s):

APPELLANT'S OPENING BRIEF

APPLICATION FOR LEAVE TO FILE APPELLANT'S OPENING BRIEF IN EXCESS OF WORD COUNT LIMIT ESTABLISHED IN RULE 8.630(b)(1)(A) OF THE CALIFORNIA RULES OF COURT

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate envelope, with postage fully prepaid, for each addressee named hereafter, addressed to

each such addressee respectively as follows:

Office of the Attorney General Marc Nolan, Deputy Attorney General 300 South Spring Street, North Tower #5212 Los Angeles, CA 90013	Office of the District Attorney Maeve Fox, Deputy District Attorney 800 South Victoria Street Ventura, CA 93009
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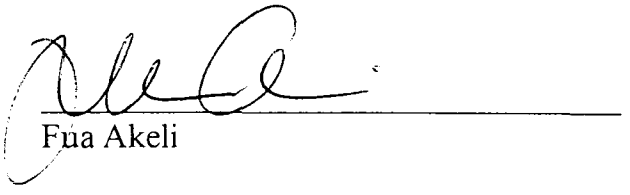
Superior Court of Ventura County Superior Court Clerk 800 South Victoria Ave. Ventura, CA 93009	

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on this 26th day of May, 2009, at San Diego, California.



Fua Akeli

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

MICHAEL RAYMOND JOHNSON

Defendant and Appellant.

Supreme Court No. S070250

(Superior Court No. 39376)

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

The Honorable Stephen Z. Perren, Judge Presiding

NOTICE OF ERRATA OF APPELLANT'S OPENING BRIEF

TO EACH PARTY AND TO COUNSEL OF RECORD FOR EACH PARTY:

Appellant, Michael Raymond Johnson, hereby submits the following Notice of Errata in Connection with the June 1, 2009 filing of Appellant's Opening Brief.

Appellant inadvertently left the following references to the deleted arguments in the body of Appellant's Opening Brief. The following excerpts should have been deleted from Appellant's Opening Brief as they refer to one of the deleted arguments, Argument VII(L) or VIII:

1. On page 183, "The prosecution's use of appellant's statements to argue he was not under the influence of extreme mental or emotional disturbance, or suffering from a mental disease or defect, is particularly troubling in that the prosecutor knew different. As is set forth in greater detail in Argument VIII below, the prosecution has admitted it deliberately withheld evidence from the defense that the prosecution's own mental health expert diagnosed appellant as schizophrenic."

2. On page 210, "The egregious error by the prosecution was compounded by its deliberate concealment of the opinion of its designated but uncalled expert, Dr. Martel, that appellant indeed suffered from paranoid schizophrenia. (See Argument VIII.)"

3. On page 229, footnote 45.

4. On page 238, from " – in light of the prosecution's concealment" though and including "was not suffering from paranoid schizophrenia - "

5. On page 391, "As demonstrated in Argument VIII, ante, both defense and prosecution experts found appellant was suffering from paranoid schizophrenia at the time he killed Deputy Aguirre."

DATED: July 2, 2009

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People v. Johnson, Michael Raymond
Supreme Court No.: S070250
Superior Court No.: 39376

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, and not a party to the within action. My business address is 530 B Street, Suite 2100, San Diego, California 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. On July 2, 2009, I caused to be served the following document(s):

1. APPELLANT'S NOTICE OF ERRATA OF OPENING BRIEF

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

Office of the Attorney General Marc Nolan, Deputy Attorney General 300 South Spring Street, North Tower #5212 Los Angeles, CA 90013	Office of the District Attorney Maeve Fox, Deputy District Attorney 800 South Victoria Street Ventura, CA 93009
Michael C. McMahon Ventura County Public Defender's Office 800 South Victoria Street, 2nd Floor Ventura, CA 93009	Michael Raymond Johnson, K-96000 San Quentin State Prison P. O. Box K-96000 San Quentin, CA 94974
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Superior Court of Ventura County Superior Court Clerk 800 South Victoria Ave. Ventura, CA 93009	

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on July 2, 2009, at San Diego, California.

Pua Akeli