No. S073597
(Los Angeles Superior Court No. PA023649)

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUAN MANUEL LOPEZ

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE MEREDITH C. TAYLOR, JUDGE, of the Superior Court)

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TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAN MANUEL LOPEZ Defendant and Appellant.	No. S073597 (Los Angeles Superior Court No. PA023649)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On February 13, 1997, an information was filed in the Los Angeles County Superior Court, charging appellant and Ricardo Hernandez Lopez with the murder of Melinda Carmody in violation of Penal Code section 187, subdivision (a). Count one of the information alleged that Carmody was killed pursuant to a special circumstance under Penal Code section 190, subdivision (a)(10), because she was a witness to a crime. It also was alleged that a firearm was used within the meaning of Penal Code section 12022, subdivision (a)(1). (CT 699-700.)

Counts two and three alleged that appellant kidnaped Melinda Carmody in violation of Penal Code section 207, subdivision (a), and that he committed the crime of assault by means of force likely to produce great bodily harm in violation of Penal Code section 245, subdivision (a)(1). It was alleged that in the commission of these offenses, appellant used a knife that was a deadly and dangerous weapon under Penal Code section 12022, subdivision (b). (CT 700-701.)

Count four of the information charged appellant with first degree residential burglary of a building occupied by Melinda Carmody in violation of Penal Code section 462, subdivision (a). (CT 701.)

Count five of the information alleged that appellant committed second degree burglary of a vehicle belonging to Margarite Pile, in violation of Penal Code section 459. (CT 702.)

Jury selection in appellant's trial began on May 20, 1998. (CT 838.) The jury was sworn on June 4, 1998. (CT 903.)

On June 23, 1998, the trial court denied appellant's motion to dismiss the charges against him pursuant to Penal Code section 1181.1. (CT 940.)

On June 29, 1998, the prosecutor amended the information to strike the allegation under Penal Code section 12022, subdivision (b), as to count three. (CT 947.)

On July 2, 1998, the jury found appellant guilty of first degree murder as charged in count one of the information. The jury also found the special circumstance to be true. (CT 1072.) The jury found appellant guilty of kidnaping and that the allegation that appellant committed the crime with a knife was true. (CT 1073.) Appellant was found guilty of assault by means of force likely to produce great bodily injury. (CT 1074.) The jury found appellant guilty of second degree burglary. (CT 1075.) The jury deadlocked on count four, residential burglary, and the trial court dismissed that count pursuant to Penal Code section 1385. (CT 1087.)

The penalty phase of appellant's trial began on July 7, 1998. (CT 1088.) Appellant rested his case on that same day without presenting any evidence. (CT 1089.) On July 8, 1998, after 45 minutes of deliberation, the jury imposed a judgment of death. (CT 1105.)

On September 18, 1998, the trial court denied appellant's motion for a new trial and his automatic motion for modification of the death verdict. (CT 1138.) At the same hearing, the trial court imposed a sentence of death as to count one. (CT 1143.) The trial court also imposed a total prison sentence of 11 years and 8 months for the remaining counts against appellant, which was ordered stayed because of the death judgment. (RT 1145-1147.)

Appellant's appeal to this Court is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

Appellant was a leader in the Parthenia Street Gang or the "Village Locos." (RT 1148.) He helped start a girl's branch of the gang, known as the "Baby Locas." (RT 1149.) The victim, Melinda (Mindy) Carmody, became a member of the Baby Locas when she was 14 years old. (RT 1153.) Melinda's nickname in the gang was "Crazy." (RT 1165.) Appellant formed a personal relationship with her on the day that she became a gang member. (RT 1152.)

Melinda was living with her mother at the time she joined the gang. (RT 2261.) She had run away from home on various occasions. (RT 2263.) In March, 1995, she ran away and began living with appellant and his family. (RT 2128, 2262, 2269.) Appellant was 21 years old at the time. (RT 2126.) Melinda's mother was upset that she had a relationship with appellant and that she lived at his home. (RT 2271.) But she did not make Melinda return to her home because she knew where Melinda was living and that she was being cared for by appellant's family. (RT 2262, 2271.) Melinda lived with appellant until September, 1995. (RT 2269.)

Appellant and Melinda maintained their relationship after she returned home. She wrote appellant a love-letter on February 2, 1996. (RT 2274; see Defense Exhibit F.) However, they broke up over the telephone on February 27, 1996, while appellant was visiting Oregon. (RT 936, 2272.)

On March 13, 1996, appellant called Melinda and told her that he needed to get some tax papers that she had at her home. (RT 936, 1044.) Melinda stated that she was scared of him and told him not to come to her

house.[1] However, he came and asked her to leave with him. Melinda refused and appellant struck her in the back of the neck with a knife and choked her. (RT 920-921.) He told her that if he could not have her, no one could. (RT 947.) She said that appellant pulled her up by the hair and took her to her room to pack a bag for her and then led her out of the house. (RT 922-923.)

There was a car in front of the house, driven by someone that Melinda had never seen before that day. (RT 925.) She stated that appellant pushed her into the car and they drove to his house. Appellant sat in front and she was in the back of the car. (RT 942.) Melinda stayed in the car with the driver while appellant went into the house and quickly returned with a small bag. (RT 927.) From there, they drove to the home of appellant's aunt. (RT 928.)

Melinda stated that appellant left and his aunt helped clean her wounds. She changed into a clean shirt. She stayed there for four hours. (RT 931.) During this time, she had trouble communicating with appellant's aunt because of the language differences – his aunt spoke Spanish and Melinda understood only a few words. Appellant's aunt drove her home. (RT 932-933.) After she returned home, she called her mother and reported the incident to the police. (RT 945.)

Appellant later told the police that Melinda had given permission for him to come to her house and pick up his papers. They argued when he got there and he hit and choked her. (RT 1045.) Melinda went with him

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1. Melinda's testimony was given in the preliminary hearing regarding the kidnaping charge.

voluntarily and they took a bus to his house. A friend picked them up and drove them to his aunt's house. (RT 1046-1047.)

Rosario Hernandez, appellant's mother, testified that Melinda came to her house with appellant. (RT 2118.) Melinda did not appear to be scared. She did not see that Melinda had suffered any injury. (RT 2119.) They left after about an hour, but before leaving, Melinda gave her a card that was dated March 13, 1996. (RT 2118, 2120, 2125.) The card showed an electric bulb and pictured a man and a woman. It had the words, "You Light Up My Life" on it. (RT 2120; see Defense Exhibit E.) Appellant told her that they were going to Mexico to be married. (RT 2136.)

Maria Hernandez, appellant's aunt, testified that appellant and Melinda came to her house on March 13, 1996. (RT 2144.) Maria spoke English at the time of the incident. (RT 2149.) She learned that they were planning to go to Mexico, but she tried to talk them out of their plans. (RT 2148-2149.) Melinda did not appear to be scared or frightened, and Maria saw no injuries. (RT 2150-2152.) Maria convinced them not to go to Mexico and her husband (James Murphy) drove them back to Melinda's house. (RT 2150, 2152.) Maria stated that they stayed at her house for an hour or two. (RT 2148.)

James Murphy was fixing his car when appellant and Melinda arrived, but knew that they wanted him to drive them to Ensenada, Mexico. (RT 2186.) He stated that after they stayed two or three hours, he eventually gave them a ride back to their neighborhood. (RT 2187.) He testified that Melinda did not appear to be frightened or injured and that there was nothing to indicate that she was there against her will. (RT 2188-2189.)

Some time after the incident, Melinda wrote in her diary, "Bird [appellant] broke in and stabbed me and choked me and kidnapped me. Went to Police station, went to Grandma's." (RT 2268.) Two days later, she told a teacher about the incident. (RT 2255.)

Appellant was arrested the night of the incident after he allegedly broke into a car. (RT 984-985.) Zury-Kinshasa Terry testified that she heard the sound of glass shattering and saw someone in her aunt's car. (RT 983-984.) When she came to the door, the person got out of the car and said, "Bitch, if you don't get back in the house, I am going to kill you." (RT 985.) She identified appellant as the person she saw. (RT 986.) The car's owner, Margarite Pile, called the police. (RT 986, 1004.) Afterwards, she found pry marks near the car's radio. (RT 1006.)

Appellant told the arresting officer that he was in the area to see his girlfriend and pointed out that he had a tattoo with her name (Melinda) on it. (RT 1014, 1018.)

On March 28, 1996, Melinda testified at the preliminary hearing regarding the kidnaping charge. (RT 1049.) The investigating detective believed that Melinda was frightened and upset during her testimony. (RT 1051.) At one point, the judge indicated that the court was going to take a break. Appellant sat forward in his chair and said "I don't have to sit here and listen to this shit." (RT 1055.) Appellant later told the investigating officer that although he had made a mistake regarding the kidnaping charge, some of Melinda's testimony made him mad. (RT 1612.) He also told the investigating officer that her testimony made him sad. (RT 1613.)

While appellant was in jail on the kidnaping charge, phone records from the jail showed that numerous calls were made to the Lopez household. (RT 1999-2016.) Patricia Lopez testified that she helped

appellant set up three-way phone calls. (RT 1591.) Patricia testified that appellant did not call and ask to speak to his brother Ricardo, but she remembered telling the investigating police officers that appellant called for Ricardo but he was not home. (RT 1594.) She also remembered telling the officers that a week before Melinda was killed, appellant asked her to set up a three-way phone call with Ricardo and Jorge Uribe ("Pelon"). (RT 1597.) She did not know what they spoke about. (RT 1597, 1605.)

Appellant also called Sandra Ramirez, the leader of the Baby Locas and the original member of the gang.[2/] (RT 1149, 1157.) Ramirez testified that during one conversation, appellant admitted stabbing Melinda and trying to kidnap her so that they could be married in Mexico. (RT 1160.) He also told Ramirez to ask Melinda not to go to the preliminary hearing. (RT 1161.)

Appellant called Ramirez the day before Melinda was killed. (RT 1163.) Ramirez was already talking with another gang member, Alma Cruz, so she set up a three-way phone call. (RT 1165.) Appellant talked to them about a gang meeting that was to be held the next day. (RT 1166.) He was concerned that the gang pay their dues to the Mexican Mafia. (RT 1167.) The meeting had been planned for some time, and such meetings were a regular part of gang life. (RT 1324.)

Appellant also discussed making "Happy" a gang member. Happy was a friend of Melinda's and the Baby Locas had planned to "jump her in"

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2. During the police investigation, appellant initially denied speaking with Ramirez. He later acknowledged that he spoke to her, but denied speaking with anyone else from the gang. (RT 1618-1619.)

at a park that same Friday.[3] (RT 1168, 1376.) The regular gang meeting had been set before they decided to jump Happy into the gang. (RT 1324.) Appellant stated that he had spoken to Melinda and knew about the plans to make Happy a member. (RT 1175.)

The park was in an area that was not controlled by the gang. (RT 1324.) Appellant told Ramirez that it would be better to jump Happy in the neighborhood that the gang controlled, rather than at the park. (RT 1176, 1617.) Ramirez did not think that it mattered where a new member was jumped, but they deferred to appellant's authority. (RT 1177, 1378-1379.) Alma Cruz testified that all of the other Baby Locas had been initiated at a neighborhood location and she had no reason to question appellant about this.[4] (RT 1455-1456.) It was decided that the initiation should be done on April 12th, the day of the scheduled meeting. (RT 1179.)

During this conversation, appellant asked Alma if she could kill a homegirl.[5] (RT 1187, 1382.) Ramirez did not hear Alma's reply, but Alma testified that she told appellant it depended on what the homegirl had done to her. According to Alma, appellant said, "I already have someone doing it for me." (RT 1382.)

A "green light" had been called before the meeting. (RT 1325.) This term was used by the Mexican Mafia (EME) to indicate that a gang is subject to attack. (RT 1647.) One of the reasons for a green light is that a

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3. "Jumping in" refers to the process of making a gang member by having the new member fight other gang members. (RT 1150.)

4. Appellant later told the police that the new member had to be jumped in the neighborhood because it was a tradition. (RT 1659,)

5. A "homegirl" is a female member of the gang. (RT 1187.)

gang has not been paying its dues. (RT 1648.) Accordingly, Ramirez expected that someone from the gang would bring a gun to the meeting for protection.[6/] (RT 1325.)

On April 12, 1996, Sandra Ramirez borrowed her parents' car and picked up members of the Baby Locas, including Alma and Melinda, to go to Schoenborn Street for the meeting and to jump Happy into the gang. (RT 1180-1184.) They arrived at the meeting site in the alley around 7:30 p.m., but only Ricardo Lopez and Jorge Uribe were there. Other gang members showed up later. (RT 1198.) Sandra told Melinda not to be afraid of Ricardo. (RT 1195.)

The gang members, including Ricardo, bought 40-ounce beer and malt liquor at a nearby liquor store. Ricardo drank both types of alcohol. (RT 1201, 1203, 1331, 2238, 2240.) Melinda and other gang members were also drinking. (RT 1434.) During this time, the gang members were talking to each other informally, the boys on one side of the street, the girls on the other. (RT 1328-1329.)

While Melinda was on one side of the street talking to the girls, Sandra walked over to Ricardo, who was standing with Uribe. Ricardo had been drinking. (RT 1335.) He asked her why she had brought "them." Sandra asked, "Who?" Ricardo said, "You know what's going to happen?" Sandra did not know. Ricardo then said, that if anything happened, she should say it was a "drive-by." Sandra was still bewildered. Ricardo then

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6. Ricardo told the police that he obtained the gun from Uribe. The investigating officer testified that Ricardo admitted discussing the crime with Uribe two or three days before the homicide occurred. (RT 1837-1838.) Ricardo said that Uribe knew what was going to happen, although he did not want to shoot Melinda himself. (1 Supp. CT 928-929.) This evidence was admitted only against Ricardo. (RT 1831.)

pulled a gun, pointed it at her, and said he was going to shoot her. At trial, Sandra could not remember why he threatened her. Ricardo also mentioned how they were going to jump her boyfriend for failing to pay dues. In any event, Uribe told Ricardo to put the gun away. (RT 1203, 1205-1213.) When Sandra saw Ricardo with the gun, she thought he had brought it because of the "green light." (RT 1335.)

Soon after Sandra had returned to where the other girls were standing, Uribe walked over to the group and told Melinda that Ricardo wanted to talk to her. Melinda seemed displeased, but went over there anyway. (RT 1395, 1540.)

Ricardo and Melinda talked to each other in raised voices.[7] (RT 2243-2244.) As Melinda spoke with Ricardo, he extended his arm down the right side of his body, holding his gun against his right thigh. At some point, Melinda broke off the conversation, turned, and began to walk away almost at a run, crying out, "Shy Girl [Sandra Ramirez], let's get out of here." Ricardo began shooting at her.. Melinda fell to the street. Ricardo walked closer and fired one more shot as she lay on the ground up on her elbows. She then collapsed to the ground completely. (RT 1215-1224, 1395-1400, 1473-1475, 1541-1545.) Angelica Soto, one of the witnesses, testified that Ricardo said something about "brother." (RT 1549.)

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7. Ricardo told the police that he was angry because of the things Melinda had said about appellant during her preliminary hearing testimony. (1 Supp. CT 900-906.) He stated that Melinda also was angry and refused to answer him when he asked her why she had said those things. (1 Supp. CT 909.) He shot her when she turned to walk away. (1 Supp. CT 925.) Ricardo stated that he did not want to kill Melinda, but only to wound her. (RT 1861, 1864.) This statement was admitted only against Ricardo. (RT 1831.)

Immediately after Ricardo shot Melinda, he placed the gun against his own head. (RT 1439, 1561.) Ramon Ramos tried to get him to surrender the gun. (RT 1440.) Ricardo refused to give it to him. He stated, "It's for my *carnal*," or brother, and pulled the trigger. The gun did not fire. (RT 2245, 2249-2251.) Ricardo left with it, hiding it in his house, where it was ultimately recovered by the police. (RT 1779.)

Melinda died from multiple gunshot wounds. One of the fatal bullets entered her back and punctured a lung. A second fatal bullet entered the back of her head and went through her brain. A third bullet entered her back, but hit nothing vital. (RT 1704, 1707, 1710-1711, 1717, 1725-1726.)

When Melinda was taken to the hospital, a paramedic saw her pager. The chaplain also attempted to identify her by checking the numbers on the pager. Both witnesses stated that there was a number on the pager, "187," which was repeated several times. (RT 1525-1526, 1906.) A police officer testified that "187" meant "murder." (RT 1661.) Appellant later told the police investigator that Ricardo could not have placed "187" on Melinda's pager because he did not know her pager number. (RT 1665.)

Sandra Ramirez testified that appellant telephoned her from jail the next morning, April 13. He asked her what happened. She told him that Ricardo shot Melinda, but she did not know if Melinda was dead or alive. Appellant asked her if she knew where Ricardo was. She did not. (RT 1274-1275.) Appellant later told Sandra not to say anything to the police.[8/] (RT 1280-1282.) Appellant later told investigating officers that he first

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8. Ricardo also called Sandra and told her to tell the police that the incident was a drive-by shooting. (RT 1279-1280.) Ricardo also warned Sandra's boyfriend in a letter that Sandra was not to testify or the homeboys would harm her. (RT 1290-1291.)

learned about Melinda's death when his attorney told him, a week after the crime. (RT 1610.)

B. Penalty Phase

The penalty phase took one day to complete. The prosecution introduced evidence that appellant had been involved in a jailhouse altercation with officers and also offered victim impact evidence. No evidence was presented on appellant's behalf.

Angela Perez was a deputy sheriff who worked in the infirmary of a correctional facility. (RT 2786.) She testified that on July 11, 1997, appellant was brought to the infirmary after an altercation with another inmate. (RT 2787.) Her partner asked her to get the handcuffs to return appellant to another part of the jail. (RT 2788.) Appellant said, "Fuck you, I ain't going to the hole." (RT 2791.) When she tried to handcuff appellant, he elbowed her in the face. They fought and appellant kicked and hit her. (RT 2793-2795.) Another officer attempted to spray appellant with something similar to pepper spray. (RT 2803.) Other officers assisted in handcuffing appellant. (RT 2796, 2804.)

Dee Carmody, Melinda's stepmother, testified about how Melinda was part of her family. (RT 2807.) Melinda lived with them for awhile and often visited. Her family was devastated by the loss. (RT 2810-2811.)

Melinda's grandmother, Edna Steffen, was also very close to her. (RT 2814.) She, too, was devastated by the loss and became obsessed with revenge because appellant was living but Melinda was dead. (RT 2818.)

Susan Carmody, Melinda's mother, told the jury about how much she loved her daughter. They had been going to therapy together to try to work out their problems. (RT 2822.) After her death, her world stopped. (RT 2823.)

ARGUMENT

Introduction

The case against appellant was built on the single statement that appellant allegedly made to Alma Cruz, asking Alma whether she could kill a homegirl. This was not enough to support a conviction, particularly under the "corpus delicti" rule that requires proof of a crime independent of a defendant's admission. In order to try to provide the required proof, the prosecutor introduced evidence that invited the jury to speculate that appellant must have committed the crime, but none of this evidence established that appellant had acted as a principal in Melinda's death – i.e., that he aided, abetted, or encouraged Ricardo to commit the crime.

As part of his case against Ricardo, the prosecutor introduced Ricardo's statement to the police admitting that he planned the crime with Jorge Uribe. This statement was to be used only against Ricardo, but the limitation was undermined when the jury learned that appellant had participated in a three-way telephone conversation with Uribe and Ricardo during this same time period. Although there was no evidence to establish what the three had discussed, the prosecutor urged the jury to use Ricardo's statement to the police in order to speculate that they planned the crime together.

Similarly, the jury was left to speculate that Ricardo implicated appellant when he tried to shoot himself and said. "for my *carnal* (brother);" and that appellant was responsible for the "187" number on the victim's pager.

Appellant demonstrates below that these and other errors led the jury to ignore the critical gaps in the evidence and turn appellant's alleged statement to Alma Cruz into an admission justifying a capital conviction.

This was not enough to support the guilt verdict. Nor was it enough to permit a death sentence The judgment in this case must be reversed.

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I.

THE TRIAL COURT IMPROPERLY LIMITED VOIR DIRE OF PROSPECTIVE JURORS

At the time of appellant's trial, the trial court conducted voir dire of prospective jurors. (See former Code of Civ.Proc., § 223 [voir dire from counsel permitted only if there was "good cause"].) At the beginning of jury selection in appellant's trial, the trial court stated that it would not voir dire prospective jurors about racial prejudice:

> I noticed in reading the questionnaires, as I'm confident you did as well, that a number of people did not respond to the question about racial prejudice.[9] I don't have any intention of following up on that question, ladies and gentlemen. I was pleased to have you ask it so that if somebody did respond, you would have the benefit of their responses. In some of those responses, some showed a great sensitivity to the question, others showed less than great sensitivity to the question. For other people, it was apparently something they had a ready answer to, and that suggests perhaps something about them one way or the other as any person would choose to infer; but inasmuch as the non-Hispanic who is part of the information before the court goes, that is, the alleged victim . . . is the only non-Hispanic, I believe, with respect to the charges themselves, and there does not seem to have been any kind of discriminatory prosecution here. I mean it's a simple and regular charging, so if those people did not answer that, I do not intend to go over the subject matter.

(RT 276.) Both appellant and appellant's co-defendant objected to this limitation. (RT 276.) The trial court's decision to exclude questions about racial prejudice violated appellant's federal and state constitutional rights to due process, his right to a fair and impartial jury, and a reliable verdict in a

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9. The trial court apparently referred to Question 86, asking if jurors believed there was "racial discrimination against Latino/Mexican-Americans in Southern California." (See RT 112; CT 868.)

capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. Voir Dire on Racial Prejudice was Critical to the Guilt Phase

The Sixth and Fourteenth Amendments impose an obligation to provide an impartial jury to the defendant in a criminal proceeding. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6.) There is a similar obligation under Article I, section 16 of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272, 283 ["The right to a fair and impartial jury is one of the most sacred and important guaranties of the constitution"].) In particular, a judge's duty to inquire into the possibility of racial bias of prospective jurors is well-established under state and federal law. (*People v. Mello* (2002) 97 Cal.App.4th 511, 516.)

The United States Supreme Court has emphasized the importance of an adequate voir dire. "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) It has also recognized that "the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." (*Dennis v. United States* (1950) 339 U.S. 162, 171-172; see *Morford v. United States* (1950) 339 U.S. 258, 259 (per curium) [reversible error for the trial court to prohibit voir dire about a loyalty order that might have influenced case alleging that defendant failed to provide documents to the House Committee on Un-American Activities].)

In the guilt phase of a trial, racial prejudice may play an important role in how a juror perceives the issues before the court. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 424 ["the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice"]; *People v. Holt* (1997) 15 Cal.4th 619, 660 [inquiry into possible racial bias "essential" in a capital case involving a black defendant and white victim].) Accordingly, voir dire on racial prejudice must be conducted if there are special circumstances in the case that create a significant likelihood that racial prejudice might infect the trial. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595.)

In *Ham v. South Carolina* (1973) 409 U.S. 524, an African-American defendant claimed he had been framed on a charge of marijuana possession by law enforcement officers who were "out to get him" because of his civil rights activities. He requested that the judge ask potential jurors four questions relating to possible prejudice. Two of the questions sought to elicit possible racial prejudice against African-Americans; the other two dealt with the defendant's appearance and pretrial publicity. The trial court refused to ask any of the proposed questions. The Supreme Court reversed the judgment:

> Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,'and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice.

(*Id.* at pp. 526-527, citations omitted.)

California courts have similarly recognized that voir dire about racial bias is particularly important because of the unique ways that prejudice may affect a juror:

> Because racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence – and sometimes even good faith efforts to be objective – trial judges must, where appropriate, be willing to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held.

(*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312-1313, quotations omitted.) Accordingly, *Taylor* found that interracial crime is a special circumstance that requires inquiry about racial prejudice. (*Id.* at p. 1315.)

In *People v. Wilborn* (1999) 70 Cal.App.4th 339, the defendant was an African-American who contended that white officers fabricated the basis for a traffic stop that led to cocaine charges. (*Id.* at p. 347.) Voir dire was conducted only by the trial court, which did not ask any questions that were likely to elicit the existence of racial bias or prejudice. The trial court indicated that it wanted to avoid any extraneous racial issues, but the reviewing court held this was error. It emphasized that the purpose of voir dire was not to introduce racial prejudice into the trial, but to keep it out. (*Ibid.*)

The trial court in this case similarly erred by considering that racial prejudice was extraneous to any issues before the jury. It did not believe that further voir dire was needed because it found that there was no evidence that racial considerations affected the charges against appellant. However, the issue in jury selection was not whether the prosecutor might have charged appellant in a racially discriminatory manner, but whether a juror might be influenced by this factor. In other words, the trial court

should have considered the potential discrimination by a juror rather than whether appellant was charged properly.

Appellant stated that it was particularly important to explore the racial biases of potential jurors, including determining whether jurors were aware of problems with racial discrimination or whether they had been exposed to such problems. (RT 112.) This case presented many racial and ethnic factors that could have prejudiced a juror against appellant. Appellant was an adult Hispanic male (with family in Mexico) who was alleged to have lived with an underage Caucasian girl, kidnaped her in order to take her to Mexico and marry her, and later arranged for her death. That Melinda left home and participated in a Hispanic gang with links to the Mexican Mafia may have troubled appellant's jury. A juror's racial and racial ethnic bias may have created the assumption that appellant would be guilty of the offense regardless of the strength or weakness of the evidence.

The trial court itself suggested that some of the answers to the question on racial prejudice in the questionnaires were not adequate. (RT 276.) Indeed. voir dire questions about racial prejudice particularly were important because the jury questionnaire, in and of itself, did not guard against the possibility of racial discrimination. The questionnaire item referred to by the trial court simply asked the prospective jurors if they believed that there was racial discrimination against Hispanics. (CT 868.) Another question asked the potential jurors if they would use the same standards to judge a witness's credibility, regardless of a laundry list of factors that included racial and ethnic background. (CT 867.) The questionnaire also asked if they had been afraid of another person because of their race. (CT 868.) A final question asked if they belonged to any group that limited membership on the basis of race or ethnic origin. (CT

868.) Very few jurors would answer these questions in such a way that they would admit to racial prejudice. (See *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1312 [racial prejudice "lies hidden and beneath the surface"]; *Smith v. Phillips* (1982) 455 U.S. 209, 222 (conc. opn. by O'Connor, J.) [juror "may have an interest in concealing his own bias [or] may be unaware of it"].) Under these circumstances, reliance on the questionnaire alone was not sufficient to determine if bias affected a juror.[10/] (See *People v. Stewart* (2004) 33 Cal.4th 425, 454-455 [trial court may not excuse jurors for cause by relying on questionnaire alone without conducting further voir dire]; *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1314 [court conducted voir dire creates "increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors"].)

B. Voir Dire on Racial Prejudice was Necessary for the Penalty Phase

Adequate voir dire in a capital trial is necessary in order to determine whether jurors may be biased in ways that would affect the penalty determination. In *Morgan v. Illinois* (1992) 504 U.S. 719, the trial court prohibited the defendant from asking whether jurors would automatically impose the death penalty if he were found guilty. (*Id.* at p. 723.) The United States Supreme Court emphasized that voir dire plays a critical function in assuring that the right to an impartial jury is honored. (*Id.* at p.

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10. Even overt answers by potential jurors generated no voir dire on racial prejudice. For example, potential Juror 7813 wrote, "It appears that as a race they [Hspanics] are involved in more of the day to day crimes than other races," and "Mexicans and blacks appear to me to be more violent and threatening." (CT 3322.) The trial court did not ask any follow-up question about this matter. (RT 470-475.)

729.) It held that general questions about fairness and impartiality were not sufficient to explore specific concerns. (*Id.* at p. 735.) Accordingly, due process required that the sentence be reversed. (*Id.* at p. 739; see also *People v. Cash* (2002) 28 Cal.4th 703, 720 [voir dire required to determine if defendant's prior crimes might cause juror to automatically vote for death].)

Voir dire about racial or ethnic prejudice is particularly critical in cases involving minority defendants and white victims. The United States Supreme Court has emphasized that the penalty verdict in a capital case is a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" (*Turner v. Murray* (1986) 476 U.S. 28, 33-34, quoting *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, fn. 7.) In *Turner*, there was a black defendant and a white victim, the Court stated that the broad penalty discretion creates "a unique opportunity for racial prejudice to operate but remain undetected." (*Id.* at p. 35.) Accordingly, the defendant was entitled to have the jurors questioned about racial bias. (*Id.* at p. 37.)

This Court has similarly held that in a capital case involving an interracial killing, a trial court is required to question prospective jurors about racial bias on request. (*People v. Bolden* (2002) 29 Cal.4th 515, 539; see also *People v. Holt*, *supra*, 15 Cal.4th at p. 660 [inquiry into possible racial bias "essential" in a case involving a black defendant and white victim].)

As discussed above, voir dire on racial prejudice was important in this case. The trial court erroneously believed that it had no need to question jurors about racial prejudice because appellant had not been charged in a discriminatory manner. Even assuming that the

trial court was not required to voir dire on racial prejudice for purposes of the guilt phase, the manner in which appellant was charged had nothing to do with how bias may have infected the penalty determination. Appellant was an adult Hispanic gang member who was accused of killing an underage white girl. This factor may have led a juror to impose the death penalty without considering mitigation. Accordingly, the trial court was under a duty to conduct adequate voir dire about racial prejudice to ensure that such bias did not affect the penalty determination. (*Turner v. Murray*, *supra*, 476 U.S. at p. 37.)

C. Reversal is Required

In *People v. Cash*, *supra*, 28 Cal.4th at p. 719, the trial court did not permit the defense counsel to ask whether there were any particular crimes or facts that would cause the juror to automatically impose the death penalty. This Court found that the restriction on voir dire was error, and reversed the penalty judgment because it was impossible to determine from the record whether any of the jurors held views that might have disqualified them from serving on a capital jury. (*Id.* at p. 723.)

Here, the trial court stated that it would not question jurors about an important issue – racial prejudice – that affected both the guilt and penalty phases. Few issues were as important to the jury selection in this case, or involved such subtle states of mind. Voir dire was essential. Since this Court cannot determine whether jurors might have expressed views that would have disqualified them from the jury, the judgment against appellant must be reversed. (*Turner v. Murray*, *supra*, 476 U.S. at p. 37 [inadequate voir dire on racial bias requires penalty reversal]; see also *Morgan v. Illinois*, *supra*, 504 U.S. at p. 739 [inadequate voir dire requires reversal]; *Morford v. United States, supra*, 330 U.S. at p. 259 [reversing judgment in

case where the opportunity to prove actual bias was denied]: *United Sates v. Gillis* (10th Cir. 1991) 942 F.2d 707, 710 [judgment reversed after court refused to allow inquiry aimed at revealing potential bias].)

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II.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION BROUGHT UNDER *WHEELER* AND *BATSON* BY FAILING TO CONDUCT A PROPER INQUIRY INTO WHETHER THERE WAS A PRIMA FACIE CASE OF DISCRIMINATION

Appellant objected to the prosecution's peremptory challenge that struck the last African-American from the jury panel, after the prosecutor used a previous challenge to dismiss the only other African-American juror. The trial court failed to find that there was a prima facie case of discrimination because it erroneously relied on information that was not available to counsel. Although the prosecutor went on to explain his reason for striking the juror, this was unsupported by the record and had nothing to do with the rationale cited by the trial court. The prosecutor's actions and the trial court's failure to conduct a proper inquiry violated appellant's rights to a trial by jury and to equal protection. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79; Cal.Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 6th & 14th Amends. [equal protection clause].)

A. The Trial Court Erroneously Failed to Find a Prima Face Case of Discrimination

Under the California Constitution, a defendant's right to trial by a representative jury is violated by the use of peremptory challenges to exclude jurors solely on the ground of group bias. (*People v. Wheeler*, *supra, 22* Cal.3d at p, 276-277.) The Equal Protection Clause of the federal Constitution similarly proscribes discriminatory challenges on the basis of race. (*Powers v. Ohio* (1991) 499 U.S. 400, 409; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.)

In *People v. Wheeler*, *supra*, 22 Cal.3d 258, this Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*Id.* at pp. 276-277; see also *People v. Box* (2000) 23 Cal.4th 1153, 1187.) "Group bias" means "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215, and *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276.)

In *Batson v. Kentucky*, *supra*, 476 U.S. 79, the United States Supreme Court similarly held that the Equal Protection Clause of the Fourteenth Amendment forbids peremptory challenges of potential jurors on account of their race when the defendant is a member of that race.[11/] In a case like this one, which involved a minority defendant, such challenges may not be used to "strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." (*Id.* at p. 97.)

Under both *Batson* and *Wheeler*, a defendant has the initial burden of showing that peremptory challenges are being exercised for discriminatory reasons. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.)

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11. Appellant did not cite *Batson v. Kentucky*, *supra*, 476 U.S. 79, in the trial court. However, his failure to do so does not bar this Court's consideration of his jury challenge under the holding in that case. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Federal standards recognize that a prima facie case is established if the defendant has "'raise[d] an inference' that the prosecution has excluded venire members . . . on account of their race." (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195.) The inference of a discriminatory purpose is not a high standard. The Supreme Court repeatedly has emphasized that a prima facie burden is low. (See *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 [describing it as "minimal"]; *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253 ["not onerous"].)

Once the defendant has made a prima facie showing of a reasonable inference that the prosecution has excluded one or more jurors on the basis of group or racial identity, the burden shifts to the prosecution to show that it had genuine nondiscriminatory reasons for the challenges in question. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 97-98; *People v. Fuentes* (1991) 54 Cal.3d 707, 714; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Finally, if a race-neutral explanation is offered, the trial court must assess whether intentional discrimination has been proven anyway. "[T]o sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptoriness on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses – i.e., for reasons of specific bias . . . ." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282; accord, *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 97-98.)

If the trial court finds that the burden of justification has not been met as to any of the challenged peremptory challenges, the presumption of their validity is rebutted and the trial court must dismiss the entire venire and begin jury selection anew. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.) The exercise of just one improper challenge is sufficient to establish

a violation and is reversible per se. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715-716, fn. 4.)

Here, appellant objected after the prosecutor used a peremptory challenge to excuse potential juror 9877, the last remaining African-American on the jury panel. (RT 488-489.) Appellant noted that the potential juror had prior jury experience and supported the death penalty. He stated that she appeared to be otherwise qualified apart from any racial matters. (RT 489.)

The trial court stated that the potential juror was a witness in the homicide of a friend a number of years ago. (RT 489.) However, the trial court primarily relied on information it had discovered about her:

> I have noted about this particular person that she doesn't seem to be quite tuned in sometimes, and I'm understanding that might be because of some information that I have that counsel don't have because it's not on the record.
>
> My clerk, Ms. Arredondo, told me that 9877 is coming to work in the daytime and working the shift – the swing shift at night so that she's in court all day and working during the night. I noticed when she was sitting in the audience when we originally met her, she seemed to be behaving in a relatively unusual kind of way, leaning over her seat, not tuning in and paying attention to what we were doing. She had to leave once during the proceedings, as you may recall, and I can't say that that's what the exercise was based on, but it would certainly appear to me from what she said and from the information, that might explain her what I would call relatively noticeable conduct in court, that perhaps added together, that was sufficient. I would certainly accept it as so.

(RT 489-490.)

The prosecutor volunteered that she excused the potential juror because of the "uncandid manner she answered particularly on her jury experience." (RT 491.) The trial court disagreed with this assessment, but

found that it was a sufficient reason to support the challenge for cause.[12/] (RT 492.)

1. The trial court's initial decision was erroneous

The trial court erroneously determined that the prosecutor might have challenged the juror because she did not always appear to be "tuned in" and relied on information that was not before either counsel to support its decision. Had the juror's demeanor been an issue, either the trial court or counsel could have questioned her about it to determine if she should be excused for hardship or for cause. The trial court could have asked if the individual's swing-shift schedule would continue to be a problem once the trial commenced. That no one questioned the juror about this indicated that it was not a major factor in the decision to excuse her from the jury. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281 [failure to question potential juror relevant to determining whether there is a prima facie case].)

Moreover, the trial court erred to the extent that it relied on knowledge that went beyond that of the prosecutor. At the prima facie level, it is one thing to find a reason that could have motivated the prosecutor to excuse a juror (see *People v. Turner* (1994) 8 Cal.4th 137, 168), and another to find reasons that went beyond a prosecutor's knowledge. The evaluation at the prima facie level must focus on what the prosecutor may have actually done, rather than to consider information that the court had gained through its clerk – particularly if that information does not provide a reason to have excused the juror.

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12. The trial court made it clear that it had not found a prima facie case of discrimination since it stated that it must rule on the motion without first hearing the prosecutor's reasons. (RT 491.)

2. The trial court should not have credited the reason that the prosecutor volunteered

After the trial court made its ruling, the prosecutor stated that he had excused the potential juror because she was not candid about her jury experience. The trial court disagreed with the prosecutor's assessment (RT 492) and the record does not support it. Indeed, the potential juror clarified her questionnaire to indicate that a verdict had not been reached when she served as a juror in a petty theft trial in 1985, but she had served as an alternate juror on a homicide case and had agreed with the verdict that was reached. (RT 416; CT 4484.) If anything, this indicated that she was completely candid – she took the time to carefully review her questionnaire to ensure that it was accurate.[13/] Nothing about her voir dire indicated that she was trying to hide anything about her prior jury service. (RT 416-423.)

The trial court apparently believed that any race-neutral reason was sufficient. However, "neither the trial courts nor [the reviewing court] are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it. Any other approach leaves *Batson* a dead letter." (*Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327. 1331.) Indeed, that the prosecutor recited a reason unsupported by the record increased the likelihood that his challenge was exercised for a

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13. Other jurors made similar changes to their questionnaires. (See, e.g., RT 368 [Juror 3689]; RT 521 [Juror 2207]; RT 639 [Juror 8982]; RT 645 [Juror 1952]; RT 676 [Juror 1230]; RT 741 [Alt. Juror 0490]; RT 768 [Alt. Juror 0871]; RT 779 [Alt. Juror 6319]. That the prosecutor applied a different standard to an African-American juror suggests that it was done for a discriminatory purpose. (See *Miller-El v. Cockrell* (2003) 123 S.Ct. 1029, 1043 [disparate treatment relevant to *Batson* inquiry]; see also *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969; *United States v. Thomas* (2d. Cir. 2003) 320 F.3d 315, 317-318; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699.)

discriminatory purpose. (See *United States v. Chinchilla*, *supra*, 874 F.2d at p. 699 [that some of the prosecutor's reasons for exercising a peremptory challenge did not hold up under judicial scrutiny called into question the legitimacy of other reasons given by the prosecutor].) Accordingly, the trial court erred in finding that there was no prima facie case of discrimination.[14/]

B. The Trial Court Used an Incorrect Legal Standard in Determining Whether There was a Prima Facie Case of Discrimination

Under *People v. Wheeler*, *supra*, 22 Cal.3d 258, and its progeny, the determination of whether the prima facie showing had been made required appellant to "show a strong likelihood that such persons are being challenged because of their group association." (*Id.* at p. 280; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.) The trial court here did not cite any particular test or state that any particular standard applied in determining whether appellant established a prima facie case after the prosecutor excused the potential juror. Yet, it presumably followed this Court's language and required appellant to demonstrate a strong likelihood of group bias. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [trial court presumed to follow the law without explicit statement to the contrary]; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 342 ["trial court is presumed to know and follow the law"].)

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14. Should the Court find that the trial court's finding about the prosecutor's reason constituted a ruling that there was a prima facie case that was rebutted by the prosecutor, then it is clear that the court erred by not considering whether the prosecutor's reason was supported by the record. (See *Purkett v. Elem* (1995) 514 U.S. 765, 768 [court must determine if prosecutor's reasons are persuasive and not a pretext for racial bias]; *People v. Montiel* (1993)5 Cal.4th 877, 910, fn. 9 [nondiscriminatory reason must appear to be genuine].)

The California requirement for a "strong likelihood" of group bias is an impermissibly stringent standard.[15] The proper standard under *Batson* is whether the circumstances show a reasonable "inference" that the prosecution excluded potential jurors because of their race. (*Batson v. Kentucky, supra*, 476 U.S. at p. 97; *Wade v. Terhune, supra.*, 202 F.3d at p. 1195.) In *Wade*, the Ninth Circuit explained the difference between the two standards:

> [U]nlike the *Batson* Court, which required only that the defendant "raise an inference" of discrimination, the *Wheeler* Court demanded that the defendant "show a strong likelihood" that the prosecutor had excluded venire members from the petit jury on account of their race. [Citation.] *Batson* and *Wheeler* thus may be thought to prescribe different tests for establishing a prima facie case.
>
> *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* "strong likelihood" test in determining whether a prima facie case has been established.
>
> In our view, the *Wheeler* "strong likelihood" test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous *Batson* "inference" test.

(*Wade v. Terhune*, *supra*, 202 F.3d at pp. 1195-1197.)

In response to *Wade*, this Court stated that the "strong likelihood" and "reasonable inference" tests are actually the same thing. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.) Under the *Box* restatement of the

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15. The United States Supreme Court has granted a petition for writ of certiorari to determine if the standard applied in California is erroneous. (*Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 824].)

standard, the defense must show "a strong likelihood [or reasonable inference]" of discrimination. (*Id.* at p. 1188.) Yet, the trial court here did not have the benefit of this clarification. (See *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047 [*Box* cannot be applied to case decided before it was issued since California courts were applying an unconstitutionally relaxed standard of scrutiny].) Therefore, this Court must presume that the trial court used the improper and overly stringent "strong likelihood" standard in ruling on whether appellant established a prima facie case of group discrimination.

This Court should therefore review the issue de novo, without deference to the findings of the trial court. As discussed above, it was apparent that there was no reason for the prosecutor to have struck the potential juror. She supported the death penalty. A friend of hers had been a victim in a murder case and she believed that the justice system had handled the matter well. (RT 418-421.) Moreover, the rationale cited by the prosecutor was not supported by the record and was not applied equally to other jurors. Under these circumstances, the trial court erred in not finding that there was a prima facie case of discrimination. Reversal is required. (*People v. Snow* (1987) 44 Cal.3d 216, 226-227.)

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III.

APPELLANT WAS NOT PRESENT DURING TWO STAGES OF HIS TRIAL IN VIOLATION OF HIS STATUTORY AND CONSTITUTIONAL RIGHTS

Appellant was excluded from the individual voir dire that the trial court conducted in chambers with nine prospective jurors during the jury selection process. The trial court improperly failed to ensure appellant's presence or obtain a waiver from him in violation of appellant's statutory rights under section 977, as well his state and federal constitutional rights to due process and a trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

A. Factual Background

During voir dire, the trial court asked counsel to meet with her in chambers. It stated that it needed to speak privately with a number of potential jurors. The trial court was concerned that if confidential voir dire was conducted in the courtroom, where appellant could be present, it would have to move the other jurors into the hall. Therefore, it proposed to speak with the jurors privately in chambers, without appellant's presence.[16/] Although appellant's counsel agreed to this procedure, appellant was not present during this proceeding. The trial court did not ask appellant about this procedure or obtain his waiver. (RT 609-610.) The trial court then met

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16. Appellant was in restraints during the trial and could not walk into the court's chambers. (See RT 92.)

with two perspective jurors to determine whether they were subject to challenge for cause.[17] (RT 611-618.)

The trial court repeated this procedure the following day, this time without asking either counsel or appellant about whether this method was agreeable. (RT 712.) Again, the trial court met with two prospective jurors in appellant's absence to determine whether they were subject to challenge for cause.[18] (RT 712-720.)

The trial court used this same procedure during the selection of alternate jurors, speaking with five prospective jurors in chambers and ruling on challenges for cause.[19] (RT 724-732, 750-761, 781-789.)

B. The Trial Court Violated Appellant's Statutory and Constitutional Rights

Under California's statutory law, a capital defendant must be present at all proceedings unless the defendant waives his presence under Penal

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17. The trial court questioned prospective juror 0903 about whether he could impose the death penalty. (RT 612-614.) The prosecutor later used a peremptory challenge to excuse this juror from the jury. (RT 623.) The trial court also questioned prospective juror 0886 about whether she could vote for the death penalty. (RT 617.) The trial court excused her for cause over appellant's objection after she stated that she could not impose the death penalty. (RT 617, 619.)

18. The trial court questioned prospective juror 3193 about whether his wife's pregnancy would make it difficult for him to serve on the jury. (RT 715.) Appellant's counsel stipulated that the juror be excused. (RT 716.) The trial court also questioned prospective juror 4156 about legal problems he had experienced a number of years before this trial. (RT 716-720.) Appellant's trial counsel later exercised a peremptory challenge to excuse this juror. (RT 723.)

19. The trial court questioned prospective jurors 3689, 2393, 5421, 7011, and 8921 in chambers. The court also excused juror 8026 for cause while in chambers because she had language difficulties. (RT 8921.)

Code section 977, or is remanded for disruptive behavior under Penal Code section 1043. By enacting these statutes, "[t]he Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) In order to waive presence, a felony defendant must "execute in open court, a written waiver of his or her right to be personally present" at trial. (Pen. Code, § 977, subd. (b)(1).) A defendant's personal waiver of his constitutional right to be present at critical stages of a capital trial must be knowing, intelligent, and expressly made on the record. (*People v. Robertson* (1989) 48 Cal.3d 18, 60-62.)

Appellant had a federal due process liberty interest in receiving the full protection provided by section 977. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Moreover, under the Sixth and Fourteenth Amendments of the federal constitution, every defendant "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 977.) The right to be present extends "to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict and . . . [is] scarcely less important to the accused than the right to trial itself." (*Diaz v. United States* (1912) 223 U.S. 442, 455.) A "critical stage" is any "step of a criminal proceeding" that holds "significant consequences for the accused." (*Bell v. Cone* (2002) 535 U.S. 685, 695.)

Federal courts have emphasized that there is a fundamental constitutional right to be present at the voir dire and empaneling of the jury. (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671, citing *Diaz v. United States*, *supra*, 223 U.S. at p. 455 [right to be present during jury selection is

"scarcely less important to the accused than the right of trial itself"]; see also *Walker v. Lockhart* (8th Cir. 1988) 852 F.2d 379, 381-382 [defendant had the "constitutional right to be present at the in camera voir dire of the jury"]; *Beard v. United States* (D.C. 1988) 535 A.2d 1373, 1375 [importance of defendant's presence during voir dire "cannot be overemphasized"]; *United States v. Sherwood* (9th Cir. 1996) 98 F.3d 402, 407 [felony defendant has fundamental right to be present during the attorney-conducted jury voir dire at sidebar]; *United States v. Washington* (D.C. Cir. 1983) 705 F.2d 489, 497 [defendant has right to be present at bench-conducted voir dire because the right of the defense to exercise peremptory challenges "can require direct consultation with the defendant and something more than second hand descriptions of the prospective jurors' responses to questions during voir dire"]; see also *People v. Sloan* (N.Y. 1992) 592 N.E.2d 784, 786-787 [defendant had fundamental right to be present during voir-dire questioning of jurors at bench because defendant's assessment of demeanor and responses "could have been critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories"].)

At a critical point in the proceedings, appellant apparently was left in the courtroom while the attorneys and the trial court moved the proceedings into chambers. By excluding appellant from the confidential portion of voir dire, the trial court made it impossible for appellant to assist his counsel when jurors were challenged and excused. The trial court's error in excluding appellant from this portion of jury selection process affected the integrity of the trial and requires reversal. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [constitutional violations "affecting the framework within which the trial proceeds" defy ordinary harmless error

analysis and require reversal]; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630 [defining structural error as one that affects the trial's integrity]; see also *Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, 900 [defendant's absence from in-chamber proceeding was structural error]; *United States v. Crutcher* (2d Cir. 1968) 405 F.2d 239, 244 [defendant's absence during jury selection could not be treated as harmless error because there was "no way to assess the extent of the prejudice a defendant might suffer by not being able to advise his attorney during the impaneling of the jury"].)

Moreover, even if this issue is reviewed under harmless error standards, appellant's exclusion from the confidential voir dire violated federal constitutional rights and cannot be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In *Boone v. United States* (D.C. 1984) 483 A.2d 1135, the trial court's error in excluding the defendant by conducting portions of voir dire at the bench was found to be prejudicial error. The reviewing court found that the defendant's presence was particularly critical to his defense and jury selection: "The defendant alone has peculiar knowledge about the facts of the alleged incident which brings him before his peers for judgment, about himself, and possibly about any participants or victims." (*Id.* at p. 1137.) The court noted that the Supreme Court had emphasized that the "'defense may be made easier if the accused is permitted to be present at the examination of jurors . . . for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.'" (*Id.* at p. 1138, quoting S*nyder v. Massachusetts, supra,* 291 U.S. at p. 106.) It found that the defendant's presence was important for jury selection in order to protect impartiality and fairness. (*Id.* at pp. 1138, 1142.) It also found that the juror's perception of

the defendant was important to the case, yet he was excluded from an important part of the jury selection procedure. Therefore, reversal was required. (*Id.* at p. 1140.)

The judgment against appellant must similarly be reversed. The case against appellant was largely built upon a single statement that he made to another gang member. (See Argument IX [insufficient evidence to support the verdict].) The meaning that the jurors derived from this statement was influenced by a number of circumstances, including appellant's role as a Hispanic gang leader. His status could not help but affect how the jurors would view him and the inferences that they might make against him. Yet, appellant had no opportunity to participate in the most sensitive part of voir dire. Instead, appellant was left in the courtroom while counsel, the trial court, and court personnel went into chambers. The message to the jurors who remained in the courtroom was unmistakable – appellant either could not be trusted to participate in important matters affecting his trial or he was disinterested in the entire process.

It was important to both the guilt and penalty phases that appellant actually participate in all parts of the trial; that he would be seen as someone who was interested in his own defense; that the jury see him as a human being who was engaged in the process.[20/] In effect, the trial court's decision to conduct voir dire in its chambers meant that from the start of the trial, appellant was denied an opportunity to assist his counsel and that he was separated from his own defense in front of the jurors. Under these

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20. This perception was particularly important because the prosecutor argued in the penalty phase that appellant was disrespectful of the judicial proceedings. (RT 2854.)

circumstances, the error cannot be harmless beyond a reasonable doubt. (See *Boone v. United States*, *supra*, 483 A.2d at p. 1140.)

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IV.

THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO PRESENT EVIDENCE OF A THREE-WAY CALL WITH RICARDO LOPEZ

The trial court permitted the prosecutor to introduce evidence that appellant's sister set up a three-way telephone call between appellant, Ricardo Lopez, and Jorge Uribe. This call allegedly took place shortly before Melinda was killed, but there was no evidence admitted against appellant linking this conversation to Melinda's death.

In order to protect appellant's Sixth Amendment confrontation right, both parties stipulated that Ricardo's statement to the police would be redacted to eliminate references to appellant. The stipulation also forbade any mention of the three-way conversation. By establishing that a three-way conversation occurred, the prosecutor violated the stipulation and invited the jury to speculate that appellant had planned the present offense. Accordingly, its use violated appellant's due process right to enforcement of the stipulation and its admission was more prejudicial than probative under Evidence Code section 352. Its use left the resulting judgment unreliable. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. 1, §§ 7, 15, 16, 17.)

A. Factual Background Establishing the Stipulation and the Trial Court's Rulings

Appellant filed a pre-trial motion for severance based on the statements by Ricardo Lopez to police investigators, which alleged that appellant had instigated the crime during a three-way phone conversation with Ricardo and Uribe. (CT 784.) Uribe had also given a statement to the police that alleged Melinda's killing had been discussed during the three-way call. (CT 790.) Appellant argued that both Ricardo's and Uribe's

statements to the police could not be used against appellant without violating the Sixth Amendment confrontation rights.[21] (CT 789-791, citing *Bruton v. United States* (1968) 391 U.S. 123 [co-defendant's statement inadmissible under Sixth Amendment]; *People v. Aranda* (1965) 63 Cal.2d 518 [co-defendant's statements inadmissible under state law].)

Appellant withdrew his severance motion after the prosecutor stated that he would remove all references to appellant. (RT 82-83.) Counsel for both parties later agreed to a stipulation that was meant to settle this issue. (RT 833.) The prosecutor provided the court with a redacted copy of Ricardo Lopez's statement to the police (see 1 Supp. CT 594) and set forth the terms of the agreement:

> So our agreement is that any reference to Mr. Juan Lopez, anything that he said, the fact that he was involved in any conversations with Mr. Ricardo Lopez, the fact that there were even three-way conversations, which would indicate that this was a missing third party there, those will be deleted. Our agreement is, however, that *any references* to those conversations, since they were three-party conversations, will only include a reference to the fact that this was a conversation between Ricardo Lopez and this person George Uribe, also known as Pelon, during which the murder of Miss Carmody was discussed, but there will not be *any reference* to the fact that this was a three-way conversation or that Mr. Lopez was involved in such conversation.
>
> I believe we've looked this over. We looked together. We're aware of what the prevailing case law is in this area, and we believe that this is in conformance with *Richardson v. Marsh* [(1987) 481 U.S. 200].

(RT 834, emphasis added.)

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21. Uribe could not be located and the prosecution did not introduce his statement at trial.

Appellant's counsel agreed to the stipulation with the understanding that the prosecutor would instruct the investigating officers not to refer to any part of the statement that had been redacted. The trial court accepted this stipulation. (RT 834.)

The prosecutor breached the stipulation during his opening statement. The prosecutor told the jury that Ricardo Lopez had conversations with Uribe during the week that proceeded Melinda's murder. He stated that appellant's sister, Patricia Lopez, had set up a call with Uribe when Ricardo was not available and that she later set up a three-way phone call between appellant, Ricardo, and Uribe. (RT 902.)

Appellant objected that the prosecutor's statement violated the stipulation by referring to the three-way phone call. (RT 902, 904.) He stated that the agreement was not only about the content of the conversation, but the very fact of the conversation. (RT 905.) In particular, he was concerned that the prosecutor's remarks allowed the jury to infer that the three-way conversation concerned a plan to kill Melinda, without any of the participants being available for cross-examination. He asked the trial court to declare a mistrial. (RT 905, 909.)

The prosecutor characterized the agreement as pertaining to the statement of Ricardo Lopez alone. (RT 906.) But the trial court found that the prosecutor's reference was "violative of the spirit, if not the absolute language of the stipulation." (RT 910.)

After considering the matter further, the trial court denied appellant's motion for a mistrial, but held that the prosecutor's statement was error. (RT 966.) The court found that it was clear that the stipulation prohibited any mention of a three-way phone call. (RT 967-968.) It stated that the

prosecutor was bound by the stipulation for the remainder of the trial. (RT 968.)

The prosecutor again argued against the trial court's finding, but acknowledged that the evidence of a three-way conversation could only be used against Ricardo. (RT 972.) The trial court rejected the prosecutor's interpretation of the stipulation. It found that the stipulation was a matter of record. However, it denied the motion for mistrial because the jury was instructed that the opening statement was not evidence and that they were not to take notes about it. (RT 975.)

During trial, the prosecutor introduced Ricardo's statement to the police and used it against him. Under the terms of the stipulation, the statement was redacted to remove the references to appellant. The jury was informed that Ricardo had discussed the crime with Uribe two or three days before the homicide. (RT 1837-1838.) Ricardo also stated that Uribe provided the gun to Ricardo, knowing its intended use. (CT 928-929.)

Later in the proceedings, the prosecutor sought to introduce evidence that there was a three-way phone call between appellant, Ricardo, and Uribe. (RT 1577.) Appellant objected, arguing that any evidence about the call violated the stipulation; the phone conversation was irrelevant in light of the fact that its content was inadmissible against appellant; the evidence invited the jury to speculate about the content of the conversation; and, the phone call was more prejudicial than probative. (RT 1577-1578.)

The prosecutor argued that the stipulation should be limited to Ricardo's statements and that the evidence about the three-way phone call had some relevance because appellant had told the detectives that he had not talked with either Ricardo or Uribe. (RT 1579.)

The trial court stated that the stipulation was not as clear as the prosecutor maintained. (RT 1581.) However, it permitted the evidence to be introduced. (RT 1582.)

Following the trial court's ruling, Patricia Lopez testified that she told detectives that she had received a telephone call from appellant and he appellant asked to speak to Ricardo. Ricardo was not there so she forwarded the call to Uribe. (RT 1594.) She also remembered telling the detectives that she set up a three-way phone call between appellant, Ricardo, and Uribe a week before Melinda's death.[22/] (RT 1597.)

B. Patricia Lopez's Testimony Violated the Stipulation and Eviscerated the Sixth Amendment Rights It Was Deisgned to Protect

Appellant relied upon the stipulation and withdrew his motion for severance based upon his understanding that evidence of a three-way phone conversation would not be admitted. Despite finding that the prosecutor was bound by the stipulation for all purposes, the trial court effectively set it aside to let the prosecutor introduce his evidence. The trial court did not find that it had been wrong about the meaning of the stipulation. The circumstances were identical to what had been presented in appellant's pre-trial motion for severance and during the prosecutor's opening statement. Nothing had changed to warrant any reinterpretation of the agreement. Accordingly, the stipulation should have been enforced. The trial court's ruling violated the terms of the stipulation and appellant's federal and state due process rights to its enforcement. (U.S. Const., 14th Amend.; Cal. Const., art. 1, §§ 7, 15.)

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22. Telephone records from the county jail showed that appellant made several collect calls to the Lopez household before the crime was committed. (RT 2007-2009.)

It is well-established that evidence on issues in a case may be limited in accordance with a stipulation entered into by the respective parties. (*In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 485.) A stipulation stops a party from acting contrary to its terms – it becomes a contract that must be honored. (See *In re Frye* (1983) 150 Cal.App.3d 407, 409; *Golden State Homebuilding Associates v. City of Modesto* (1994) 26 Cal.App.4th 601, 614.) Accordingly, a stipulation is interpreted and enforced under contract principles. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

When the language of a stipulation is clear the parties will be bound by that meaning and there is no need to construe it. (Civ. Code, § 1638 [language of a contract is to govern its interpretation]; see also *Floystrup v. City of Berkeley Rent Stabilization Bd* (1990) 219 Cal.App.3d 1309, 1318; *Market Insurance Corp. v. Integrity Insurance Company* (1987) 188 Cal.App.3d 1095, 1098 [objective words of a contract controls interpretation].) Moreover, all things that are incidental or necessary to effect the stipulation are implied within it. (Civ. Code, § 1656; *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 544.)

Here, the prosecutor stated that his understanding of the stipulation was different than that of appellant's. However, the trial court correctly found that the stipulation was clear and that the parties would be bound by it: under its terms, there was to be no mention of a three-party telephone conversation that included appellant. (RT 968, 975.) Thus, the prosecutor was constrained by the objective words of the agreement that he had presented. The stipulation should have been enforced throughout the entire trial.

The stipulation could only be given effect by excluding all references to the alleged three-way phone conversation. Ricardo's statements told the jury that he had discussed the killing with Uribe, two or three days before the crime occurred. (RT 1837-1838.) The jury knew that Uribe was aware of the plan when he provided a gun to Ricardo. (CT 928.) Patricia Lopez testified that Ricardo and Uribe spoke with appellant during this same general time period. (RT 1597.) The plain implication is that appellant discussed the crime with Ricardo and Uribe during this telephone call. (See RT 2413 [prosecutor argued that it did not take a "great leap of logic" to know what was discussed during the call].) This testimony rendered the stipulation meaningless because it left the jury free to speculate about the very things that the stipulation was designed to prevent and to use Ricardo's admissions against appellant.

Even if the prosecutor's wording of the stipulation was ambiguous, its terms had to be construed against him as the one who presented it to the trial court. (Civ. Code, § 1654 ["the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"]; *In re Steven A.* (1993) 15 Cal.App.4th 754, 771].) Appellant agreed to the stipulation as it was stated, and the trial court approved it on that basis. Appellant was entitled to rely on the meaning of the stipulation as it was worded and as both he and the trial court understood it – that it would prevent the prosecutor from introducing any evidence of a three-way conversation involving appellant. (See *In re Steven A.*, *supra*, 15 Cal.App.4th at p. 771.)

Moreover, appellant reasonably relied on the stipulation. He withdrew his severance motion, apparently because his counsel believed that the stipulation protected appellant's due process and Sixth Amendment

rights. He also relied on the stipulation after the trial court affirmed that the stipulation covered all references to a three-party conversation, specifically in reference to the prosecutor's statements about Patricia Lopez. Under these circumstances, appellant's detrimental reliance on the stipulation and the trial court's interpretation of it required the prosecutor to abide by its terms. (See *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1352 [defendant's detrimental reliance on plea bargain bound the prosecutor].)

Appellant had a federal and state due process right to enforcement of the stipulation. (See *People v. Haney* (1989) 207 Cal.App.3d 1034, 1038 [plea bargain agreements ascertained through contract principles and enforced through due process].) By allowing the testimony that appellant, Uribe, and Ricardo participated in a three-way call, the trial court allowed the prosecutor to make an end run around issues raised in appellant's motion for severance and defeated the underlying purpose of the stipulation. It did no good for appellant to agree that Ricardo's statement to the police could be redacted if the jury was also encouraged to speculate that he had, after all, participated in planning the crime with Ricardo and Uribe. (RT 2413.) The trial court erred in allowing the prosecutor to introduce evidence of a three-party call through Patricia Lopez's testimony.

C. The Testimony Was More Prejudicial than Probative

Even assuming that Patricia Lopez's testimony may have been otherwise permissible, the trial court should have excluded it as irrelevant and more prejudicial than probative. (RT 1577-1578; Evid. Code, §§ 352.)

Evidence Code section 352 provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is substantially

more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14). Appellant had a federal due process liberty interest in the protections that section 352 was meant to provide. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.) The use of evidence that violates this statute also implicated constitutional guarantees that ensure a fair trial and a reliable verdict in a capital case. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17; see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 [due process requires careful weighing of prejudice against probative value]; *People v. Falsetta* (1999) 21 Cal.4th 903, 917 [Evidence Code section 352 provides important due process protection]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [Eighth Amendment guarantees of heightened reliability in capital case].)

The fact of a three-way telephone conversation was irrelevant or had minimal probative value. The prosecutor stated it was relevant *only* because appellant had denied speaking to Uribe or Ricardo. (RT 1579.) However, that appellant denied speaking to others did not show a consciousness of guilt about anything related to the crime. Appellant may not have wanted to involve the police in gang matters or simply did not want to discuss his brother or Uribe with the police. Accordingly, its probative value was minimal.

Moreover, the prosecutor had established that appellant had spoken to a number of people while he was in jail. The evidence of a three-way conversation was not needed to call his statement into question. It was cumulative to the prosecutor's intended use. (See *People v. Brown* (2003) 31 Cal.4th 518, 576 [cumulative evidence may be excluded under section 352].)

Even assuming that the evidence had some probative value, its prejudicial effect was enormous. It allowed the jury to speculate that appellant must have been planning the crime with Uribe and Ricardo. (See RT 2057 [trial court cites three-way conversation as substantive evidence to support appellant's guilt].) Indeed, there was no other reason for the prosecutor to have introduced the specific fact of a three-way conversation except to encourage the jury to make this inference. As the prosecutor told the jury in his closing argument, it allowed them to use facts admissible only against Ricardo, "When you look at what happened here and who did it . . . it doesn't take a great leap of logic to see what they were talking about. Because, if you recall, it was [Uribe] that got the gun." (RT 2413.) In other words, the prosecutor did not limit his use of the evidence to show appellant's consciousness of guilt, the reason that he gave to justify its admission. He also used the conversation to bring in evidence that was admitted only against Ricardo and encouraged the jury to speculate that appellant was part of the planning for this crime. Since the prosecutor used the conversation to link appellant to the statement that Ricardo gave the police, the jury must have done the same.

The inference was improper because there was no evidence to establish what the conversation might have involved. (See *People v. Morris* (1988) 46 Cal.3d 1, 21 [inferences must not be based on imagination, speculation, surmise, or guess work].) Yet, it would have been irresistible for the jury for the jury to speculate about the nature of the conversation in light of Ricardo's statement that he had discussed the plan with Uribe during this same time period. It filled an evidentiary gap in the prosecutor's case and could not have been ignored or forgotten. As discussed below, this was enormously prejudicial. Under these circumstances, the trial court

should have found that the prejudicial effect of the evidence outweighed any probative value.

D. The Improper Testimony Was Highly Prejudicial So That Reversal Is Required

In order to establish appellant's guilt, the prosecutor had to convince the jury that appellant had planned the crime with Ricardo and Uribe. The evidence about the three-way conversation allowed the jury to speculate that appellant instigated the crime and was part of a conspiracy to kill Melinda. This had an enormous effect upon the case and rendered the trial fundamentally unfair in violation of due process principles. (*Lisenba v. California* (1941) 314 U.S. 219, 236 ["denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice"].)

Even if the error is viewed as involving only the admission of evidence under state law standards, the judgment must be reversed because it is reasonably probable that a different verdict would have been reached absent the error. (*People v. Cooper* (1991) 53 Cal.3d 771, 836.) The evidence in this case was extremely close. The primary evidence against appellant was his ambiguous statement to Alma Cruz, asking her if she could kill a homegirl. (RT 1382.) Yet, more was needed to connect link appellant to the crime, particularly since Cruz's testimony could not support a conviction in and of itself. (See *People v. Beagle* (1972) 6 Cal.3d 441, 455 [corpus delicti rules requires that crime must be proved independently of an admission].)

The testimony about the telephone call allowed the jury to use Ricardo's statement to the police against appellant. As discussed above, the prosecutor encouraged the jury to make this link and argued that it did not take a "great leap of logic" to do so. (RT 2413.) Indeed, Ricardo's

statement was particularly crucial to the prosecution because it allowed the jury to find that the crime was premeditated. Without it, the jury would only have known that Ricardo had been drinking and was angry with Melinda, that they exchanged heated words, and that he shot her with a gun that had been brought to the meeting for protection from the "green light" that had been placed upon the group. However, Ricardo admitted that he had discussed the plan to kill Melinda with Uribe and that he obtained a gun from him with the understanding that it would be used to commit this crime. Once the jury found this to be true, it would have been impossible for them not to infer that appellant had discussed the matter during a three-way phone conversation that occurred shortly before Melinda's death. Statements that were inadmissible against appellant suddenly took on new meaning and played an important role in convicting appellant.

It was impossible for appellant to defend himself against this speculation. He could not cross-examine Ricardo or Uribe about the extent of the conversation to establish anything other than what the jury was left to speculate. Under these circumstances, the trial court's instruction limiting Ricardo's statement to him alone was rendered useless. As the prosecutor argued, it goes beyond the bounds of all reason to believe that the jury could ignore the only evidence that the crime was planned between Uribe and Ricardo and not use that against appellant once they learned that all three had a lengthy conversation during the same time period as this planning occurred. (RT 2413.) Accordingly, the United States Supreme Court has emphasized,

> It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a [particular fact] and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the

> compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.

(*Shepard v. United States* (1933) 290 U.S. 96, 104; see also *People v. Talle* (1952) 111 Cal.App.2d 650, 671 [impossible for jury to compartmentalize evidence and forget about the substance of the charges]; *People v. Hamilton* (1961) 55 Cal.2d 881, 885, 898 [jury could not be expected to "departmentalize" state of mind evidence or ignore "reverberating clang" of evidence and not use it for substantive purposes].)

The three-way conversation provided the only evidence linking appellant to matters that concerned both Ricardo and Uribe. Ricardo's statement to the police made clear that he had planned the crime with Uribe and the prosecutor's argument to the jury encouraged the jury to use this statement against appellant in the specific context of the three-way conversation. Under these circumstances, the fact of the conversation was devastating to appellant's defense. Accordingly, this Court must find that the error in admitting the testimony about a three-way conversation requires reversal under either federal or state standards. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitution requires reversal unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 848 [state law requires reversal if it is reasonably probable that a more favorable verdict would be reached].)

V.

THE TRIAL COURT IMPROPERLY ALLOWED A STATEMENT ATTRIBUTED TO APPELLANT'S CO-DEFENDANT TO BE USED AGAINST APPELLANT

Appellant's co-defendant presented the preliminary hearing testimony of Ramon Ramos, who was unavailable to testify in the jury trial. Over appellant's objections, the prosecutor was allowed to introduce another part of Ramos's preliminary hearing testimony in rebuttal: that after Melinda was shot, Ricardo Lopez pointed the gun to his head and stated, "For my *carnal*."[23] (RT 2250.) Ricardo pulled the trigger, but the gun did not fire. (RT 2249.)

Appellant objected that the statement was hearsay and improper rebuttal. (RT 2218.) The trial court allowed the statement, apparently because it showed Ricardo's state of mind. The trial court stated:

> I overrule the objection by [appellant's counsel] to the statement by Mr. Ricardo Lopez, "Its for my *carnal*." Doesn't import anything from any conversations between the two of them as related to the brother, if at all, simply by virtue of what's going on in the mind at that time of Mr. Ricardo Lopez about the alleged deed that has just been apparently completed.

(RT 2222.) Appellant further objected to the statement on the grounds that it called for an improper conclusion. (RT 2250.)

This statement was hearsay when offered against appellant. It was improper rebuttal because appellant had not placed Ricardo's state of mind in issue. It was extremely prejudicial since its relevancy against appellant depended on the jury speculating that Ricardo committed the crime "for" appellant, upon his direction. Accordingly, the testimony violated the state

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23. Ramos testified that the term meant "brother." (RT 2251.)

and federal due process guarantees of fundamental fairness, appellant's right to confront the evidence against him, and affected the reliability of the penalty verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. The Testimony was Inadmissible Hearsay that Inculpated Appellant in Violation of His Confrontation Rights

Appellant objected that the testimony was hearsay. (RT 2218.) Hearsay includes any statement made by a declarant who is not a witness that is introduced for the truth of the matter. (Evid. Code, § 1200.) This Court has warned that a trial court must exercise caution before admitting out-of-court statements:

> An out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted. As this court recently observed, "[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute."

(*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204, quoting *People v. Armendariz* (1984) 37 Cal.3d 573, 585.)

Here, the trial court admitted the testimony for a non-hearsay purpose, as being relevant to Ricardo's state of mind. (Evid. Code, §§ 1250, subd. (a), 1251, subd. (a).[24/]) It also found that Ricardo's statement

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24. Evidence Code section 1250 provides, in pertinent part, that "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion or physical sensation at that time or any other time when it is itself an issue in the action; or [¶] (2) The

did not "import anything from any conversations between the two of them as related to [appellant]." (RT 2222.) However, state-of-mind evidence may only be admitted if it is relevant to an issue in the case. (*People v. Cox* (2003) 30 Cal.4th 916, 962.) Ricardo's statement was made when he pointed the gun at himself and pulled the trigger. His state of mind at that time was not relevant to the case against appellant, particularly if the trial court was right and it did not "import anything" about appellant. Accordingly, the evidence was inadmissible when offered against appellant.[25/] Its use violated Evidence Code section 1250 and appellant's federal due process liberty interest in the application of this statute. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Moreover, its use was not limited to Ricardo's state of mind. Since Ricardo's state of mind did not "import anything" against appellant, the statement's relevance depended upon the jury using it for the truth of the matter, that Ricardo had committed the crime "for" appellant – in other words, at his direction or behest. There was no other reason to introduce the statement except for the jury to make this connection. That this evidence was to be taken literally was demonstrated by the trial court when it denied appellant's motion to dismiss the murder charge under Penal Code

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evidence is offered to prove or explain acts of the declarant." Evidence Code section 1251 allows such evidence when offered to prove a declarant's "prior state of mind."

25. The prosecutor argued that the statement showed that Ricardo's reasons for what he had done, consistent with Ricardo's statement to the police that he was angry about Melinda's testimony. (RT 2200.) However, Ricardo's statement to the police was admitted only against him. (RT 1381.) This did not make his statement relevant or admissible when used in the case against appellant.

section 1181.1. At that time, the trial court referred to testimony that Ricardo had said "something" about appellant as evidence in support of the charges. (RT 2057.) After this motion was decided, the prosecutor introduced the statement itself, which made the matter far more explicit. If the trial court could not refrain from speculating that a vague reference to appellant provided evidence against him, then it is all the more likely that the jury used Ricardo's full statement in a similar fashion to conclude that Ricardo meant what he said, that he acted for appellant.

Under these circumstances, its use as hearsay to provide evidence for the truth of the matter violated appellant's Sixth Amendment right to confront the evidence against him. The United States Supreme Court recently affirmed that state rules of evidence are subject to the demands of the Confrontation Clause. (*Crawford v. Washington* (2004) 541 U.S. 36, ___ [124 S.Ct. 1354. 1364.) In particular, it has long been established that use of an out-of-court statement by a co-defendant violates this constitutional right. (*Bruton v. United States* (1968) 391 U.S. 123; see also *People v. Aranda* (1965) 63 Cal.2d 518 [applying similar rule on state law grounds].)

This Court has explained the scope of the *Bruton-Aranda* rule:

> [A]ll statements inculpating the declarant codefendant and the other defendant appear to fall within the rationale of the rule. . . . [W]hat is material for *Bruton-Aranda* analysis is not how the statement under review should be classified in the abstract – as a confession, an admission, or even an exculpatory declaration – but rather whether on the facts of the individual case it operates to inculpate the other defendant.

(*People v. Anderson* (1987) 43 Cal.3d 1104, 1123; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 [error to admit the statement or

confession of a nontestifying defendant that inculpates another defendant].) Since the statement was relevant to appellant only to the extent that it inculpated him, it should have been excluded.

Moreover, the statement lacked an "adequate indicia of reliability" necessary for non-testimonial hearsay under the Sixth Amendment. (*Ohio v. Roberts* (1980) 448 U.S. 56, 65-66; *Crawford v. Washington*, *supra*, 541 U.S. 36 [abrogating use of reliability standards for testimonial hearsay]; see *People v. Corella* (2004) 122 Cal.App.4th 461, 467 [applying *Roberts* to non-testimonial hearsay].) Ricardo made the statement while pointing the gun at himself and pulling the trigger – it could have referred to that act instead of the underlying crime; it could have meant that he committed the crime out of a personal desire to avenge appellant; or, it could have been interpreted literally as having committed the crime at appellant's behest. The statement was made at a time when Ricardo was extremely disturbed. Its relevancy to the case against appellant was dependent upon speculation about what Ricardo might have meant. Appellant had no opportunity to question Ricardo about the statement's meaning. Accordingly. nothing about the statement justified its admission. When used against appellant, as was done here, the statement was inadmissible hearsay.

B. The Testimony was Improper Rebuttal

Appellant objected that Ricardo's statement was improper rebuttal. (RT 2218.) Due Process and the Eighth Amendment standards for reliability in a capital case require firm limits on the scope of a prosecutor's rebuttal. It would be unfair for a prosecutor to withhold evidence and use rebuttal to raise new issues in a case. Therefore, this Court has held that "the scope of rebuttal must be specific" and relate directly to the evidence

that a defendant offers on his behalf. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792.)

In *People v. Ramirez* (1990) 50 Cal.3d 1158, the defendant's mother testified about a number of adverse circumstances faced by the defendant throughout his childhood. The trial court permitted the prosecutor to cross-examine her about acts of misconduct committed by the defendant. (*Id.* at p. 1191.) These acts included absences from school, an arrest for burglary and his use of heroin. This evidence was not proper rebuttal. Although the People argued that the evidence was necessary to present a "complete picture" of the defendant's character and background (*id.* at p. 1192), this Court found otherwise. It emphasized that the scope of rebuttal was limited to the issues presented on direct examination. Therefore, the Court noted, "Defendant's mother did not testify generally to defendant's good character or to his general reputation for lawful behavior." (*Id.* at p. 1193.) Moreover, the defense had not presented any evidence to suggest that the defendant did not engage in these acts during his childhood. (*Ibid.*) Thus, the prosecution should not have been permitted to introduce evidence of a course of misconduct that did not relate specifically to the evidence presented on direct examination. (*Ibid.*)

Here, appellant did not offer any evidence to place Ricardo's state of mind at issue. Accordingly, Ricardo's statement did not relate to anything appellant offered on direct examination. It was beyond the scope of proper rebuttal. The trial court erred in allowing the testimony to be used against appellant.

C. The Testimony Was Prejudicial

Under federal constitutional standards, the trial court's error in admitting Ricardo's statement is not harmless beyond a reasonable doubt.

(*Chapman v. California* (1967) 386 U.S. 18, 24.) However, even if the error is viewed strictly under state standards as a violation of evidentiary rules, it is reasonably probable that it contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

The case against appellant rested on a thin thread of evidence. The prosecution presented testimony that appellant had asked Alma Cruz if she could kill a homegirl and told her that he had someone working on it. (RT 1382.) There was also evidence that while he was in jail before the killing, appellant had telephoned Ricardo. However, there was no evidence that appellant had directed Ricardo to commit the crime. Ricardo's statement provided an important link – the jury would believe that if Ricardo had done the killing "for" appellant then appellant must have directed him to do it. Such speculation was devastating to appellant's defense, particularly because it was presented in a way that made it impossible for appellant to defend himself.

That the jury was allowed to use Ricardo's statement against appellant also made it much more likely that they would use Ricardo's entire statement to the police in a similar fashion. Indeed, when the prosecutor argued that the words "for my *carnal*" were admissible, he tied them to the statement that Ricardo had given the police indicating that he was angry about Melinda's testimony. (RT 2220.) Since the prosecutor could make this leap and justify the use of the evidence by referring to statements that were not admissible against appellant, it is likely that the jury did the same. The result violated due process and left the verdict unreliable. Accordingly, the murder conviction and death sentence against appellant must be reversed.

VI.

THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO PRESENT INFLAMMATORY HEARSAY ABOUT A MESSAGE ON THE VICTIM'S PAGER

The trial court allowed the prosecutor to present two witnesses who testified that Melinda's pager showed the message "187" shortly after the crime was committed.[26] (RT 1490-1491, 1894.) There was no evidence that this message was linked to appellant in any way. Accordingly, the trial court should have sustained appellant's objections that the evidence was speculative and unduly prejudicial under Evidence Code section 352. (RT 1490, 1894, 2107.) The use of this testimony violated appellant's statutory rights and implicated federal and state constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

A. Factual Background

Over appellant's objections, the trial court allowed Drew Oliphant, a paramedic, to testify that after Melinda was taken to the hospital, he saw the pager with the numbers "187" on it. (RT 1490, 1525.) He stated that the social worker had been holding the pager and that he did not know how long the numbers had been on the pager. (RT 1525-1526.)

Appellant also objected to the testimony of Josue Garcia Delgado, Jr. (RT 1894) Delgado, a chaplain at the medical center, stated that he was with Melinda when she died. (RT 1896, 1901.) He looked through the numbers on her pager in order to find a friend or family member who could identify her. (RT 1904-1905.) He saw the number "187" on the pager and

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26. California's statute for homicide is Penal Code section 187.

wrote a post-it note about what he had observed. (RT 1906.) The trial court also admitted the post-it note into evidence over appellant's hearsay objection. (RT 2107.)

Detective Oppelt testified that appellant told him that Melinda had been in trouble with some of the other girls in the gang, and that the number "187" had appeared on her pager before the crime. Appellant had told Melinda that his family was not involved in this. (RT 1659-1660.) Appellant also stated that Ricardo did not know her pager number. (RT 1665.)

B. The Evidence Was Irrelevant and Speculative

Appellant objected that the testimony about the number on the pager was speculative. (RT 1490, 1894.) Evidence is irrelevant and inadmissible if it is speculative or unreliable. (Evid. Code, §§ 210, 350; *People v. Parrison* (1982) 137 Cal.App.3d 529, 539; *People v. De La Plane* (1979) 88 Cal.App.3d 233, 244, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 39, fn. 25; *People v. Allen* (1976) 65 Cal.App.3d 426, 434.) Speculative evidence violates due process under the state and federal constitutions because its allows the jury to make unreliable inferences. (*White v. Illinois* (1992) 502 U.S. 346, 363-364 [unreliable evidence violates due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [due process requires fundamental fairness].) Moreover, in a capital case, speculative evidence undermines the 8th Amendment requirement for heightened reliability in the determination of guilt. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1134 [constitution places special emphasis on the need for reliability in a capital case].)

The testimony was speculative because there was no evidence that linked the message on the pager to either appellant or his brother. (RT 1490.) It has long been established that evidence of a bad act is not admissible unless it is attributable to the defendant. In *People v. Weiss* (1958) 50 Cal.2d 535, the prosecution introduced evidence of an anonymous phone call from someone who had claimed to be the defendant's attorney. The person making the call asked the witness about the case, and the prosecutor sought to show that the call may have intimidated the witness. (*Id.* at pp. 552-553.) This Court held that the evidence was inadmissible because the record was "barren of any showing that the call was connected with or authorized by any defendant." (*Id.* at p. 553; see also *People v. Hannon* (1977) 19 Cal.3d 588, 599-600 [attempt to suppress evidence must be attributable to defendant]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 781 [evidence of threats not connected to defendant was inadmissible].)

As in *Weiss*, there was no evidence in this case to establish who made the call to the victim's pager and whether it was done with appellant's knowledge or approval. Accordingly, the testimony was inadmissible and served no legitimate purpose in the case against appellant. The trial court erred in allowing the testimony.

C. The Evidence was More Prejudicial than Probative

Appellant objected that the testimony was inadmissible under Evidence Code section 352. (RT 1490, 1894.) This section provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." It applies to evidence that uniquely tends to evoke an emotional bias

against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14). These are the same concerns that are addressed by constitutional standards for due process and a reliable capital verdict. (U.S. Const., 8th and 14th Amends.) It is precisely the type of evidence that was at issue in the present case.

The trial court overruled appellant's objection because it found that the number of the pager was part of the circumstances of the crime:

> The number was there. How it got there and why it got there may be nothing more than serendipity. None of us may know that, what little's before the court now, unless we have something further that suggests that there is some known reason why it's there, but it's part of what they saw. I will permit it to come in. . . .

(RT 1490-1491.) Yet, simply because the pager was observed after the crime was committed did not make it relevant. As discussed above, the probative value of the testimony was minimal because there was nothing to connect the message on the pager to appellant or any other person. It may have been observed following the crime, but without anything further, it had no probative value to the issue of guilt.

The trial court recognized that the testimony had "some prejudicial impact." (RT 1491.) Since the only relevance to this case would be if the message had been sent by appellant or under his direction, the testimony allowed the jury to speculate that it was connected to him as evidence of appellant's guilt. Moreover, to the extent that the jury regarded the message as being from appellant, it made him appear cold and brutal – gloating over the crime. He would be seen as the embodiment of the juror's fears about

gang members and gang culture. Under either circumstance, the testimony about the pager was far more prejudicial than probative. Accordingly, the trial court erred in allowing the testimony to be introduced.

D. The Trial Court's Errors Were Prejudicial

The trial court's errors in admitting the pager testimony from two different witnesses, as well as the post-it note, allowed the jury to speculate that appellant was connected to the message on the pager. This Court has recognized that this type of evidence poses a unique risk of prejudice. As it has stated, "[E]vidence of an anonymous threat not connected with the defendant should at once be suspect as . . . an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender." (*People v. Williams* (1997) 16 Cal.4th 153, 212; *People v. Weiss*, *supra*, 50 Cal.2d at p. 554.) Regardless of whether the "187" message was seen as a threat against Melinda or an act of gloating over her death, the same principle must apply here: the prosecutor used evidence of anonymous acts against appellant in ways that made it impossible for him to defend.

The capital charges against appellant rested upon an extremely thin thread of evidence, relying primarily upon a single statement he allegedly made to another gang member. (See Argument IX [evidence insufficient to support verdict].) The testimony about the pager number invited a purely emotional response against appellant. It allowed the jury to believe that if appellant were the type of person to be responsible for such a message, then he must be guilty of all the charges against him. Under these circumstances, the guilt verdict must be reversed under either federal or state standards. (*Chapman v. California* (1967) 386 U.S. 18, 24 [error not harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d

818, 848 [state law requires reversal if it is reasonably probable that a more favorable verdict would be reached].)

Even assuming that the error was harmless during the guilt phase, it would have affected the penalty phase verdict. The jury was instructed to consider the evidence from the guilt phase in making their penalty determination. (CT 1094; RT 2883.) The testimony about the pager inflamed the jury against appellant. Once the jury concluded that appellant was guilty of the charged crime, they also would have believed that he was responsible for message. The jury was left with the impression that appellant was gloating over the murder, callous and indifferent to the consequences of his actions. The type of coldness and ruthlessness behind such a message were important considerations in the normative decision about whether appellant should live or die. Accordingly, this Court must reverse the judgment of death. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [any substantial error affecting the penalty verdict requires reversal under either federal or state standards].)

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VII.

THE TRIAL COURT IMPROPERLY RESTRICTED APPELLANT'S CROSS-EXAMINATION OF THE VICTIM'S MOTHER

The trial court improperly restricted appellant's cross-examination of Susan Carmody, Melinda's mother. The questions that the trial court did not allow appellant to ask would have given the jury a fuller, more balanced picture of this case than that which had been presented by the prosecution. The trial court's rulings violated appellant's statutory rights to cross-examine a witness on matters that are within the scope of direct examination (Evid. Code, § 761) and his state and federal constitutional rights to present a defense, to confront the evidence against him, to receive due process, and for a reliable penalty verdict. (U.S.Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. The Victim's Pattern of Running Away from Home

During Susan Carmody's testimony, the prosecutor established that Melinda ran away from home in 1995 and lived with appellant and his family. (RT 2261-2262.) Carmody also stated that her daughter had run away from home before moving in with appellant's family. (RT 2262.) On cross-examination, appellant asked how many times Melinda ran away until she lived with appellant's family. The trial court erroneously sustained the prosecutor's objections to the relevance of this question. (RT 2268-2269.)

Cross-examination is not confined to a "mere categorical review of the matters, dates or times mentioned in the direct examination" but may be directed to any matter that may qualify the effect of the testimony given on direct examination. (*People v. Zerillo* (1950) 36 Cal.2d 222, 228.) Here

the trial court erred because the question was relevant to matters raised in the prosecutor's direct-examination.

That Melinda ran away and lived with appellant and his family when she was 14 years old was clearly a sensitive issue that could easily inflame the jury against appellant. Appellant might have been seen by the jurors as being the person who was responsible for the problems that she had with her family, or a person who contributed to them. Appellant's cross-examination on this subject could have placed this in its full context, allowing the jury to determine why Melinda ended up living with appellant's family. The question was therefore appropriate on cross-examination. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1185 [cross-examination proper with respect to facts that are expressly stated or necessarily implied from the testimony on direct examination].)

B. The Circumstances Under Which the Victim Returned Home

On direct-examination, Susan Carmody stated that Melinda had lived with appellant's family after she ran away from home. She returned to Carmody's home in September, 1995. (RT 2263.) On cross-examination, Carmody testified that Melinda came back on her own, but stated that it was "possible" that police officers scared her into doing so. (RT 2269.) Appellant sought to clarify this by asking if Carmody had told investigating officers in this case that the police had scared Melinda into returning home. The trial court sustained the prosecutor's objection to this question as improper impeachment. (RT 2270.)

The trial court erred because Carmody's testimony had been unclear about whether Melinda had returned home on her own or had been prodded to do so by police officers. Appellant therefore sought to clarify the matter

by asking Carmody about statements she had given to investigating officers in this case. This question was proper, both as impeachment and substantive evidence, because Carmody's testimony had been inconsistent or evasive. (Evid. Code, § 1235; see *People v. Montiel* (1993) 5 Cal.4th 877, 930 [inconsistent statements properly admitted if answers are evasive].)

The testimony was important because of the distinction between the two statements. If Melinda had returned home voluntarily, there would be an implication she had rejected appellant in someway. If Melinda returned home only because she had been scared by police officers, the situation was far different since she would have been separated from appellant through the actions of a third party. It would have affected both appellant's and Melinda's state of mind and been important for the jury to consider in both the guilt and penalty phases of the trial. Accordingly, appellant should have been permitted to cross-examine Carmody about her statement to the police investigators.

C. Carmody's Bias Toward the Victim's Associations with Appellant

Appellant asked Carmody if she had ever stated that Melinda dressed "like a white girl" when they were together, but when Melinda was not with Carmody, she dressed "like a chola."[27/] The trial court sustained the

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27. "Chola" is a slang word, generally referring to a Latina girl in a gang. (See Charlotte Observor, "Gang Lingo,"<http://www.mercurynews .com/mld/charlotte/news/special_packages/gangs/6942939.htm?1c> [as of December 20, 2004].)

prosecutor's objections that the question was irrelevant and called for hearsay.[28] (RT 2274.)

This statement was not hearsay since it was not offered for the truth of the matter – that Melinda dressed in a certain matter. (See Evid. Code, § 1200 [defining hearsay as statements that are introduced for the truth of the matter].) Moreover, it was relevant to explore Carmody's state of mind, her bias in this case as a result of her daughter's relationship with appellant. (Evid. Code, §§ 780 [credibility of witness].)

Evidence Code section 780 allows a jury to consider any matter that relates to the bias of a witness or one's attitude toward the underlying case. (Evid. Code, § 780, subds. (f), (j).) The credibility of a witness is affected by emotions that are tied to a case. Thus, it has long been recognized that "it is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship toward the parties, are always proper matters for investigation." (*People v. Pickens* (1923) 61 Cal.App. 405, 407-408; see also *Newman v. Los Angeles Transit Lines* (1953) 120 Cal.App.2d 685, 690 [proper to show any feeling of antagonism or animosity of a witness toward a party].)

Here, appellant's question related to Carmody's attitude towards Melinda's relationship with appellant. If Carmody believed that her daughter dressed appropriately only when she was home, then it clearly demonstrated bias against the person who allegedly helped turn Melinda into a "chola." Accordingly, appellant should have been allowed to question Carmody about how her attitude and emotions affected her perceptions and testimony in this case.

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28. The trial court denied appellant the opportunity to approach the bench to discuss the matter outside the jury's hearing. (RT 2274.)

D. Reversal is Required

Carmody's testimony provided substantial support for the kidnaping charge and established some of the circumstances of the alleged homicide. The questions that appellant tried to ask were important because they showed the extent of Melinda's problems before she moved in with appellant and his family, the nature of her relationship with appellant, and Carmody's own bias against appellant in the case.

The trial court's rulings violated appellant's statutory rights and implicated his federal due process liberty interest in the application of California's evidentiary rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) They also violated appellant's Sixth Amendment right to confront the evidence against him (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678); his due process right to fundamental fairness (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643); and, his Eighth Amendment right to a reliable verdict in a capital case (*Ford v. Wainwright* (1986) 477 U.S. 399, 411) The errors, both individually and cumulatively, were not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *Irving v. State* (Miss. 1978) 361 So.2d 1360, 1363 ["what may be harmless error in a case with less at stake becomes reversible error when the penalty is death."].)

Even if this Court should find that the errors were harmless in the guilt phase, they affected the penalty phase of the trial. The penalty phase of a capital trial is "in many respects a continuation of the trial on guilt or innocence of capital murder." (*Monge v. California* (1998) 524 U.S. 721, 732.) Jurors were instructed to consider the evidence admitted in the guilt phase. (RT 2884, CALJIC 8.85.) Here, this case involved very sensitive and emotional issues regarding appellant's gang association and Melinda's

participation in the gang. Melinda's family testified at the penalty phase about the impact that her death had upon them. The questions that appellant tried to ask would have provided more information about why Melinda came to live with appellant and his family and why she moved back home. These matters would have placed the crime in a balanced context and provided important mitigating evidence. Accordingly, this Court must reverse the penalty judgment. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [substantial error requires penalty reversal under either federal or state standards].)

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VIII.

THE TRIAL COURT IMPROPERLY PERMITTED AN INVESTIGATING OFFICER TO TESTIFY ABOUT THE VICTIM'S DEMEANOR WHEN SHE TESTIFIED AT THE PRELIMINARY HEARING REGARDING THE KIDNAPING CHARGE

The prosecutor introduced Melinda's testimony from the preliminary hearing that was held in regard to the kidnaping charge. After the testimony was read into the record, the trial court erroneously allowed the prosecutor to introduce additional testimony about Melinda's emotional state during her testimony. Over appellant's objection that the testimony was irrelevant and speculative, the investigating officer described her as being "frightened, upset, and sometimes crying." (RT 1051.) He said that the trial court had offered her some tissues during her testimony and asked if she would like to continue. (RT 1051-1052.) This testimony affected the kidnaping charge by enhancing Melinda's credibility; it affected the murder charge by making it likely that the jury speculated that Melinda was afraid of appellant. The testimony was irrelevant and speculative, violating appellant's federal and state constitutional rights to confront the evidence against him, due process, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. The Officer's Opinion was Speculative and Irrelevant

The trial court erred by admitting the investigating officer's impression of Melinda's demeanor because it was too speculative to be relevant. (See *People v. Lewis* (2001) 26 Cal.4th 334, 373 ["speculative evidence is not relevant"]; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [evidence was "simply too speculative to be considered relevant"].)

To be relevant, the demeanor of a witness is something that the trier-of-fact must observe. A jury may take into account "the whole nexus of sense impressions which they get from a witness." (*People v. Adams* (1993) 19 Cal.App.4th 412, 438.) However, when a witness is unavailable and testimony is admitted from another proceeding, the witness's demeanor cannot be observed by the jury. (*People v. Williams* (1968) 265 Cal.App.2d 888, 896.) Thus, it has been recognized that "where former testimony of the unavailable witness is received, it is clear, of course, that no one at the subsequent trial had observed the witness testifying, and no argument could be made regarding demeanor of the witness." (*People v. Manson* (1976) 61 Cal.App.3d 102, 224 (conc. and dis. opn. of Wood, P.J.)

The United States Supreme Court has also observed:

> If cross-examination at the preliminary hearing rarely approximates that at trial, observation by the trial factfinder of the witness' demeanor as he gives his prior testimony is virtually nonexistent. Unless the committing magistrate is also the trial factfinder, the demeanor purpose of the Confrontation Clause is wholly negated by substituting confrontation at the preliminary hearing for confrontation at trial. And yet, in the words of the California court, "(i)t is because demeanor --attitude and manner--is a significant factor in weighing testimonial evidence that *it is axiomatic the trier of fact, before whom the witness testified and was cross-examined * * *, is the sole judge of the credibility of a witness and of the weight to be given his testimony* ." [*People v. Green* (1969) 70 Cal.2d 654, 662.] No such determination of credibility is possible when the witness comes before the trial factfinder by the reading of a cold transcript.

(*California v. Green* (1970) 399 U.S. 149, 198, emphasis added.) In other words, the demeanor of a witness must be determined contemporaneously, where the trier-of-fact can use it to gauge the credibility of the testimony itself.

Here, the prosecutor apparently sought to avoid this limitation by having the investigating officer testify about Melinda's emotional state. However, it is one thing for the factfinder to personally observe a person who is testifying and to consider their demeanor in judging the weight that is to be given to their testimony; it is another when an investigating officer's observations about a witness's demeanor is presented as sworn testimony that has separate evidentiary value.

The investigating officer's testimony cut an extremely broad swath. Melinda did not testify that she was frightened or upset. The investigating officer did not identify any questions or answers that might have caused Melinda to be upset. Thus, there was nothing to link her mental state to any specific issue in this case. Without some evidence to connect Melinda's emotional state to a disputed issue in the case, it was irrelevant to the jury's determination. (See Evid. Code, § 1250 [state of mind evidence must be relevant to an issue in the case]; *People v. Yeats* (1984) 150 Cal.App.3d 983, 986 [before evidence of threats against a witness is admitted, "the prosecution must first establish the relevance of the witness' state of mind by demonstrating that the witness' testimony is inconsistent or otherwise suspect"]; *People v. Ireland* (1969) 70 Cal.2d 522, 529 [evidence of a victim's mental state must be relevant to issue at trial].)

Moreover, the investigating officer had no knowledge about the reasons underlying her state of mind. Even assuming that the officer's observations were correct, the jury could not determine why she was frightened. Indeed, the investigating officer may have believed that Melinda was frightened, yet she may have only been nervous about testifying in a case involving very emotional matters and her relationship with a boyfriend that she had once loved. (See Supp. 1 CT 38 [trial court

offers victim Kleenix and asks if the victim can continue].) Many adults – let alone a 16 year-old girl – are frightened or nervous about testifying in any court matter. Appellant had no opportunity to establish Melinda's actual state of mind. Under these circumstances, the testimony was speculative and unreliable.

The investigating officer's testimony was speculative and irrelevant. (Evid. Code, § 350 [only relevant evidence admissible].) Appellant had a due process liberty interest in applying California's statutory scheme to exclude this testimony. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). Because it allowed the jury to make improper inferences about Melinda's state of mind, it also violated state and federal constitutional requirements of due process and affected the reliability of the verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.) Accordingly, this Court should find that the trial court erred in permitting the investigating officer to testify about his impressions of Melinda's demeanor.

B. The Testimony Allowed the Jury to Speculate that Appellant Frightened the Victim

The jury was told that Melinda was frightened, this in turn gave rise to speculation that she had reason to be afraid to give testimony against appellant. The speculative nature of the officer's testimony demonstrates why its admission violated due process standards and affected the reliability of the first degree murder verdict under constitutional standards.

This Court has placed firm limits on testimony that relates hearsay declarations about a victim's fear. Where there is a statement that a victim feared a defendant, the statement must be excluded unless the victim's state of mind is in dispute and it is relevant to an issue in the case. Absent such dispute, a statement about a victim's fear is irrelevant. (*People v. Bunyard*

(1988) 45 Cal.3d 1189, 1204; *People v. Armendariz* (1984) 37 Cal.3d 573, 584-587.)

The risk with such testimony is that the jury will believe that the defendant was the reason for the victim's fear so that the defendant must be guilty. As the court noted in *United States v. Brown* (D.C. Cir. 1973) 490 F.2d 758, 766, "The principal danger is that the jury will consider the victim's statement of fear as somehow reflecting on defendant's state of mind rather than the victim's – i.e., as a true indication of defendant's intentions, actions, or culpability."

Here, the testimony that Melinda appeared to be frightened invited similar speculation that her fear was linked to appellant. Although there was some evidence that appellant did not want Melinda to testify and was upset over some of her testimony, there was *no* evidence that appellant had threatened her. Indeed, that Melinda continued to participate in appellant's gang after the alleged kidnaping might have indicated that she did not fear appellant or believe that he posed a danger to her. This was important to appellant's defense, yet it was undermined by the testimony about her demeanor.

Although the officer had no knowledge about why Melinda might have appeared to be scared at the time of the preliminary hearing, the jury was left to believe that she feared appellant and that her fear was justified. The jury would speculate that Melinda was frightened because appellant looked at her in a menacing way, made some kind of a threatening gesture, or otherwise indicated that she would be in danger if she testified against him. Appellant could not defend himself against this kind of speculation, particularly because there was no evidence that the victim's fear was caused by him. (See *People v. Mason* (1991) 52 Cal.3d 909, 946 [evidence of an

anonymous threat not connected with the defendant should be suspect as an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut].)

In a case where the evidence was very close, the jury would assume that appellant was responsible for both Melinda's fear and her death. Under these circumstances, the investigating officer's testimony struck "directly at the heart of the defense." (*People v. Ireland*, *supra*, 70 Cal.2d 522, 532.) The speculative nature of the testimony rendered it unduly prejudicial in violation of due process standards. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [due process guards against prejudicial evidence].) It also left the murder verdict unreliable under the Eighth Amendment by leaving the jury free to make improper inferences. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [8th Amendment requirements for reliability in a capital case extends to matters that affect guilt determination].) Accordingly, the judgment against appellant must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24 [error not harmless beyond a reasonable doubt].)

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IX.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF FIRST DEGREE MURDER

There was insufficient evidence to support appellant's conviction for first degree murder. Appellant was in jail at the time Melinda was shot by his brother and there was no direct evidence linking him to her death. The most incriminating evidence against appellant was testimony that he allegedly asked Alma Cruz if she could kill a homegirl and stated that he had "someone doing it" for him. (RT 1382.) There was no evidence about what appellant meant when he allegedly made these statements. Thus, appellant's conviction was based on his alleged motive to keep Melinda from testifying against him or to exact revenge upon her, and speculation about what he might have told his brother to do. This does not meet federal or state due process requirements or the standards under California's "corpus delicti" rule requiring independent evidence of guilt apart from a defendant's admissions. This Court must now reverse the murder verdict against appellant.

A. There was Insufficient Evidence to Support the Murder Verdict

The due process clause of the Fourteenth Amendment and article 1, section 15, of the California Constitution requires that a conviction be supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 618, 667.) Under due process standards, this Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) The *Jackson* requirement "presupposes that juries accurately charged on the elements of

a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. It was adopted to provide an additional safeguard against that possibility, and to give added assurance that guilt should never be found except on a rationally supportable subjective state of near certitude." (*West v. Wright* (4th Cir. 1991) 931 F.2d 262, 268, rev'd on other grounds, 505 U.S. 277, quotations omitted.)

By definition, "substantial evidence" requires evidence and not mere speculation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1133.) While all reasonable inferences must be drawn in support of the judgment, "[a] reasonable inference . . . may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*Ibid.*) "A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.)

Here, the prosecution had to show that appellant aided or abetted Melinda's murder. (Pen. Code, § 31 [defining principals].) This Court has explained:

> A person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.

(*People v. Marshall* (1997) 15 Cal.4th 1, 40, quotations omitted.) Mere knowledge that a crime is going to be committed and the failure to prevent it does not amount to aiding and abetting. (*In re Michael T.* (1978) 84 Cal.App.3d 907, 911.)

At the close of the prosecutor's case-in-chief, appellant asked the trial court to acquit him of the murder charge pursuant to Penal Code section 1181.1, which allows a trial court to enter an acquittal if there is insufficient evidence of a defendant's guilt.[29] (RT 1961.) "Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*People v. Trevino* (1985) 39 Cal.3d 667, 695.)

The prosecutor introduced no direct evidence to establish what appellant discussed with his brother, to show that he encouraged or instigated the crime. Instead, the case against appellant relied primarily upon the testimony of Sandra Ramirez and Alma Cruz, who stated that appellant had asked Alma if she could "kill a homegirl." (RT 1187, 1382.) After she told him that it depended on what she had done to her, appellant allegedly stated, "I already have someone doing it for me." (RT 1382.)

It was far from certain what appellant meant when he said this. Appellant had called Ramirez in order to discuss gang business. (RT 1165, 1167, 1168.) There was no indication that he had planned to speak to Alma, she just happened to be speaking to Sandra at the time he called. (RT 1165.) Appellant did not indicate anything more about what he might have meant by this statement. Accordingly, he could simply have been questioning Alma about how deeply she was committed to the gang structure or referring to other gang business.

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29. Section 1118.1, in pertinent part, provides that the trial court "on motion of the defendant . . ., at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

Although it was a three-way conversation, Sandra did not hear Alma's answer or appellant's response – and neither witness appeared to think that the statement was particularly significant. Indeed, they did not even mention it to the investigating officers and did not report it until they spoke with the district attorney just before the preliminary hearing. (RT 1427.) This testimony may have raised suspicion, but that cannot be equated with evidence sufficient to establish guilt. (*People v. Raley* (1992) 2 Cal.4th 870, 891; *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Even assuming that appellant's statement to Alma raised suspicion, the remaining case against appellant failed to establish that appellant was a principal in Melinda's death. Indeed, the speculative nature of appellant's conviction was demonstrated by the rationale used by the trial court when it denied appellant's motion under section 1181.1.

The trial court first found that Sandra Ramirez stated that appellant had tried to convince Melinda not to testify and that appellant was upset by her testimony at the preliminary hearing. (RT 2057.) Appellant asked Melinda not to testify at the preliminary hearing. (RT 1161.) During Melinda's testimony, he stood up and stated, "I don't have to listen to this shit." (RT 1055.) Appellant told the investigating officer that her testimony made him either sad or angry. (RT 1613.)

Appellant's statements did not threaten Melinda in any way. It is one thing for appellant to have been angry or upset over her testimony, it is another thing to instigate or plan her death. At most, the evidence might have pointed to a motive, but motive does not provide independent proof since equating it with guilt is speculative and conjectural. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 750 [jurors would not believe that motive

alone was sufficient to establish guilt]; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The trial court also found that appellant had an opportunity to speak to Ricardo and Uribe from jail through three-way phone conversations. (RT 2057.) Patricia Lopez testified that there was a single three-way call between appellant, Ricardo, and Uribe. (RT 1594, 1597.) However, there was no evidence about what was said during any of the conversations. Indeed, appellant had phone conversations with several people other than his brother and there was nothing unusual about appellant speaking to his friends, family, or associates. (RT 1606.) That appellant was actively involved in gang business provided ample reason for him to speak to Ricardo and Uribe, even as he spoke with Sandra Ramirez. Although appellant may have had an opportunity to have discussed the crime, this does not mean that he did so. The evidence may have raised speculation about what appellant *might* have talked about, but it was not enough to support his conviction. (See *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 838-841 [evidence that showed an opportunity to commit the crime was insufficient to establish guilt].)

Similarly, the trial court noted that appellant's statement to Detective Oppelt showed that he had lied about when he first learned of Melinda's death.[30/] (RT 2058.) Even assuming that appellant did not tell Detective Oppelt the truth about when he learned about Melinda's death or that he falsely denied having spoken to several individuals from jail over the

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30. The trial court stated, "We have the statement of Mr. Juan Lopez through Dective Oppelt that Mr. Juan Lopez apparently lied in court, is assuming inferring this from other evidence about when he learned of Melinda's death." (RT 2057-2058.) The trial court's meaning is somewhat uncertain, since appellant did not testify.

telephone (RT 2303), there was nothing to connect any false statements to the crime in this case. Given appellant's leadership in a gang, he had many reasons not to discuss his conversations with the police. Moreover, appellant's mental state at the time of the interview did not indicate a consciousness of guilt – he was clearly upset by Melinda's death, but agreed to try to answer the officers' questions. (CT 896-898.) He had been given psychiatric medication and placed on suicide watch, so he did not even remember having been informed about his rights in previous interviews. (CT 899-900.) Under these circumstances, what appellant remembered or the reasons why appellant may have told the officer certain things are speculative and do not provide reliable evidence against him.

The trial court also noted that Ricardo said "something" about appellant after the crime. (RT 2057; see RT 1549 [testimony of Angelica Soto].) Even if Ricardo said "something" about appellant, this does not establish that appellant had instigated or encouraged his brother's actions.

Appellant's brother may have been motivated by anger toward Melinda or killed her in order to help appellant, without appellant's knowledge. Indeed, there was evidence that Ricardo may have acted alone. Ricardo had been drinking shortly before the crime. (RT 1201, 1203.) He was acting recklessly before shooting Melinda – he even told Sandra that he would shoot her. (RT 1205.) Ricardo then spoke with Melinda. (RT 1216.) He was angry at her for testifying against appellant. (RT 1836, 1859.) He shot Melinda as she ran away.[31] (RT 1218-1219.) Even if Ricardo mentioned appellant, it does not show that he was acting upon appellant's behest. Ricardo's statement – which was not subject to cross-

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31. In a statement admitted only against Ricardo, he told the police that he had not meant to kill Melinda, only to wound her. (RT 1861, 1864.)

examination – did not establish that appellant was implicated in the crime.[32/]

The trial court finally found that appellant spoke to Sandra Ramirez about changing the location where a new member of the Baby Locas was to be initiated ("jumped in") into the gang. (RT 2058.) A gang meeting had been set before the conversation took place in order to discuss dues that the Mexican Mafia required the members to pay. (RT 1167, 1324.) Appellant believed that the initiation should take place in the neighborhood controlled by the gang. (RT 1176, 1617.) As Alma Cruz testified, *all* of the other Baby Locas had been initiated in a neighborhood location and she had no reason to doubt appellant's belief that it should be done in this manner. (RT 1455-1456.) It was decided to jump the new member at the same time and place that they had already planned to meet. (RT 1179.) There was nothing unusual about this.

Both the men's and women's gang sections had already planned to attend the Friday meeting, so changing the location of the initiation ceremony did not add anything further to the evidence against appellant. The members of the Village Locos and Baby Locas (including Melinda) would have attended the scheduled meeting in any event. Thus, changing

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32. After the trial court made its ruling on the section 1181.1 motion, the prosecutor introduced Ramon Ramos' testimony from the preliminary hearing, stating that Ricardo said "for my *carnal* [brother]" while holding the gun to his head. (RT 2245, 2249-2251.) The trial court admitted the statement as evidence of Ricardo's state of mind. This evidence should not be considered in determining whether the trial court erred in denying appellant's motion to acquit. (*People v. Trevino*, *supra*, 39 Cal.3d at p. 695.) However, for the reasons stated above, it does not provide any further proof of appellant's guilt. (See also Argument V [statement improperly admitted against appellant].)

the initiation ceremony did not make it easier for Ricardo to have committed the crime – and seemingly only complicated things by ensuring that there would be several witnesses. (See RT 1205-1206 [Ricardo asks Sandra why she brought the others].) In short, there was no evidence that the meeting arrangement was linked to Melinda's death. It did not provide proof of appellant's guilt.

Taken as a whole, the verdict was based on speculation about what appellant might have said to his brother. This was not sufficient evidence to support the verdict under federal and state due process standards. The trial court erred when it denied appellant's motion to acquit. Reversal is required. (*People v. Allen* (2001) 86 Cal.App.4th 909, 918-919 [erroneous denial of motion to acquit requires reversal]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [reversal required if verdict is legally and factually insufficient].)

B. There Was No Independent Evidence Apart from Appellant's Admissions

California's corpus delicti rule required that appellant's participation in the murder be proved independently of any admissions. (*People v. Holbrook* (1955) 45 Cal.2d 228, 234; *People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. Crew* (2003) 31 Cal.4th 822, 836-837.) "Distilled to its essence, the corpus delicti rule requires that the prosecution establish the corpus delicti of a crime by evidence independent of the defendant's extrajudicial inculpatory statements before he or she may be . . . convicted of an offense. (*People v. Ochoa* (1998) 19 Cal.4th 353, 450.) The rule is that the prosecution cannot meet its burden of proving the corpus delicti of a crime by relying exclusively upon the extrajudicial statements,

confessions, or admissions of the defendant. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.)

The corpus delicti rule is based on state requirements rather than federal law. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173.) However, appellant has a federal due process liberty interest in assuring that his conviction does not violate California's requirements. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The prosecution's case rested primarily upon appellant's statement to Alma Cruz, but independent proof apart from appellant's admissions were required under the corpus delicti rule. As discussed above, the evidence offered in this case failed to meet this standard. Indeed, appellant's three-way phone conversation with Ricardo and Uribe was admitted to show that appellant had a consciousness of guilt when he told the police that he had not spoken to them, but there was nothing to link this to the crime – at most, his statement to the police was an admission that itself required independent corroboration of guilt. (*People v. Wright* (1990) 52 Cal.3d 367, 403 ["corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant."].)

Without appellant's admissions, the only evidence against him was that he had an alleged motive to have committed the crime and an opportunity to have planned it. Yet, both matters were speculative. Appellant did not threaten the victim and no evidence offered against him established what might have been planned. Appellant's involvement in the crime was not supported by evidence that was independent of his admissions. The guilt verdict must be reversed. (*People v. Alvarez*, *supra*, 27 Cal.4th at pp. 1168-1169.)

X.

THE TRIAL COURT ERRED IN ADMITTING THE VICTIM'S DIARY AND STATEMENTS THAT SHE HAD MADE TO A TEACHER

The trial court erroneously allowed the prosecutor to introduce in rebuttal an entry in Melinda Carmody's diary and statements that she had made to her teacher. Appellant objected that these statements were hearsay and improper rebuttal. (RT 2226.) However, the trial court allowed the evidence to be admitted as prior consistent statements under Evidence Code section 1236. (RT 2225-2226.) The trial court erred because the statements were made after Melinda's inconsistent statements and after she had reported the incident to the police and accused appellant. Accordingly, they were not prior consistent statements under the statute. Moreover, the testimony violated appellant's constitutional rights to due process and a fair trial, to confrontation of witnesses and to a reliable capital trial. (U.S. Const. 6th, 8th, & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16, 17.)

A. Factual Background

During the trial, the prosecutor introduced Melinda Carmody's preliminary hearing testimony that appellant came to her house on March 13, 1996. Melinda stated that he attacked, wounded her, and dragged her to the car. (RT 921-924.) Appellant drove her to his house, but she stayed in the car with another person who she could not identify. (RT 927.) Appellant then drove her to his aunt's house, where his aunt helped clean her wounds and change her clothes. Melinda had difficulty communicating with appellant's aunt because she did not speak Spanish. After a few hours, appellant's aunt drove her home. (RT 930-931.) Melinda reported the incident to the police when she returned home. (RT 945.)

Appellant's mother, his aunt, and his aunt's husband all testified at trial that Melinda did not appear to be frightened and that there was nothing to indicate that she was being held against her will. No one saw that Melinda had suffered any injury. (RT 2119; 2150-2151; 2188.) Appellant's mother testified that Melinda gave a her a pen and ink drawing that showed a man and woman inside a light bulb with a caption stating, "You Light Up My Life" that was dated March 13, 1996, the day of the incident. (RT 2124; see Defense Exhibit E.)

Appellant's aunt testified in English and stated that she spoke English at the time of the incident. She learned that Melinda and appellant planned to go to Mexico in order to marry. She talked them out of this idea. (RT 2148-2149.) Her husband drove them back to their neighborhood. (RT 2152, 2187.)

In rebuttal, over appellant's hearsay objections, the prosecutor introduced an entry from Melinda's diary. The entry was written after she gave her statement to the police. It stated, "[Appellant] broke in and stabbed me and choked me and kidnaped me. Went to Police station, went to Grandma's." (RT 2268.) The prosecutor also presented, over appellant's objections, the testimony of Frank Torres, a former teacher of Melinda's, who testified that she told him that appellant had broken into her house, threatened her, held a knife to her neck and took her to his aunt's house. (RT 2255.)

B. The Victim's Diary Entry and Purported Statement Were Not Admissible as Prior Consistent Statements

Evidence is subject to exclusion as hearsay if it is an out of court statement that is offered to prove the truth of the matter. (Evid. Code, § 1200.) The trial court admitted Melinda's statements u

under an exception to the hearsay rule as a prior consistent statement under Evidence Code sections 791 and 1236. (RT 2225-2226.)

Evidence Code section 791 states:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

Evidence Code section 1236 provides:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

Under these two sections, the timing of the consistent statement is critical. A prior consistent statement is not admissible unless it was made *before* the inconsistent statement or the motive for fabrication arose. (See *People v. Flores* (1982) 128 Cal.App.3d 512, 524 [consistent statement not admissible because it was made after the witness had a motive for fabrication]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1303

[statements admissible only if made before the time that the defendant asserted a motive to fabricate had arisen].)

Here, appellant presented evidence that placed some of Melinda's testimony in dispute. However, the only inconsistent statements were those made to appellant's witnesses during the incident itself, when she spoke of going to Mexico with appellant. (RT 2148.) Similarly, the only motive for fabrication that was even hinted at by appellant's trial counsel was when he asked Melinda's mother if she had inflicted the injuries after she found out that Melinda had been with appellant. (RT 2275.)

Melinda's diary entry and her statements to Torres were made after the alleged incident had been reported to the police. At that point, she had already spoke to appellant's relatives and any motive to fabricate the evidence was already present. Accordingly, Melinda's statements were inadmissible hearsay because they were not made *before* any other inconsistent statements or *before* she had a motive to fabricate appellant's guilt. The trial court erred in finding that the testimony was a prior consistent statement.

C. The Hearsay Testimony Violated Appellant's Sixth Amendment Right to Confront the Evidence Against Him

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court recently affirmed that state rules of evidence are subject to the demands of this clause. (*Crawford v. Washington* (2004) 541 U.S. 36, ___ [124 S.Ct. 1354. 1364.)

In *Crawford*, the defendant's wife gave a tape recorded statement to the police during her interrogation. The prosecutor offered the statement as

a declaration against penal interest. (*Id.* at p. 1357.) However, the Supreme Court held that the defendant had been denied his right to confront the witness. It held that testimonial hearsay statements, including statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," must be excluded if the defendant did not have an opportunity to cross-examine the declarant. (*Id.* at p. 1365.)

The Supreme Court did not define the extent of what constitutes "testimonial hearsay," stating that at a minimum it includes testimony given at certain hearings and police interrogations. (*Id.* at p. 1374.) However, the rationale at the core of *Crawford* should be applied to the present case. The evidence admitted against appellant simply recounted statements that Melinda had already given to the police. This evidence was not introduced at the hearing and appellant had no opportunity to cross-examine her about them.

Even if these statements were not "testimonial hearsay" under *Crawford*, they still violated the Confrontation Clause because they did not bear an "adequate indicia of reliability." (*Ohio v. Roberts* (1980) 448 U.S. 56, 65-66 [Confrontation Clause requires hearsay to bear sufficient indicia of reliability]; see also *People v. Pinn* (1971) 17 Cal.App.3d 99, 106 [there must be substantial evidence that the statements of the hearsay declarant are "trustworthy and credible"].) The statements were made after Melinda had reported the incident to the police and had committed herself to her particular version of the facts at issue. Whatever motive she had to accuse appellant of kidnaping her had already been established. Accordingly, the evidence was not reliable and inadmissible under either *Crawford* or *Roberts*.

C. Reversal is Required

The trial court rulings violated the limitations imposed by Evidence Code sections 1236 and 791. Accordingly, the erroneous application of California's statutory rules deprived appellant of an important procedural protection and liberty interest that is protected under the federal due process clause. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The trial court's ruling violated appellant's Sixth Amendment right to confrontation because it allowed hearsay that had no basis for admission. (*Crawford v. Washington* (2004) 541 U.S. 36; *Ohio v. Roberts* (1980) 448 U.S. 56, 63.) It also violated the Eighth and Fourteenth Amendments insofar as the evidence at issue did not meet due process and the heightened reliability that is constitutionally required of evidence used in support of a death judgment. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-58.) Because the error implicated appellant's federal constitutional rights, reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The erroneously admitted evidence affected both the guilt and penalty phases of the trial. The kidnaping charge was based on Melinda's testimony, which was not entirely credible. For example, she stated that she had been unable to communicate with appellant's aunt, Maria Hernandez, because Maria spoke Spanish.. (RT 932.) However, Hernandez testified in English, was married to a man named "Murphy," and stated that she spoke English at the time of the incident. (RT 2149.) Appellant presented numerous witnesses who testified that Melinda had not sustained any injuries and that there was nothing to indicate that she was frightened,

scared, or had been abducted against her will. Given the stark contrast between this testimony, it is likely that the hearsay persuaded the jury to believe the charges against appellant. It provided testimony that was not subject to challenge. Under these circumstances, the prosecution cannot establish beyond a reasonable doubt that the trial court's errors were harmless. Accordingly, this Court must reverse the kidnaping verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Moreover, the kidnaping allegation added to the weight of the penalty phase aggravation. Indeed, it was the underlying charge that was at the heart of the homicide. The inadmissible hearsay provided crucial support for this charge and further inflamed the jury against appellant. It certainly would have been a major part of the penalty decision and would have influenced how the jury viewed the testimony of appellant's family and the mitigation in the support offered appellant through their testimony and presence in the courtroom. Under these circumstances, this Court cannot be certain that the penalty verdict was not affected by the errors. The death judgment must be reversed. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54 [any substantial error affecting the penalty phase of a capital trial must be deemed prejudicial].)

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XI.

THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

It was the prosecutor's theory that appellant was motivated to instigate the homicide because he was angry about Melinda's testimony at the preliminary hearing. The trial court instructed the jury under CALJIC 2.51:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish a defendant is guilty. Absence of motive may tend to show that a defendant is not guilty.

(CT 981; RT 2654.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof so that appellant had to show an absence of a motive. As applied to the unique facts of this case, the instruction violated state and federal constitutional guarantees of due process, appellant's right to a fair trial before a properly instructed jury, and a reliable verdict in a capital case.[33] (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art 1, §§ 7, 15, 16, 17.)

A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

It is beyond question that motive alone is insufficient as a matter of law to prove guilt. As discussed in Argument IX, *supra*, due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S.

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33. Appellant acknowledges that this Court has rejected similar arguments about this instruction (see *People v. Nakahara* (2003) 30 Cal.4th 705, 713), but the Court should reconsider its opinion in light of the facts of this case.

307.) Motive alone does not meet this standard because a conviction based on motive evidence would be speculative and conjectural. (See e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The motive instruction given in this case allowed the jury to use it to establish guilt. In this regard, it stood out from the other standard evidentiary instructions given to the jury. The other instructions that covered an individual evidentiary consideration included an admonition that it was insufficient to establish guilt:

CALJIC No. 2.03 (Consciousness Of Guilt--Falsehood): "However, that conduct is not sufficient by itself to prove guilt . . . ." (RT 2656; CT 985.)

CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt . . . ." (RT 2656-2657.); CT 986.)[34/]

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34. Other CALJIC instructions similarly ensure that a single circumstance cannot be used to prove guilt:

CALJIC No. 2.04 (Efforts By Defendant To Fabricate Evidence): "However, that conduct is not sufficient by itself to prove guilt . . . ."

CALJIC No. 2.05 (Efforts Other Than By Defendant To Fabricate Evidence): "[T]hat conduct is not sufficient by itself to prove guilt . . . ."

CALJIC No. 2.15 (Possession Of Stolen Property): "[T]he fact of that possession is not by itself sufficient to permit an inference that the defendant _____ is guilty of the crime of _____."

CALJIC No. 2.16 (Dog-Tracking Evidence): "This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of _____."

Because CALJIC No. 2.51 is startlingly anomalous in this context, it prejudiced appellant during deliberations. The instructions listed above were read within moments of the motive instruction. That instruction would appear to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, they would conclude that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction][conc. opn. of Brown, J.].)

In *People v. Dewberry* (1959) 51 Cal.2d 548, 557, this Court recognized that differing standards in instructions create erroneous implications. It stated:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding

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CALJIC No. 2.50.01 (1999 Revision) (Evidence Of Other Sexual Offenses): "However, . . . that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]."

CALJIC No. 2.50.02 (1999 Revision) (Evidence Of Other Domestic Violence): "However, . . . that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged offense[s]."

CALJIC No. 2.52 (Flight After Crime): "[F]light . . . is not sufficient in itself to establish [his] [her] guilt . . . ."

> of guilt of the lesser offense applied only as between first and second degree murder."

(See also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction, is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the facts of the case highlighted the differences between CALJIC 2.51 and other instructions. The prosecutor offered evidence that appellant was upset with the victim's testimony during the preliminary hearing. (RT 1055.) This instruction allowed them to make an evidentiary leap and find that appellant *must* have wanted to kill the victim and discussed this with his brother. In other words, the motive instruction allowed the jury to speculate that appellant planned the crime. No other instruction regarding the consideration of evidence allowed the jury to make such a leap. Accordingly, the instruction violated appellant's constitutional right to due process of law and his Sixth Amendment right to a properly instructed jury. The instruction also rendered the resulting verdict unreliable under the Eighth Amendment.

B. The Instruction Impermissibly Reduced the Prosecutor's Burden of Proof and Violated Due Process

The prosecutor had the burden of proving beyond a reasonable doubt that appellant was a principal in the homicide. (*In re Winship* (1970) 397 U.S. 358, 361- 364.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on a major factor that the prosecutor's case demanded – that the jury find that appellant intended to aid, encourage, or instigate his brother to commit the crime. (*People v. Marshall* (1997) 15 Cal.4th 1, 40.) The instruction violated due process by improperly undermining a correct understanding of

how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The prosecutor's case was built upon appellant's alleged motive to kill the victim after her preliminary hearing testimony. His alleged motive was the same as his intent. The law itself uses these terms synonymously in discussing the guilt of a principal:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, emphasis added; see also *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008 [using both "motive" and "intent" to describe a kidnaping for the purpose of robbery]; *People v. Bowman* (1958) 156 Cal.App.2d 784, 795 [discussing "criminal motive" and "evil intent"].) Under these circumstances, informing the jurors that motive was not an element of the crime and need not have been proved was constitutional error because it diminished the jury's understanding of what the prosecutor had to prove before they could find appellant guilty.

C. The Instruction Shifted the Burden of Proof to Imply that Appellant had to Prove Innocence

CALJIC 2.51 informed the jurors that the absence of motive could be used to establish that appellant was not guilty. The instruction effectively sled the jury to believe that appellant needed to show that he had no motive to kill the victim. It was particularly important in this case because the prosecutor's case depended largely upon speculating that appellant must have acted in conformity with this motive – that he must have sought the victim's death because he was angry about her testimony at the preliminary hearing. This instruction encouraged the jury to adopt the prosecutor's theory unless appellant established that he had no such anger.

As used in this case, CALJIC 2.51 deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, (1970) 397 U.S. 358, 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].) Accordingly, the instruction was given in error.

D. Reversal is Required

As discussed above, the trial court's error implicated appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Accordingly, this Court must reverse the judgment unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The prosecutor was faced with the difficulty of proving that appellant intended to encourage his brother to kill the victim without providing direct evidence of what they might have said to each other. Under these circumstances, the instruction improperly allowed the jury to convict appellant of first degree murder based upon motive alone, lowered the prosecutor's burden of proof and allowed the jury to consider whether appellant could show an alternate motive for the crime.

The motive instruction was key to this case because appellant's underlying purpose, his alleged motive to commit the crime, was exactly what the jury had to consider in order to link appellant's conversations with his brother to the underlying crime. Taken as a whole, the instruction placed appellant in a "Catch-22" situation that allowed the jury to assume that appellant was guilty because he was angry and to assume that he was angry because he was guilty. Either way, it was impossible for appellant to defeat such a motive and to establish his innocence.

This Court should find that based upon the facts in this case, the instruction was not harmless beyond a reasonable doubt. Reversal is required.

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XII.

THE CONSCIOUSNESS OF GUILT INSTRUCTIONS WERE IMPERMISSIBLY ARGUMENTATIVE AND ALLOWED THE JURY TO FIND IMPROPER INFERENCES TO ESTABLISH APPELLANT'S GUILT

The trial court instructed the jury over appellant's objections that it could consider any false statement by appellant as evidence of his consciousness of guilt. The instruction, CALJIC No. 2.03, read as follows:

> If you find that before this trial a defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(CT 985; RT 2656.)

It also instructed the jury that it could consider any attempt to suppress evidence as something showing consciousness of guilt. The instruction, CALJIC 2.06, read:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness and/or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(CT 986; RT 2656-2657.)

Both of these instructions unfairly highlighted evidence favorable to the prosecution and invited the jury to draw critical but irrational inferences against appellant. Although this Court has rejected other challenges to these instructions (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713), it should reconsider its decisions in light of the unique facts of this

case. The instructional errors, especially when considered in combination, deprived appellant of due process, equal protection, a fair jury trial, and a fair and reliable jury determination of guilt, special circumstances, and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

A. The Instructions Were Argumentative

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and must be refused. (*Ibid.*) The consciousness of guilt instructions were impermissibly argumentative because they singled out isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Here, the instructions at issue informed the jury that they could consider appellant's statements or actions as evidence of his "consciousness of guilt." It focused on the prosecutor's theory of the case by informing the jury that if it found certain facts, then it could consider that evidence for a specific purpose: to show consciousness of guilt. Highlighting the prosecutor's use of this evidence implicitly discounted any other explanation. The jury was told that they were to judge appellant to determine whether he showed a consciousness of guilt, and not whether there were other valid inferences. Rather than allow even-handed

consideration of the evidence, the instructions were one-sided and therefore argumentative. (*Estate of Martin*, *supra*, 70 Cal. at p. 672.)

The Supreme Court of Wyoming has held that giving similar instructions to establish consciousness of guilt through a defendant's flight always will be reversible error because it unduly emphasizes certain evidence. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in such instructions.[35/]

The reasoning of two cases are particularly persuasive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

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35. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745, holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements.)

This Court should adopt the reasoning from the cases noted above. Appellant had a federal and state due process right to fairness and equality. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [due process requires a "two-way street" between prosecution and defense].) Since the instructions highlighted the prosecution's theory at the expense of appellant, they were particularly unfair. Indeed, there was no need for the consciousness of guilt instructions in this case since the trial court instructed the jury on how to consider circumstantial evidence, allowing either party to present its argument without highlighting the specific use of this evidence by the prosecution. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455 [consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given].)

The instructions therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15), his right to receive an acquittal unless

his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends; Cal. Const., art. I, § 17). Under these circumstances, the trial court erred in giving an argumentative instruction. (*People v. Sanders* (1995) 11 Cal.4th 475, 560 [trial court must refuse to deliver any instructions which are argumentative].)

B. The Instructions Allowed the Jury to Make Irrational Inferences

The consciousness of guilt instructions given in this case allowed the jury to make certain inferences: they permitted the jury to infer one fact, consciousness of guilt, from other facts, i.e., false statements (CALJIC 2.03) or attempts to conceal evidence (CALJIC 2.06). These instruction violated constitutional standards because they permitted inferences based on evidence that was not necessarily linked to the underlying crime.

The constitutionality of a permissive inference instruction depends upon whether there is a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296 (*en banc*).) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.)

In this context, a rational connection is not merely a connection that is logical or reasonable; it is rather a connection that is "more likely than

not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court*, *supra*, at pp. 157, 162-163.)

Here, appellant objected that the instruction was improperly applied to the evidence in this case. (RT 2303.) The prosecutor stated that CALJIC 2.03 could be given to the jury because appellant told the investigating officer that he had not spoken to his brother. (RT 2303.) Similarly, the prosecutor stated that CALJIC 2.06 applied to appellant, in part, because he asked Sandra Ramirez to tell the victim not to go to court over the kidnaping charge and not to say anything to the police after the victim was killed.[36] (RT 2305.) These actions did not necessarily indicate a consciousness of guilt, yet both instructions contained far-reaching implications that allowed the jury to speculate that these actions showed appellant's guilt.

Appellant's actions would have been the same with regard to any potential crime or his activity – the same actions that were used to show consciousness of guilt of a kidnaping or a plan to murder were equally attributable to his status as a gang leader. Appellant's statement to the police investigators, denying contact with other gang members, did not indicate that he was deliberately misleading the police in regard to his

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36. The prosecutor stated that this instruction would also apply because appellant asked Alma Cruz if she could kill a homegirl. The trial court stated that it did not follow this use "quite as well." (RT 2306.)

involvement in the homicide, particularly because he had not been charged in the matter. There is certainly nothing extraordinary about not wanting to provide information about his conversations with his brother, or about telling a gang member not to say anything to the police, particularly if his brother was involved in the crime and the crime had implications for the gang as a whole. There was no evidence specifically tying appellant's "consciousness of guilt" to the crimes charged or establishing that the inferences about these crimes were more likely than not to be true. The instructions were therefore constitutionally infirm. (See *Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness of guilt instructions permitted the jury to make irrational inferences of guilt against appellant, both instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15). The instructions also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends; Cal. Const., art. I, § 17).

C. Reversal is Required

The instructions at issue here allowed the jury to infer that appellant's statements indicated that he was guilty of the charged crimes. In a case where the evidence against appellant was thin at best (see Argument IX [insufficient evidence]), the improper inferences permitted by the

instructions took on special significance. It allowed the jury to assume that even comparatively innocent actions were equated with appellant's guilt. This added significant weight to the evidence against appellant. Under these circumstances, this Court cannot find that the erroneous instructions were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18,24; see *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

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XIII.

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT PHASE IMPROPERLY ATTACKED APPELLANT'S COUNSEL AND LINKED APPELLANT TO EVIDENCE THAT WAS ADMITTED ONLY AGAINST APPELLANT'S BROTHER

During his closing argument in the guilt phase of the trial, the prosecutor attacked the honesty of appellant's trial counsel and improperly implied that there were facts not in evidence that linked appellant to a plan to kill Melinda that involved both Uribe and Ricardo. These arguments constituted prosecutorial misconduct, violating appellant's due process rights to fundamental fairness and affecting the reliability of the guilt verdict in a capital case. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

In particular, the prosecutor responded to the arguments of appellant's trial counsel by engaging in personal attacks. He rebuked any suggestion that his evidence was speculative by attacking the credibility of both defense counsel:

> But who wants you to speculate? I want you to think about what the – counsel has looked you in the eye unblinkingly and just said straight out, butter wouldn't melt in their mouth. . . .

(RT 2601.) Defense counsel objected and their objection was sustained by the trial court. (RT 2601.) The prosecutor also denigrated appellant's counsel in discussing the car burglary charge by stating, "I thought Mr. Gladstein had been in the courtroom during the testimony . . . ." (RT 2604.) Again the trial court sustained appellant's objection. (RT 2604.)

The prosecutor later argued that if Sandra Ramirez and Alma Cruz wanted to implicate appellant, they would have quoted him as saying, "I've

got Ricardo and Pelon [Uribe] working on this." (RT 2525.) Appellant objected that the prosecutor was arguing facts not in evidence, but the trial court overruled the objection and permitted the argument. (RT 2625-2626.)

A. The Prosecutor Erroneously Denigrated Defense Counsel

The prosecutor attacked the integrity of appellant's trial counsel, effectively accusing him of lying to the jury so that "butter would not melt" in his mouth. (RT 2601, 2604.)

This Court has set firm limits prohibiting this kind of conduct. "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.) "'An attack on the defendant's attorney can be as 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.'" (*Ibid*, quoting 5 Witkin & Epstein, *Cal. Criminal Law* (2d ed. 1988), Trial, § 2914, p. 3570; see also *People v. Bell* (1989) 49 Cal.3d 502, 538 [improper for prosecutor to resort to personal attacks on the integrity of opposing counsel].) The Court has observed that if there is merely "a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1992) 4 Cal.4th 1233, 1302.)

In *People v. Jones* (1997) 15 Cal.4th 119, 167, the Court found that a prosecutor committed misconduct by stating that the defendant's counsel was not candid with the jury. Similarly, in *People v. Sandoval* (1992) 4 Cal.4th 155, 183, the prosecutor told the jury that the defendant's counsel had perpetrated a fraud upon the trial court. The Court stated that this kind of remark was improper. (*Id.* at p. 184.)

Other courts have also found that a prosecutor commits misconduct by denigrating a defendant's counsel. (See, e.g., *United States v. Rodrigues* (9th Cir. 1998) 159 F.3d 439, 451 [prosecutorial misconduct denied defendant fair trial where prosecutor misstated law and slandered defense counsel]; *People v. Ray* (1984) 126 Ill.App.3d 656, 660 [467 N.E.2d 1078] [misconduct to repeatedly charge defense counsel with "lying" to jury, and trying to "confuse" and "intimidate" jury]; *Washington v. State* (Fla. App. 1997) 687 So.2d 279, 280 [reversal for characterizing the defense as "nothing but a big lie"].)

Here, the prosecutor clearly stated that appellant's counsel could look the jurors in the eye and lie to them. This was a direct attack upon counsel's credibility and his ethics. It went far beyond what this Court found improper in *Jones* and *Sandoval*. It should not be condoned.

B. The Prosecutor Improperly Argued Facts Not in Evidence

It is well-established that a prosecutor may make reasonable inferences based upon the evidence, but may not mischaracterize facts or argue facts that are not in evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Lewis* (1990) 50 Cal.3d 262, 283.) A prosecutor's argument violates due process if it infects the trial with unfairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Argument based on facts not in evidence also violates the Eighth Amendment requirement that a verdict in a capital case be an informed, reasoned, and reliable decision. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [65 L. Ed. 2d 392 , 100 S. Ct. 2382] [constitutional requirements for reliability in capital case extends to guilt determination].)

The trial court erred in denying appellant's objection to the prosecutor's statement that Sandra Ramirez would have linked Uribe and

Ricardo to appellant if she had been trying to implicate him falsely. Sandra would have had no reason to mention Uribe in this context. There was no evidence to indicate that Sandra believed Uribe was involved in the crime. Indeed, there was nothing to tie Uribe to the crime other than Ricardo's statements to the police, which were not admitted against appellant. Accordingly, there was no legitimate reason for the prosecutor to have argued that Sandra would have named both Ricardo and Uribe if she had wanted to implicate appellant. The prosecutor's argument was based on facts that were not in evidence against appellant and mischaracterized any argument that might have been made in regard to Sandra.

C. Reversal is Required

The importance of the prosecutor's closing argument has long been recognized:

> The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight. It must therefore be reasonably objective. . . . the prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial.

(*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) Because of the great weight carried by the prosecutor, "[i]mproper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

In determining the prejudicial effect of prosecutorial misconduct, the Court "must weigh the cumulative effect of the improper statements that pervaded the prosecutor's closing argument." (*People v. Herring* (1993) 20

Cal.App.4th 1066, 1075.) Even when objections to prosecutorial misconduct have been sustained, the misconduct may be considered in determining the prejudicial effect of other error. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 829 [misconduct to which objections had been sustained added to weight of other misconduct].)

The prosecutor's argument about Sandra Ramirez was particularly prejudicial because, in order to convict appellant of the homicide, the prosecutor had to show that appellant had instigated or encouraged Ricardo. The only direct evidence that Ricardo planned the crime with another was Ricardo's statement to the police. This was not admitted against appellant. Therefore, the prosecutor needed to encourage the jury to assume that appellant must have been involved in the planning if Ricardo was guilty. His statement to the jury made it appear as if this was a natural assumption, based on all the information that the prosecutor knew. The mere fact that he assumed that Sandra would have linked appellant to facts established only in the case against Ricardo encouraged the jury to make the same link and find that appellant was guilty.

Moreover, the prosecutor's suggestion was particularly harmful because he bolstered his credibility by attacking the honesty of opposing counsel. The clear message was that appellant was dishonest to argue that there was insufficient evidence of his guilt, but the prosecutor was honest and authoritative. Although the trial court sustained appellant's objections, the prosecutor's point was established. He argued his credibility and used it to encourage the jury to speculate that appellant planned the crime with Ricardo and Uribe.

The evidence against appellant was based only upon the narrowest thread. Therefore, anything that the prosecutor could do to link appellant to

Ricardo's statement would have weighed heavily in the jury's deliberations. Under these circumstances, this Court cannot find that the prosecutor's improper argument was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XIV.

THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY STATED THAT THE CRIME ALWAYS REQUIRED A DEATH SENTENCE AND PRESENTED AN EMOTIONAL PLEA TO THE JURORS RECALLING THE CRY FOR VENGEANCE ON THE PART OF THE VICTIM'S FAMILY

The prosecutor's penalty phase argument went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury and by arguing that the death sentence was required to protect the two main witnesses in this case and to preserve the rule of law. The argument violated appellant's federal and state constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

A. Factual Background

Even on the face of the record, it is apparent that the prosecutor delivered a very emotional argument to the jury. Over appellant's objection that the argument was improper, the trial court allowed the prosecutor to tell the jury that appellant had placed Sandara Ramirez and Alma Cruz in a very bad position. (RT 2856.) The prosecutor took advantage of this ruling to continue his line of argument:

> He arranged through them, using them to get someone that was their friend in a position to be killed, and during that conversation, what is he talking about? He's talking about the Mexican Mafia. He's talking about dues. He's talking about killing homegirls. And then afterwards, they're told not to say anything. They still had enough courage to do the right thing, but it took a lot of courage. So when does their nightmare end? When can they stop looking over their shoulder?

(RT 2856.)

The prosecutor went on to compare his version of appellant's life in prison with the experience of the victim's family:

> I want to you to think about when you're a lifer and you're in prison, what are you doing? What can you do? Can you read? Can you watch tv? Can you work out? Can you have friends. It might be monastic, but do you have a life? Do you continue to breathe the air that is upon this earth? Do you continue to think? Do you continue to write to your friends and family? Do you have visits? Do you have life. Do you have a life? On holidays, or whatever, can you family come and see you.
>
> If Mindy's family want to visit her, they can't. If they want to talk to – well, I take that back because they can go to the grave site, and what a bleak and lonely experience that must be, to see the – visit the grave of your child. And when they talk to her, I know that they hope and they pray that she's listening and hearing their words, but its not the same as holding your child or holding your grandkids.[37]

(RT 2866.)

The trial court "noted" appellant's objection that the prosecutor was asking the jury to base their decision on emotion. (RT 2866.)

The prosecutor expanded the scope of his argument to state that the justice system failed to protect the victim. (RT 2867-2868.) He told the jury that the witnesses in this case had courage, "knowing that a person such as the defendant here has connections." (RT 2868.) He then concluded his argument with another very emotional appeal that placed the jury in the role of protecting these witnesses and society as a whole. He told the jury that unlike the victim, the system must protect Sandra and

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37. This argument echoed testimony by Edna Steffen, the victim's grandmother, that she was vengeful because her granddaughter was dead but that appellant remained alive. (RT 2819.)

Alma and that their trust in the system and "their need for justice" was in the juror's hands. (RT 2869.) He warned that if "people ever feel that that trust is misplaced, we cannot function as a society." (RT 2869.) He equated this trust with the death penalty:

> You look at the defendant and you'll have to say to him, I know what you are. I know what you've done. And we will not, we cannot, if we're to survive as a society tolerate this. It cannot be done. It cannot be accepted. You have to say to him very clearly that this was way over the line and that if you have anything to say about it at all, he will never be put in a position where he will be able to do this again.

(RT 2869-2870.) The trial court again "noted" appellant's objection to the prosecutor's improper argument but did not sustain it. (RT 2870.)

B. The Prosecutor Improperly Argued that the Death Sentence was Needed to Protect the Witnesses in this Case and Maintain the Rule of Law

A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger v. United States* (1935.) 295 U.S. 78, 88.) Accordingly, a prosecutor violates state law by using "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill* (1988) 17 Cal.4th 800, 819.) A prosecutor's misconduct also implicates federal due process guarantees if it infects a trial with fundamental unfairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Moreover, the Eighth and Fourteenth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama* (1980)447 U.S. 625, 638.)

The prosecutor's argument plays a particularly important role in the penalty phase. The death penalty must be a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh* (1989)

492 U.S. 302, 328.) Accordingly, it is misconduct for the prosecutor "to make comments calculated to arouse passion or prejudice." (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) Improper appeals include arguments designed to inflame a juror's personal fears and emotions. (*Newlon v. Armontrout* (8th Cir. 1989 885 F.2d 1328, 1335; see *Darden v. Wainwright* (1986) 477 U.S. 168, 180-181 [improper argument that death penalty was only guarantee against a future similar act]; *People v. Haskett* (1982) 20 Cal.3d 841, 864 ["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"]; *Bertolotti v. State* (Fla 1985) 476 So.2d 130, 133 [prosecutor's appeal to consider the message sent to the community was "obvious appeal to the emotions and fears of the jurors"].) The prosecutor violated these limits in his closing argument to the jury.

1. The prosecutor improperly urged the jury to protect Sandra Ramirez and Alma Cruz

Near the beginning of his argument, the prosecutor stated appellant subjected Sandra Ramirez and Alma Cruz to a continuing nightmare. (RT 2856.) He concluded by telling the jury that they must protect them, and that future of our society was in the jurors' hands. (RT 2869.) He told the jury that the way to accomplish this was to put appellant to death: "He will never be put in a position where he will be able to do this again." (RT 2870.)

The prosecutor's message was unmistakable – the system had failed the victim and the death penalty was the only way that the jury could prevent appellant from posing a future danger to Sandra and Alma. This argument was inflammatory because it set the jury up to be Sandra and Alma's personal guardians and diverted the jury from its proper task.

The argument was particularly improper because there was no evidence that appellant had threatened them in any way.[38] Appellant had not threatened the witnesses at this trial, nor did he threaten all the witnesses who had testified in earlier hearings. Even assuming that he committed the underlying crime, his relationship with Melinda was unique and his reaction to her testimony was undoubtedly influenced by their past relationship. Appellant had hoped to marry her in Mexico, instead she testified against him. Her testimony affected him in ways that Sandra and Alma's testimony could never have done.

Moreover, the prosecutor's argument also suggested that appellant would present a danger as long as he was imprisoned. This Court has allowed prosecutors to argue that a defendant presents a future danger, based upon the evidence. (*People v. Davenport* (1985) 41 Cal.3d 247, 288.) This Court should reconsider its opinion because future dangerousness is not a proper aggravating factor under California law. (See Pen. Code § 190.3; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) The prosecutor's argument that the death penalty was necessary to prevent appellant from committing similar crimes therefore violated due process by arbitrarily depriving appellant of his state-created liberty interest in a sentencing determination based solely on the statutory factors. (*Hicks v. Oklahoma*,

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38. Ramirez testified that she had received a letter from appellant's brother warning her not to testify. (RT 1285-1292.) The trial court allowed this evidence because Ricardo's statement affected Ramirez. (RT 1144.) Nothing tied the letter to appellant and it would have been improper for the jury to consider it as substantive evidence against appellant. (See *People v. Hannon* (1977) 19 Cal.3d 588, 599-600 [threats against a witness not attributable to the defendant are inadmissible].)

supra, 447 U.S. at p. 346 [due process liberty interest in the requirements of state law].)

2. The prosecutor improperly told the jury that the rule of law depended on the imposition of the death penalty

According to prosecutor, the jurors bore the responsibility for the entire justice system: that if we are to survive as a society, the crime of killing a witness must be punished by death. (RT 2869-2870.) Indeed, under the prosecutor's rationale, the death penalty should be imposed *any* time the special circumstance was found to be true. This argument misled the jury because the law was satisfied with either life imprisonment without parole or the death sentence. (See *People v. Brown* (1985) 40 Cal.3d 512, 537, fn. 7.) It prevented the jurors from considering mitigation and reaching an individualized judgment about appellant, because if the special circumstance warranted the death penalty in and of itself, no amount of mitigation could ever overcome it. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 105 [8th and 14th Amendments require consideration of mitigating evidence].) In so doing, the prosecutor diminished the jurors' sense of personal responsibility for an individualized penalty verdict. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329; *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn. 15 [*Caldwell* extends to any argument that diminishes a juror's sense of personal responsibility.)

The prosecutor's argument improperly inflamed the jurors' emotions by suggesting that the death penalty was necessary to society's survival. (See *United States v. Williams* (9th Cir. 1993) 989 F.2d 1061, 1072 [improper to use community role of jurors to appeal to their passions].) It is a juror's emotional response to such appeals that renders them egregious in the guilt phase. (See *Viereck v. United States* (1943) 318 U.S. 236, 247

[prosecutor's statements suggesting that others were relying on the jurors for protection compromised the verdict]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146 [improper for prosecutor to appeal to community conscience and fear of future crime].) It was similarly improper in the penalty phase to for the prosecutor to have stirred the emotions of the jurors by suggesting that they are under a societial duty to impose death. (See *Newlon v. Armontrout*, *supra*, 885 F.2d at p. 1335 [improper to appeal to jurors' personal fears and insinuate that all murders should be punished with death]; *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1019-1021 [numerous comments, including, "how do you know that if you let him go this time it won't be done again" were designed to appeal "to the jury's passions and prejudices" and required reversal].)

The prosecutor made it appear as if the survival of Sandra, Alma, and society as a whole depended upon a death verdict. In effect, he told the jury that all expected the death penalty – the jury had to make sure that Sandra and Alma's trust was not misplaced; society had to make sure that this crime was not tolerated. According to the prosecutor, Sandra and Alma's lives were in the jury's hands, as well as the future of our very rule of law. (RT 2869.) The impact of this argument was overwhelming. Accordingly, this Court should find that the prosecutor violated due process by infecting the trial with fundamental unfairness and compromised the Eighth Amendment's requirements for a reliable penalty verdict.

C. The Prosecutor Improperly Contrasted Life in Prison with the Victim's Family Visiting the Grave Site

"[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952.) The prosecutor in this case ignored this

limitation and described Melinda's family visiting the grave site, hoping and praying that she would hear their words, in order to contrast their loss with appellant serving a life sentence without parole. (RT 2866.) The prosecutor invited the jury to weigh the comparative pain of the victim's family against appellant's life in prison. This argument was designed solely to inflame the emotions of the jurors. It set up a standard that no defendant in a capital case could ever overcome because the victim's loss will always be real and a defendant's sentence to life in prison will always mean that he or she lives. The prosecutor's argument violated appellant's constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

1. The argument was an inflammatory call for vengeance

References to visits to the victim's grave site are inflammatory. In *Duckett v. State* (Okla.Crim.App. 1995) 919 P.2d 7, the prosecutor argued in words strikingly similar to the present case:

> Ladies and Gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while John Howard [the victim] lies cold in his grave? Is that justice? Is that your concept of justice? How do Jayme and Tom and John's son [the victim's family] go visit him?"

(*Id.* at p. 19.) The reviewing court unhesitantly found this to be error: "These kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future." (*Ibid.*; see also *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373, [evidence that the victim's son put flowers on his mother's grave and brushed the dirt away "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative"];

Walker v. Gibson (10th Cir. 2000) 228 F.3d 1217, 1243 [prosecutor improperly appealed to the jury's emotions by referring to one victim as being "cold in his grave"]

Here, the prosecutor's argument was particularly inflammatory in light of the testimony of the victim's grandmother. Edna Steffen testified about her obsession with revenge. (RT 2819.) She stated that she remained vengeful because her granddaughter was dead, but appellant was alive and in prison.[39] (RT 2819.) In a penalty trial that lasted only one day, the grandmother's heart-felt testimony would have been in the jurors' minds. That the prosecutor echoed this feeling, in even more graphic terms, validated the grandmother's emotional response to the crime. Under these circumstances, the prosecutor's argument was a call for vengeance, presented in a way that no juror could ignore. (See *Furman v. Georgia* (1972) 408 U.S. 238, 344-345 (conc. opn. of Marshall, J.) [8th Amendment limits the role of retribution and vengeance in the penalty determination].)

2. The argument improperly used victim impact evidence

The United States Supreme Court allowed victim impact evidence in order to offer a "quick glimpse" into a victim's life that showed one's "uniqueness as an individual human being." (*Payne v. Tennessee* (1991)

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39. Appellant objected to this testimony, but the trial court inexplicably ruled that no question was pending. Because appellant did not pursue the matter or ask that the jury be admonished, any issue about the testimony was not preserved for appeal. However, it clearly violated the prohibition of victim impact witnesses testifying about their opinion of the appropriate punishment for a defendant. (See *Booth v. Maryland* (1987) 482 U.S. 496; 508-509.) The testimony is presented here in order to show how the prosecutor adopted the same theme in his closing argument and misused the victim impact evidence.

501 U.S. 808, 823.) Although such evidence was permissible, the Court emphasized that "victim impact evidence is not offered to encourage comparative judgments" between the defendant and the victim. (*Ibid.*) Nor does it permit the prosecutor to use inflammatory evidence that renders the trial fundamentally unfair. (*Id.* at p. 825.) The prosecutor's argument misused the victim impact evidence in this case by inviting the jury to compare the loss suffered by the victim's family with the value of appellant's life in prison. The comparison inflamed appellant's jury against him and violated due process and Eighth Amendment standards.

The argument was similar to one that invites comparisons between the life of a victim and that of a defendant. A number of state courts have found that such comparisons are unduly inflammatory. (See *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 182 ["Common experience informs us that comparing convicted murderers with their victims is inherently prejudicial because defendants in that setting invariably will appear more reprehensible in the eyes of jurors"]; *State v. Storey* (Mo. 1995) 901 S.W.2d 886, 902 [jury must "consider a wide array of aggravating and mitigating circumstances," but the question of whose life was more important was not among them.]; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 419-420 [improper to argue that jury should balance the life of the defendant against that of the victim]; see also Utah Crim. Code, § 76-3-207, subd. (2)(a)(iii) [permitting the introduction of victim impact evidence but only "without comparison to other persons or victims"].)

Overemphasizing the permanency of the victim's death, as contrasted to life in prison, is also erroneous because all homicides by definition involve this situation. As the Oklahoma court has found, "the State's contention – it is unfair for [the defendant] to live since [the victim]

is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." (*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Eddings v. Oklahoma, supra,* 455 U.S. at p. 105 [8th and 14th Amendments require individualized consideration of mitigating evidence].) Accordingly, the trial court erred in allowing the prosecutor to compare appellant's life in prison with the loss to the victim's family.

D. Reversal is Required.

The prosecutor's argument focused on extremely emotional matters that led the jury to believe that the death penalty was required without any real consideration of mitigating evidence – whether it be that the type of crime required the death penalty in order to preserve the rule of law or that the loss suffered by the victim's family inherently made it unjust or unfair for appellant to live. The jury could not have ignored the prosecutor's passion, evident even in the cold record of a transcript, that the death penalty was necessary to protect Sandra, Alma, and society as a whole.

The prosecutor offered the jury an easy way to make a hard choice. If death were required to protect society or the witnesses in this case – if it were necessary to avenge the victim's loss – then it need not determine an individualized sentence. Given the great weight afforded a prosecutor's words and the 45-minute speed of their deliberations, it is clear that the jury took the prosecutor's invitation and imposed the death penalty without the kind of determination required under the federal and state constitutions. (See *Berger v. United States, supra,* 295 U.S. at p. 88 [prestige of prosecutor carries great weight]; *People v. Talle* (1952) 111 Cal.App.2d 650, 677 [prosecutor given great weight]; *People v. Sandoval* (1992) 4

Cal.4th 155, 205 (dis. opn. of Mosk, J.) [prosecutor improperly offered jurors an easy way to avoid a hard choice].)

In the penalty phase, any substantial error requires reversal. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Ashmus* (1991) 54 Cal.3d 932, 965; *Chapman v. California* (1967) 366 U.S. 18, 24 [federal constitutional error requires reversal unless it is harmless beyond a reasonable doubt].) In this case, the emotional and far-reaching impact of the prosecutor's argument affected the jurors understanding of their duty and ensured that they would automatically vote for death. The error requires that the judgment of death be reversed.

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XV.

THE TRIAL COURT FAILED TO INSTRUCT THE JURORS THAT THEY WERE TO DISREGARD APPELLANT'S RESTRAINTS IN REACHING THE PENALTY VERDICT

Appellant was shackled in restraints throughout the entire trial. Although appellant objected when the trial court imposed additional restraints following an incident in the courtroom, the trial court did not believe that these restraints would be visible to the jury. However, during the penalty phase, the jury was made aware of the restraints through the testimony of one of the prosecution's witnesses. At this point, the trial court was under a sua sponte duty to instruct appellant's jury that the restraints should play no role in the penalty determination. The trial court's failure to instruct the jury violated appellant's rights to due process, a fair and impartial jury, and a reliable penalty verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. Factual Background

Appellant and Ricardo were restrained throughout the entire trial. (See RT 92.) Following an altercation in the guilt phase, the trial court imposed additional restraints upon appellant and his co-defendant, handcuffing them in the front to a "D" ring attached to a security belt. (RT 1257.) Both defendants were concerned that the additional restraints would be visible to the jury (RT 1243, 1258-1260), but the trial court stated that it did not believe that the restraints would be visible. (RT 1262,)

During the penalty phase of the trial, any question about the jury's awareness of the restraints was answered when Deputy Sheriff Angela Perez referred to the restraints during her testimony. She testified that she

handcuffed appellant following an incident in the jail. She compared the handcuffs she used with that being used in the courtroom:

> I walked over to handcuff him . . . with the chains in my hand. They're similar – I don't know what he's wearing now, but its a handcuff on each end, and it – its got a chain, and I was holding him like this.

(RT 2792.)

B. The Trial Court was Under a Sua Sponte Duty to Instruct the Jury that the Restraints Were to Play No Role in the Penalty Determination

After the trial court imposed additional restraints, appellant was concerned that they would be visible to the jury. Even assuming that the restraints were not visible, the jury was made aware of them through the prosecution witness. The effect is the same as if the jury saw the restraints, since it is the juror's awareness of the restraints that creates the potential for prejudice. (See *People v. Cox* (1991) 53 Cal.3d 618, 652 [finding that the jurors were not aware of the restraints].)

This Court has held that when jurors are aware of restraints during the guilt phase "the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the defendant's guilt." (*People v. Duran* (1976) 16 Cal.3d 282, 292.) "The rationale behind the sua sponte instruction requirement imposed by the *Duran* court is to alleviate the potential prejudice arising from the need to have visible, physical restraints on a defendant in the courtroom while in the jury's presence." (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141.)

The same requirement must apply to the penalty phase. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748 [constitutional concerns about shackling at trial apply to the penalty phase].) Indeed, the Supreme Court has characterized shackling as an "inherently prejudicial practice."

(*Holbrook v. Flynn* (1986) 475 U.S. 560, 567.) Shackling is especially prejudicial in a capital trial. (*Deck v. Missouri* (May 23, 2005) 544 U.S. ___ [2005 WL 1200394].) Unlike the guilt phase, the penalty decision is a normative judgment, based not only on the nature of the crime but also the personal history and the character of the defendant. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Under these circumstances, "a jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." (*Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450.) "Shackling sends a message to the jury that in the court's view, the defendant is so dangerous that he or she cannot be allowed to attend the proceedings, even with other security measures, without physical restraints." (*State v. Finch* (1999) 137 Wash.2d 792, 864-865 [975 P.2d 967, 1009].) The prejudice to the defendant in such a situation is undeniable. (*Ibid*; see also *Willocks v. State* (Tenn.Cr.App. 1976) 546 S.W.2d 819, 822 [sua sponte duty to instruct that shackling should in no way influence the determination of guilt or innocence or the assessment of punishment].)

When the jury is aware of restraints, a sua sponte limiting instruction is necessary to satisfy the constitutional right to due process and a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830 [failure to give limiting instruction when restraints are visible implicates constitutional standards]; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1117 [citing constitutional basis for an instruction limiting the jury's consideration of restraints].) A limiting instruction was also necessary under federal due process standards, since appellant had a liberty interest in

the application of the *Duran* rule. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). Moreover, since shackling is inherently prejudicial, a limiting instruction was required in order to ensure the reliability of the penalty verdict. (U.S. Const., 8th Amend.; Cal. Const., art. 1, §§ 17.) Accordingly, the trial court erred in failing to instruct the jurors to disregard the restraints that it had imposed upon appellant.

C. Reversal is Required

The potential for prejudice was particularly significant in the penalty phase since the jury had to determine appellant's guilt under factor (b) and to determine if death was the appropriate punishment. The jury's awareness of appellant's restraints weighed heavily in the normative penalty determination. The restraints suggested that appellant was particularly dangerous, one of the worst of the worst. Shackling confirmed the prosecutor's argument that appellant was particularly dangerous and disrespectful of the court. (See Arguments III, XIV.) Under these circumstances, the trial court's error in not instructing the jury requires reversal. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [substantial error requires penalty reversal under either federal or state standards].)

XVI.

THE TRIAL COURT'S PENALTY PHASE INSTRUCTIONS FAILED TO PROVIDE APPROPRIATE GUIDANCE TO THE JURY

This Court has stated that trial courts should expressly instruct the jury at the penalty phase about which of the instructions previously given continue to apply. (*People v. Babbit* (1988) 45 Cal.3d 660, 718, fn. 26.) Rather than do that in the present case, the trial court instructed appellant's jury to *disregard* all guilt phase instructions. (RT 2883) Several of the guilt phase instructions were particularly important because the prosecutor introduced evidence under Penal Code section 190.3, factor (b), to show that appellant had been involved in a battery upon a correctional officer. The jury needed to determine whether appellant was guilty of this crime, but on this important matter the jury was told to disregard all relevant instructions. The trial court's instruction violated appellant's rights to due process, a properly instructed jury, and a reliable penalty verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.)

A. The Trial Court Improperly Failed to Define Reasonable Doubt

The trial court instructed the jury that it could consider evidence that appellant had committed battery against a peace officer, but that the jury must first be satisfied beyond a reasonable doubt that appellant had committed the offense.[40/] (RT 2887.) However, the jurors were told to disregard the definition of reasonable doubt that had been given to them in the guilt phase. (RT 2883.) The definition of reasonable doubt is a term of

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40. The trial court did not instruct the jury about the elements of this offense.

art that can be easily misunderstood by jurors. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 23 [conc. opn. of Kennedy, J.]; *People v. Brigham* (1979) 25 Cal.3d 283, 315 [conc. opn. of Mosk, J.].) Accordingly, the trial court's failure to define reasonable doubt at the time of the jury's penalty phase deliberations was error. (See *People v. Phillips* (1997) 59 Cal.App.4th 952, 956; *People v. Crawford* (1997) 58 Cal.App.4th 815; *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1219.)

In *People v. Elguera*, *supra*, 8 Cal.App.4th 1214, the trial court instructed the jury using CALJIC 2.10, which explained that each fact supporting circumstantial evidence must be proved beyond a reasonable doubt. (*Id.* at p. 1218.) The trial court gave the definition of reasonable doubt at the start of voir dire, but did not define it during the full instructions. Moreover, the jury was not provided a written copy of the instruction. (*Id.* at pp. 1217-1218.) The court of appeal held that the trial court's failure to instruct the jury on the definition of reasonable doubt at the time that the full instructions were given was error. (*Id.* at p. 1219.) It explained that failure to instruct the jury after presentation of the evidence did not convey the "centrality and importance" of the instruction. (*Id.* at p. 1222.) "If any phrase should be ringing in the juror's ears as they leave the courtroom to begin deliberations, it is 'proof beyond a reasonable doubt.'" (*Id.* at p. 1223.) In particular, the court emphasized that the definition of reasonable doubt is crucial to the juror's understanding of how the law is to be applied. It noted that the definition is provided by statute (Pen. Code, § 1096) and that departures from its language have repeatedly been deemed error. (*Ibid.*, citing *People v. Garcia* (1975) 54 Cal.App.3d 61, 63-66.) It pointed out that "the jurors were unlikely to remember the exact definition read to them five and one-half hours earlier." (*Ibid.*)

In *People v. Payton* (1992) 3 Cal.4th 1050, 1068, this Court held that failure to define reasonable doubt during the penalty phase of a trial was not error because the trial court instructed the jury that most of the guilt phase instructions continued to apply. It found that "the specific reference to the guilt phase instructions, which were made available to the jury, sufficed." (*Id.* at pp. 1968-1069; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 720 -721 [no error in not defining reasonable doubt because trial court instructed that relevant guilt phase instructions still applied]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1020 [reasonable juror would believe that guilt phase generic instructions continue to apply].) Here, however, the jurors were specifically told that the instructions given in the guilt phase of the trial did *not* apply. (RT 2883.) Accordingly, the jurors would not have used the guilt phase instructions during their deliberations. (See *People v. Adcox* (1988) 47 Cal.3d 207, 253["it must be presumed that the jurors observed and applied the instructions given them"]).

The penalty phase of the trial was far different than the guilt phase. The penalty phase began five days after the jury returned its guilt verdict. Unlike the guilt phase, the jurors were not provided with the elements of the offense. They were told instead to disregard all of the guilt phase instructions. Under these circumstances, it is unlikely that the jurors would recall the exact language of the reasonable doubt instruction and know that they should apply it to the factor (b) allegation. Accordingly, the trial court erred in not providing the jury with the definition of reasonable doubt during its instructions.

B. The Trial Court Failed to Instruct the Jury How to Consider the Penalty Phase Evidence

Since the trial court instructed the jury to disregard all guilt phase instructions, it had no guidance about how to consider the evidence introduced in the penalty phase.

This Court has held that a number of instructions are required in the determination of guilt. These include:

• CALJIC 2.20 [Credibility of Witnesses]; see Pen. Code, § 1127 [jurors must be instructed sua sponte that they are the exclusive judges of the credibility of witnesses]; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [substance of instruction must be given sua sponte];

• CALJIC 2.70 [Confessions and Admissions Defined]; see *People v. Mendoza* (1987) 192 Cal.App.3d 667, 676, fn. 3 [sua sponte duty to give instruction whenever a pretrial statement of a defendant is received]; *People v. Beagle* (1972) 6 Cal.3d 441, 455-456 [sua sponte instruction];

• CALJIC 2.71 [Admission Defined]; see *People v. Marks* (1988) 45 Cal.3d 1335, 1346 ["If defendant's oral admissions are introduced into evidence, the trial court must sua sponte deliver the instruction"].

As discussed above, the evidence introduced under Penal Code section 190.3 involved similar considerations to the guilt determination. The jurors had to be convinced beyond a reasonable doubt that appellant committed a criminal offense. (*People v. Robertson* (1981) 33 Cal.3d 21, 53.) The prosecutor introduced several witnesses in order to prove the allegation. Appellant's statements were used against him. (See RT 2791 [appellant stated that he was not going to go to the "hole"].) Accordingly, the trial court should have told the jury that the guilty phase instructions about the consideration of evidence were still relevant and continued to

apply in the penalty phase.[41] (See *People v. Babbit, supra, 45* Cal.3d at p. 718, fn. 26.)

C. Reversal is Required

Appellant's jury was told to disregard all previous instructions given in the guilt phase. Therefore, they had no definition of reasonable doubt and no guidance about how to consider the evidence. These matters, both individually and cumulatively, violated appellant's constitutional rights and affected the very structure of appellant's trial.

In *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, the United States Supreme Court explained that there are certain errors that affect the framework within which a trial proceeds. These errors are defects in the trial mechanism that defy harmless error review. (*Id.* at p. 309.) They implicate fundamental protections provided a defendant in a criminal case.

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

(*Ibid.*) Structural error requires reversal per se because it infects the integrity of the trial itself. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630.) This Court should find that the trial court's instruction for the

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41. In *People v. Livaditis* (1992) 2 Cal.4th 759, 784, this Court held that CALJIC 2.71 was not required sua sponte in the penalty phase because the "distinction between mitigation and aggravation is often more blurred than the distinction between a statement that incriminates and one that does not." However, this distinction was not present in this case, where appellant's statement, "Fuck you, I ain't going to the hole," was introduced under factor (b). (RT 2791.) As discussed above, this factor requires the jury to find appellant's guilt beyond a reasonable doubt. Yet, on such an important matter, the jury was given absolutely no guidance about how to consider the evidence.

jury to completely disregard of all previous instructions, without providing any guidance governing the jury's fact-finding process in the penalty phase, is structural error that requires reversal.

In particular, the United States Supreme Court has found that a constitutionally deficient definition of reasonable doubt cannot be harmless error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [124 L.Ed.2d 182, 113 S.Ct. 2078].) Here, the failure to provide any instructions on the definition of proof beyond a reasonable doubt denied appellant of "one of the most elementary and fundamental rights provided by our system of justice." (*People v. Crawford, supra*, 58 Cal.App.4th at p. 823.)

In *Sullivan*, the trial court had given the jurors a definition of "reasonable doubt" that did not meet constitutional standards. (*Sullivan v. Louisiana, supra*, 508 U.S. 275.) The United States Supreme Court held that this was not subject to harmless error analysis. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt." (*Id.* at p. 278, emphasis in original.) The Court emphasized that without a proper definition of reasonable doubt, there has been no jury verdict within the meaning of the Sixth Amendment.

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question of whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

(*Id.* at p. 280, emphasis in original.)

"The *Sullivan* decision is straightforward and uncompromising." (*People v. Crawford*, *supra*, 58 Cal.App.4th at p. 821.) It applies not only to deficient definitions of reasonable doubt, but to cases where the court has omitted the definition in pre-deliberation instructions. (*Ibid.*; *People v. Phillips*, *supra*, 59 Cal.App.4th at p. 957 [rejecting contention that argument of counsel and other instructions relating to reasonable doubt adequately informed the jury so as to render error harmless].) Accordingly, this Court has recognized that *Sullivan* distinguished the structural error involved in the failure to give an adequate reasonable doubt instruction from other instructional errors, such as failure to instruct on an undisputed element of the crime. (*People v. Flood* (1998) 18 Cal.4th 470, 494.)

The Court should similarly find that failure to define reasonable doubt as part of the penalty phase deliberations is structural error. Under California law, the jury must determine the truth of "other crime" evidence brought under factor (b) beyond a reasonable doubt. (*People v. Robertson*, (1981) 33 Cal.3d 21, 53.) This determination is required by due process and is especially important in the penalty phase of a capital trial in order to guarantee that the Eighth Amendment's requirement for heightened reliability has been met. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414] [standard of reliability, accuracy, and fairness].) Without an adequate definition of reasonable doubt, no proper jury verdict has been reached that would permit harmless error review. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) Accordingly, the judgment in this case must be reversed.

Even assuming that the Court should conduct harmless error analysis, it must reverse the penalty verdict if there was any substantial error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [substantial error

requires penalty reversal under either federal or state standards].) Here, the trial court's instructions to completely disregard all previous instructions affected how the jury would consider the factor (b) evidence – the only aggravating factor outside the circumstances of the crime that was charged against appellant. This Court should find that the complete lack of all relevant instructions was a substantial error that requires reversal.

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XVII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme

Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the

> Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[42/]

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42. See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444 ; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments XVI-XVIII, which are incorporated here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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prosecutions where death has and has not been imposed].

XVIII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XVII.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating

circumstances" (Penal Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[43/]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531].)

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43. There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b) below.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The High Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital

sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[44/] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether

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44. Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537, emphasis in original.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[45/] Only

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45. See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

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judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. *State v. Ring* (Az. 2003) 65 P.3d 915.)

outweigh any and all mitigating factors.[46/47/] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the

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46. In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

47. This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[48/]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (See section 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also

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48. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen*, *supra*, 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

(all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), emphasis in original.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541, (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*,

supra, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a

harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 (emphasis added).)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. As the Arizona Supreme Court has found, this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; *accord, State v.*

Whitfield (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[49]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the

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49. See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

finding must be made by a jury and must be made beyond a reasonable doubt.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey*, 530 U.S. at 539 (dis. opn. of O'Connor, J.)).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California, supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitution Require That The Jury Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That The Aggravating Factors Outweigh the Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition of life or death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also Matthews v. Eldridge (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict];

Conservatorship of Roulet (1979) 23 Cal.3d 219 [appointment of conservator]. The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 755 (quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in California's procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. they involve "imprecise substantive standards that leave determinations

unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]*n a capital sentencing proceeding*, as in a criminal trial, the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Monge v. California*, *supra*, 524 U.S. at p. 732 , quotations omitted, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for its decision are true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such

arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (See Cal. Penal Code, § 190.3), and may impose such a sentence even if no mitigating

evidence was presented. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4, subdivision (e), requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the

circumstances in aggravation that support its verdict." (See *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[50/]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin*

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50. The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[51]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "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, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at p. 732; *accord Johnson v. Mississippi,* 486 U.S. at p. 584; *Gardner v. Florida*, 430 U.S. at 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a

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51. Appellant acknowledges that this Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

verdict." (See also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[52/] For example, in cases where a criminal defendant has 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., Penal Code § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (See *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (See e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum

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52. The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); 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); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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).)

punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury..

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute, like California's, permits a wide range of possible

aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

XIX.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case (CALJIC No. 8.88) read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the

aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(CT 1103-1104; RT 2889-2891.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and require reversal of his sentence. (See e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Under CALJIC No. 8.88, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 1104; RT 2890.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the

exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded:
>
> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[53/]

Appellant acknowledges that this Court has stated, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.)

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53. The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, emphasis added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The

words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) The instruction violated due process and rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), requiring that the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *accord, People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of

"appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that

the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute the defendant.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (RT 2890 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346) and must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating

circumstances." (Pen. Code, § 190.3.)[54] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original emphasis.)

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54. The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[55/]

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55. There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" . . . there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law . . ., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S.

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same principle should apply to jury instructions.

387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; *cf. Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52

Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

XX

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to a modified version of CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (CT 1095-1096; RT 2884-2886) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (CT 1103-1104; RT 2889-2891). These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the introduction of evidence under Penal Code Section 190.3, subdivision (b) violated appellant's federal constitutional rights to due process, equal protection and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied appellant his federal constitutional rights to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Fourth the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instruction to

require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Section 190.3, subsection (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within that statute's meaning, even ones squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), 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.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of

religion";[56] sought to conceal evidence three weeks after the crime;[57] threatened witnesses after his arrest;[58] disposed of the victim's body in a manner precluding its recovery,[59] or had a mental condition that compelled him to commit the crime.[60]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) It is, therefore, unconstitutional as applied. (*Ibid.*)

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56. *People v. Nicholas* (1991) 54 Cal.3d 551, 581-582.

57. *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

58. *People v. Hardy* (1992) 2 Cal.4th 86, 204.

59. *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

60. *People v. Smith* (2005) 35 Cal.4th 334, 352.

B. The Instruction On Penal Code Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Violated Appellant's Constitutional Rights To Due Process, Equal Protection, Trial By Jury And A Reliable Penalty Determination

Factor (b), which tracks Penal Code Section 190.3(b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." The prosecution in this case alleged that appellant had committed one other act of force or violence under this statute.

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (CT 1095; RT 2884.) The jurors were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the criminal acts alleged. (CT 1097; RT 2886.) Although the jurors were told that all 12 must agree on the final sentence (CT 1104; RT 2891), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation.

(*Ibid.*) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide (if any), and the special circumstance allegations.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

1. The use of unadjudicated criminal activity as aggravation renders appellant's death sentence unconstitutional

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital

proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst*, *supra*, 897 F.2d at p. 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law and a properly instructed, impartial jury. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16.)

2. The failure to require a unanimous jury finding on the unadjudicated acts of violence denied appellant's sixth amendment right to a jury trial and requires reversal of his death sentence

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are

limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[61]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Lines* (1997) 15 Cal.4th 997,

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61. The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged act of violence, there is no need to reach this question here.

1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

3. Absent a requirement of jury unanimity on the unadjudicated acts of violence, the instructions on Penal Code section 190.3, subdivision (b), allowed jurors to impose the death penalty on appellant based on unreliable factual findings that were never deliberated, debated or discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330; *Green v. Georgia*

(1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (CT 1097; RT 2886-2887.)

Thus, as noted above, appellant's jury was permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364. a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment

did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts curtailed deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding. . . ." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike

the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously *(see, e.g., People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation – in this case, only factors (a) and (b) were included. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) Appellant did not present any mitigating evidence in the penalty phase and many of the mitigating factors were also not applicable in this case, including factors (e) [consent of victim]; (f) [moral justification; and . (h) [ability to appreciate the criminality of one's conduct].) Instructing the jury on irrelevant matters diluted the jury's focus, distracted its attention from the task at hand and introduced confusion into the process. Such irrelevant instructions also created a grave risk that the death penalty was imposed on the basis of inapplicable factors. Finally, the list of inapplicable mitigating factors inevitably denigrated the mitigating evidence that the jury received in the guilt phase of the trial.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (See factors (d) and (g); CT 1095; RT 2884), and "substantial" (See factor (g); CT 1096; RT 2885), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

E. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to

due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (See generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-

Furman state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[62/] California's failure to require such findings renders its death penalty procedures unconstitutional.

F. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding.

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62. See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

(See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights . . . It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) . . . ." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not

simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XVII, *supra*, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, factor (b), and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in this argument. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake. For all the reasons set forth above, appellant's death sentence must be reversed.

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XXI.

APPELLANT CANNOT LAWFULLY BE EXECUTED BECAUSE THE ERRORS OCCURRING DURING THIS TRIAL AND HIS DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Appellant's death sentence was unlawfully imposed in violation of international law, covenants, treaties and norms that bind the United States as the highest law of our land. This Court should review the arguments presented in this brief in light of the international standards for a fair trial. In particular, these standards affirm the right to life and require that if the death penalty is to be imposed, it must be supported by evidence that is so clear that it leave room for no alternative explanation of the facts. The evidence in this case does not rise to this level, requiring that the death judgment against appellant be reversed.

A. This Court Must Follow and Apply International Law

The United States Supreme Court has recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700; see also *United States v. Pink* (1942) 315 U.S. 203, 230-231["state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"]; *Murray v. Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 118 [courts must interpret domestic law consistently with international law] .) Thus, international law has provided an important basis for determining how our own constitution is to be interpreted, including the evolving standards that inform the interpretation of the Eighth Amendment's prohibition against cruel and unusual

punishment. (See *Roper v. Simmons* (2005) ___ U.S. ___ [125 S.Ct. 1183,1198-1200] [citing international abolition of juvenile death penalty]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn . 21 [citing practices of the world community in prohibiting death penalty for mentally retarded offenders]; *Trop v. Dulles* (1958) 356 U.S. 86, 102 [referring to unanimity of the "civilized nations"].)

International law is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina* (9th Cir. 1992) 965 F.2d 699, 715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"]; Rest.3d Foreign Relations Law of the United States, § 111(1) ["International law and international agreements of the United States are law of the United States and supreme over the law of the several States"]; and *Id.* at § 702, comment c ["[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"].)

Even treaties and international agreements that are not ratified by a particular country may still be binding as demonstrating the customary law of nations. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." (*Id.*, at § 102; see also *North Sea Continental Shelf Cases,* 1969 I.C.J. 3 [state practices may be deduced from treaties, whether ratified or not]; Connie de la Vega, *The Right to Equal Education: Merely a guiding Principle or Customary International Legal Right* (1994) 11 Harv. Blackletter J. 37, 41; Rest.3d Foreign Relations Law of the United States, §

324 ["an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states"].)

Courts in this country have acknowledged and followed the principles establishing the importance of international law. (See, e.g., *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* (1983) 462 U.S. 611, 623 ["[the claim] arises under international law, which, as we have frequently reiterated is part of our law"]; *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, 423 ["[I]t is, of course, true that United States courts apply international law as part of our own in appropriate circumstances"].) Moreover, in the area of human rights, numerous courts have recognized and applied international law. (See, e.g., *Jama v. United States Immigration and Naturalization Service* (D.N.J. 1998) 22 F. Supp. 2d 353; *Abebe-Jira v. Negewo* (11th Cir. 1996) 72 F.3d 844, 848; *Kadic v. Karadzic* (2d Cir. 1995) 70 F.3d 232, 246 ; *Hilao v. Marcos* (9th Cir. 1994) 25 F.3d 1467, 1474-1476; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 887.)

The body of international law that governs the administration of capital punishment by the State of California and the United States includes, but is not limited to, the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention Against All Forms of Racial Discrimination; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and, the Vienna Convention on the Law of Treaties. Decisions of the Human Rights Committee (established under

ICCPR, article 28) and other bodies interpreting these treaties provide authoritative guidance for this Court.

The purpose of these and other treaties is to require signatory nations, including the United States, to protect the rights of all people, including appellant and others who have been accused of capital crimes. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." (Rest.3d Foreign Relations Law of the United States, § 313, reporter's notes p. 184.) Accordingly, the rules found in these treaties and the customary law that they establish are directly enforceable in U.S. courts and are available as an alternate basis for granting relief. (See Jordan J. Paust, "Customary International Law and Human Rights Treaties are Law of the United States" (1999) 20 Mich. J. Int'l L. 301, 325-327.)

Accordingly, this Court must give effect to international law established through treaty provisions and customary application, regardless of whether it is interpreted as an independent requirement or as part of the "evolving standards" of the Eighth Amendment. (See *Atkins v. Virginia*, *supra*, 536 U.S at p. 312.) Under either interpretation, international law requires that both the guilt and penalty judgments against appellant must be reversed.

B. The Right to Life

The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." (Article 6, para. 1, International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The right to life is a fundamental human right which is expressed throughout the International Covenant. The death penalty clearly contravenes the "right to life."

The use of the death penalty in this country is increasingly at odds with other nations:

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . [and] with China, Iran, Nigeria, Saudi Arabia, and South Africa [under the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions.

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.) [other nations have abolished capital punishment]; *People v. Bull* (1998 Ill.) 705 N.E.2d 824, dis. opn. of Harrison, J.)[63/]

Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that

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63. Since this article was published in 1995, South Africa has abandoned the death penalty.

abolition is desirable. (See Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at the Abolition of the Death Penalty. Adopted by the General Assembly, December 15, 1989.)

The Supreme Court of Canada has placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

In particular, the nations of Western Europe are uniform in not using the death penalty (see, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plur. opn. of Stevens, J.)); *all* Western European nations have now abolished the death penalty. (See Cokley, *Whatever Happened to That Old Saying "Thou Shalt Not Kill?": A Plea for the Abolition of the Death Penalty* (2001) 2 Loy. J. Pub. Int. 67, 119-120.) It should be noted that

appellant is a citizen of Mexico (CT 1185 [probation report]), a country which has also abolished the death penalty.

That uniformity of view among Western European nations is especially important because our Founding Fathers looked to those countries for the "law of nations," as models of the laws of civilized nations, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

International law must be used in determining our constitutional standards. "'Cruel and unusual punishments' and 'due process of law' [are not] static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 (dis. opn. of Powell, J.).) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Roper v. Simmons*, supra, 125 S.Ct. at pp. 1198-1200 [drawing from the practices of the international community]; *Atkins v. Virginia*, *supra,* 536 U.S. at p. 316, fn . 21 [citing practices of the world community in determining 8th Amendment requirements].)

Thus, constitutionally "cruel and unusual punishment" is not limited solely to whatever violated the standards of decency of the civilized nations of Europe in the 18th century; it encompasses whatever violates *evolving* standards of decency. Eighth Amendment jurisprudence must recognize that the standards of decency of the nations of Europe have evolved, and in so doing re-examine the use of the death penalty in this country. These standards should now prohibit using a form of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose "standards of decency" are supposedly antithetical to our own.

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, using it as regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, certainly is. The International Covenant on Civil and Political Rights, article 6(2), states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. . . ." The Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the death penalty should be a quite exceptional measure." (General comment, International Covenant on Civil and Political Rights. Article 6.) Since the law of nations considers it improper to use capital punishment as regular punishment, it is unconstitutional in this country because international law is a part of our law. (*Hilton v. Guyot, supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

C. The Evidence in this Case Does Not Meet the Standards of International Law That Is Necessary Before a Death Verdict May Be Imposed

Even assuming that the death penalty may be imposed, international law imposes a particularly high standard that must be met in such cases. The standard adopted by the United Nations Economic and Social Council allows a death verdict only if there is clear and convincing evidence "leaving no room for alternative explanation of the facts." ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984, ¶ 4; see also *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [applying standard]; European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard]; Accordingly, this standard is part of the international customary and decisional law that this Court should apply. Because the record against appellant does not preclude an alternative explanation of the facts, the death penalty must be reversed.

As discussed in Argument IX [insufficient evidence], there was room in this case for an alternative explanation of the facts. The case against appellant was largely based on his ambiguous statement to Alma Cruz; speculation about appellant's motive; and, the assumption that he must have planned the crime with his brother and Uribe. Appellant's role in the gang could explain his ambiguous statements to Cruz and his telephone calls to various gang members. Any anger that he expressed about Melinda's testimony was not linked to a threat of violence against her. Appellant's brother certainly could have been affected by this anger and taken matters into his own hands. Under these circumstances, international

law does not permit the death verdict to be imposed. (*Albert Wilson v. Philippines,* United Nations Human Rights Committee, Communication No. 868/1999, *supra*, at p. 5.)

D. The Right to an Impartial Tribunal

Appellant had a right to be tried before an impartial tribunal.[64/] Under international law, the principle of impartiality, which applies to each individual case, demands that each of the decision-makers, including the jury, be unbiased. (See *Collins v. Jamaica* (1991) IIHRL 51, Communication No 240/1987 [impartial juries]; see also ICCPR, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].)

The right to an impartial tribunal is fundamental. The Human Rights Committee has stated that it "is an absolute right that may suffer no exception." (*González del Rio v. Peru*, (Communication No. 263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40).) "The international standard on the issue of 'judge and juror impartiality' employs an objective test based on 'reasonableness, and the appearance of impartiality.'" (*William Andrews v. United States*, Report No 57/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 (1997) at ¶ 159.) Under this standard, "justice must not only be done, it must also be seen to be done." (European Court, *Delcourt*

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64. The international standards refer to "tribunals" rather than courts. The right encompasses both juries and judges. For example, the European Court has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. (See *Sramek Case*, 22 October 1984, 84 Ser. A 17, para. 36; *Le Compte, Van Leuven and De Meyere Case*, 23 June 1981, 43 Ser. A 24, para. 55.)

Case, 17 January 1970, 11 Ser. A 17, ¶ 31.) That the international standard is to be applied without exception should compel this Court to reverse the judgment without regard to standards of harmless error.

In this case, the jury selection procedures rendered appellant's trial fundamentally unfair and violated appellant's right to an impartial jury under international standards. In particular, the trial court refused to question potential jurors about racial or ethnic bias. (Argument I.) As a result, appellant had no means to determine if potential jurors may have been biased against him as a result of his ethnic and racial background, particularly since the victim in this case was Caucasian.

The impartiality of the jury was also compromised by the prosecutor's improper excusal of African-Americans during jury selection. (Argument II.) That the prosecutor used racially-related reasons affected the impartiality of the tribunal by denying appellant a jury drawn from a fair cross-section of the community. Accordingly, this Court should find that the jury selection process used in this case violated international standards for an impartial tribunal.

E. Protection Against Prosecutorial Misconduct

A defendant in a criminal case has the right to expect that a prosecutor will not exceed the boundaries of proper conduct. This right is protected by the due process guarantees of the state and federal Constitutions, but must also be interpreted through the standards set by customary international law.

The *Guidelines on the Role of Prosecutors* were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the UN General Assembly. The Guidelines were adopted in an effort to assist governments

in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings."

The Guidelines provide that prosecutors are to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." This Court should find that these standards are part of the customary law that forms part of the law of the nations.

The prosecution in this case failed to uphold these international standards in its conduct throughout the trial and in its closing argument to the jury. The prosecutor violated these standards when his opening statement referred to a three-way conversation between appellant, Ricardo, and Uribe, despite having entered into a stipulation that forbade this reference. (See Argument VI.) The prosecutor used racially-related criterion to select the jury in this case. (See Argument II.) During his closing argument in the guilt phase, the prosecutor improperly denigrated appellant's counsel and argued facts that were not in evidence before the jury, inviting the jury to assume that appellant had planned the crime with Ricardo and Uribe. (See Argument XIII) During the penalty phase, the prosecutor improperly argued that the nature of the crime itself demanded the death penalty in order to preserve the rule of law and set the jury to be the personal guardian of both the witnesses in this case and society as a whole. (See Argument XIV.) These examples demonstrate the atmosphere that the prosecutor created during this trial violated international standards of conduct. This Court should accordingly reverse the judgment in this case.

F. The Right to a Fair Hearing

The right to a fair hearing lies at the heart of the concept of a fair trial that is protected by both state and federal constitutional due process guarantees and international standards. Under international law, everyone is entitled to a fair hearing. This right encompasses all the procedural and other guarantees of fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the criterion of a fair hearing. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR,; Article 6(1) of the European Convention; Article XXVI of the American Declaration; Article 8 of the American Convention.)

The right to a fair hearing in criminal trials is specified by a number of concrete rights that are minimum guarantees. The observance of each of these guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial. (See Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para. 24.)

In an advisory opinion sought by Mexico concerning failure to adhere to the Vienna Convention, the Inter-American Court on Human Rights has found that states may impose the death penalty only if they

rigorously adhere to the fair trial rights set forth in the ICCPR. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).)

The Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. (See, e.g., *Johnson v. Jamaica*, No. 588/1994 (1996), H.R. Comm. para. 8.9 [delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed]; *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 ["[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of article 6 of the Covenant."]; Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990) ["in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative"].)

Appellant was denied his right to a fair hearing throughout his trial, as shown by the cumulative effect of all claims raised in this brief, which are incorporated herein by reference. In particular, the trial court allowed the prosecutor to break the stipulation that had prohibited references to a three-way conversation between appellant, Ricardo, and Uribe. This evidence invited the jury to speculate that appellant must have planned the crime with these individuals, despite any evidence to establish this. (Argument IV.) The trial court also admitted inflammatory and prejudicial evidence against appellant in violation of California's evidentiary protections. (Argument V [Ricardo's statement]; Argument VI [pager message]; Argument X [victim's diary].) Its instructions to the jury

misinformed the jury on key points of law. (Argument XI [motive]; Argument XII [consciousness of guilt].) Under these circumstances, appellant's trial failed to meet the minimum guarantees of fairness required by international law. The judgment against appellant must be reversed.

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XXII.

CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[65] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of

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65. Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace*, *supra*, 848 F.2d at p. 1476.)

the errors when errors of federal constitutional magnitude combined with other errors].)

Appellant's trial was fundamentally flawed because it was based on improper evidence that encouraged the jury to speculate that he must have committed the crime. The jury was led through a series of erroneous evidentiary matters that included testimony about a three-way phone conversation with appellant, Ricardo, and Uribe(Argument IV); Ricardo's statement that his act was done for his brother (Argument V); the "187" message on the victim's page (Argument VI); and, testimony that the victim was frightened (Argument VIII). Each of these contributed to speculation that appellant must have planned the crime.

The trial court erroneously allowed the excerpts from the victim's diary and conversations with her teacher to be used against appellant. (Argument X.) The trial court did not permit appellant's to cross-examine the victim's mother on several key points. (Argument VII.) It erroneously instructed thejury on motive and consciousness of guilt. (Arguments XI, XIII.) It allowed the prosecutor to engage in inflammatory argument that affected the jury's guilt deliberations. (Argument XIII.) The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting convictions a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's convictions must therefore be reversed.

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that

evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

During the penalty phase, the trial court failed to instruct appellant's jury after it became aware that appellant was shackled. (Argument XV.) It permitted the prosecutor to engage in emotional and unfounded argument that urged the jury to impose death in order to protect Sandra Ramirez, Alma Cruz, and society as a whole. (Argument XIV.) It instructed the jury to disregard all the guilt phase instructions and did not provide any further instructions on important matters affecting their consideration of penalty phase evidence. (Argument XVI.) This Court can have no confidence in the reliability of a verdict in light of the combined effect of all the errors in this case, constitutional and otherwise. It cannot be satisfied that the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].) Accordingly, the judgment must be reversed.

CONCLUSION

For all the reasons stated above, the judgment this case must be reversed.

DATED: May 24, 2005

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON
Deputy State Public Defender

DECLARATION OF SERVICE

Re: People v. Juan Manuel Lopez

No. S073597
L.A. Superior Ct. No.: PA023649-01

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Theresa A. Patterson
300 S. Spring St., 5th Floor
Los Angeles, CA 90013

Juan Manuel Lopez
(Appellant)

Each said envelope was then, on May 25, 2005, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty that the foregoing is true and correct.

Executed on May 25, 2005, at San Francisco, California.

DECLARANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Arnold Erickson, am the Deputy State Public Defender assigned to represent appellant, Juan Manuel Lopez, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 60,780 words in length excluding the tables and certificates.

Dated: May 24, 2005

Arnold Erickson