IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KIONGOZI JONES, Defendant and Appellant.

CRIM. S075725

Los Angeles
Superior Court
No. NA031990-01

APPELLANT'S OPENING BRIEF

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

The Honorable Bradford L. Andrews

MICHAEL J. HERSEK
State Public Defender

Jessica McGuire
Assistant State Public Defender
Cal. State Bar No. 88563

Attorneys for Appellant

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

TABLE OF AUTHORITIES

CASES **PAGE(s)**

CONSTITUTIONS

STATUTES

CASES PAGE(s)

JURY INSTRUCTIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,**	**No. S075725**
	Los Angeles Superior Court
v.	**No. NA031990-01**
KIONGOZI JONES, **Defendant and Appellant.**	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal pursuant to Penal Code section 1239, subd. (b), from a conviction and judgment of death entered against Kiongozi Jones ("appellant") in the Los Angeles County Superior Court on November 23, 1998. (3CT 714-717.)[1] The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

A felony complaint was filed against Kiongozi Jones (hereinafter "appellant") and Melvin Sherman in the Los Angeles Municipal Court on December 17, 1996, charging appellant and Sherman with the murders of Mario Lopez and Jose Villa, in violation of Penal Code section 187, subd. (a), and the attempted murders of Veronica Mungia and Nery Hernandez. in violation of Penal Code sections 664 and 187, subd. (a). Enhancements for use of a

---

[1] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

firearm/handgun and for commission of a serious felony under Penal Code sections 12022, subd. (a) (1), 12022.7, subd. (a) and 1192.7, subd. (7) (c) (8) were alleged. (1CT Supp.IV 4.) Appellant waived arraignment on December 26, 1996, and entered a plea of not guilty. Bruce McGregor was appointed to be appellant's defense counsel. (1CT Supp.IV 9.)

A preliminary hearing was held on January 9, 1997 (1CT Supp.IV 27), at the conclusion of which the court ordered dismissal of counts one and three of the complaint (the murder of Mario Lopez and attempted murder of Veronica Mungia) as to appellant, but held appellant to answer on counts two and four (the murder of Jose Villa and attempted murder of Nery Hernandez.) The court dismissed all counts as to Sherman. (1CT Supp.IV 23, 25, 180.)

An Information was subsequently filed against appellant on January 23, 1997, in the Los Angeles Superior Court, charging him with the murders of Mario Lopez and Jose Villa and attempted murders of Veronica Mungia and Nery Hernandez, as well as the concomitant enhancements. (1CT Supp.IV 192-195.) Appellant was arraigned the same day and entered guilty pleas as to all of the charges. The public defender was appointed to represent appellant. (1CT Supp.IV 196.)

On February 13, 1997, the public defender was relieved and appellant appeared with retained counsel, Juliette Robinson Slayton. (1CT Supp.IV 197.) Appellant's motion to set aside the information pursuant to Penal Code section 995, was heard on February 25, 1997. Counts one and three of the information (murder of Mario Lopez and attempted murder of Veronica Mungia) were set aside, and the motion was denied as to counts two and four (murder of

Jose Villa and attempted murder of Nery Hernandez).

Appellant filed another motion to dismiss on March 21, 1997, which was granted in its entirety on March 24, 1997. However, the same day the prosecution filed a new complaint charging appellant with two counts of murder under Penal Code section 187, subd. (a) (Mario Lopez and Jose Villa), one count of attempted murder under Penal Code sections 664 and 187, subd. (a) (Nery Hernandez), one count of assault with a firearm under Penal Code section 245, subd. (a) (2) (Veronica Mungia), and one count of shooting into an inhabited dwelling. under Penal Code section 246. (1CT Supp.IV 229; 3CT Supp.IV 364.) Appellant was arraigned on the new complaint on April 3, 1997, and the public defender was appointed to represent him. Appellant pleaded not guilty to all counts. (3CT Supp.IV 365-366.) A preliminary hearing was held on May 19 and 20, 1997 (1CT 1-180), at the conclusion of which appellant was held to answer on all counts. (1CT 180.)

On June 3, 1997, an Information was filed in the Superior Court charging appellant with two counts of murder with a multiple murder special circumstance (Penal Code §§ 187(a) and 190.2(a)(3)); one count of attempted murder (Penal Code §§ 664 and 187(a)); one count of assault with a firearm (Penal Code § 245(a)(2); and one count of shooting at an inhabited dwelling (Penal Code § 246). (1CT 227-236.) Appellant, represented by the Public Defender, was arraigned and pleaded not guilty to all charges. (1CT 238.) On October 9, 1997, the Public Defender was relieved and replaced by *pro bono* retained counsel, Juliette Robinson Slayton. (1CT 267; 1RT 198.)

Appellant's motion to dismiss for insufficiency of the evidence

under Penal Code section 995 and motion to dismiss for speedy trial violation were denied on December 2, 1997. (2CT 318.) On December 5, 1997, the prosecution's motion to consolidate appellant's case with Melvin Sherman's case was denied. (2CT 319.)

Jury selection began on December 8, 1997. (2CT 320.) Appellant's motion to dismiss for prosecutorial misconduct was denied on December 10, 1997. (2CT 322.) On December 18, 1997, the trial court granted appellant's *Wheeler*[2] motion and dismissed the venire. A new venire was summoned the same day and voir dire resumed on December 19, 1997. The jurors and four alternates were sworn on January 8, 1998. (2CT 337.)

The parties gave their opening statements, and the prosecution called its first witness on January 12, 1998. (2CT 338-339.) The prosecution rested and the defense began presenting its case on January 20, 1998. (2CT 344-345.) The defense rested, the jury was instructed and closing arguments were given on January 21, 1998. (2CT 346.) The jury began its deliberations at 3:35 p.m. that afternoon. (*Ibid.*) On January 22, 1998, Juror No. 1 was excused upon stipulation of the parties and was replaced by the first alternate juror. The jury also requested a read-back of some testimony. (2CT 349-350.) At 4 p.m. on January 27, 1998, the jury informed the court that it was unable to reach a unanimous verdict. The court declared a mistrial and the jury was discharged. (2CT 374.)

Appellant's motion to dismiss after hung jury was denied on

---

[2] *People v. Wheeler* (1978) 22 Cal.3d 258.

February 13, 1998. (2CT 402.) The same day the prosecution filed its notification of potential penalty phase evidence under Penal Code section 190.3. (2CT 406.) Attorney Juliette Robinson was appointed by the court to represent appellant on March 17, 1998. (2CT 427.) The prosecution's motion to consolidate appellant's case with Melvin Sherman's case for trial was granted on March 24, 1998. (2CT 432.) The prosecution filed an Information on April 15, 1998, charging appellant with the same crimes and special circumstance allegation as had been charged against him in the prior trial. Sherman was charged with the same offenses and special circumstance and also with conspiracy to commit murder under Penal Code section 182, subd. (a) (1). The prosecution sought the death penalty for appellant but not for Sherman. (2CT Supp.IV 355.)

Jury selection began July 6, 1998 (2CT 449), and the jurors and alternates were sworn on July 13, 1998. (2CT 463-464.)

The prosecutor and appellant's counsel gave their opening statements on July 14, 1998, and the prosecution began presenting its evidence. (2CT 465-466.) The next day, July 15, 1998, the parties stipulated to excuse Alternate Juror No. 2. (2CT 468.) The prosecution rested its case on July 21, 1998, and the defense presented their respective witnesses. (2CT 477-478.) The defense rested on July 23, 1998, the jury was instructed and the parties began their closing arguments. (2CT 481-482.) Closing arguments were completed and the jury began its deliberations at 2 p.m on July 24, 1998. (20RT 5082-5085.) On July 31, 1998, at 2 p.m., the jury returned a verdict of guilty on all counts and a finding of true with respect to the multiple murder special circumstance allegation, as well as the felony enhancements. (2CT 585-587; 20RT 5205-5209.)

The jury found Sherman not guilty of conspiracy to commit murder, and guilty on all the remaining counts. It also found true the multiple murder special circumstance allegation as well as the felony enhancements. (*Ibid.*)

The penalty phase commenced on August 4, 1998. The parties gave their opening statements and the prosecution began its case in aggravation. (2CT 588-589.) The prosecution concluded its case on August 5, 1998, and appellant began presenting his case in mitigation the same day. (2CT 597.) On August 6, 1998, the court granted the prosecution's motion to excuse Juror No. 2, who was replaced by Alternate Juror No. 1. (2CT 599.) On August 7, 1998, both sides rested their case, the jury was instructed and the jury began its deliberations at 2:00 p.m. (2CT 600.) At 3 p.m. Juror No, 3 was excused by stipulation of the parties and was replaced by Alternate Juror No. 3. The court instructed the jury to begin its deliberations anew. (*Ibid.*) The jury returned a verdict of death on August 13, 1998, at 11:35 a.m. (3CT 652-653.)

On November 17, 1998, the trial court denied appellant's motion for new trial and modification of sentence, and sentenced appellant to death on counts one and two and to prison terms on the remaining counts. (3CT 701-705.)

*****

STATEMENT OF FACTS

A. Introduction

This case arises from the murder of two men, Mario Lopez and Angel Villa, who were shot to death within minutes of each other in Long Beach, on the evening of December 6, 1996, around 7 p.m. Two other people, Veronica Mungia and Nery Hernandez, were also shot, but survived. At least one of the murder victims, Mario Lopez, was a member of an Hispanic gang, known as the East Side Longos (hereinafter "Longos"). Veronica Mungia was Lopez's sister. Lopez was shot while socializing with a fellow gang member in front of his apartment. Mungia, who was inside the apartment at the time, was struck in the knee by a bullet that came through the open front door. Angel Villa was riding his bike around the corner from the apartment complex a few minutes after the Lopez/Mungia shooting, when he was shot through the eye at close range. Nery Hernandez was shot in the chest seconds later, as he was pulling his car out of a driveway a few feet from where Angel Villa was shot. According to the prosecution's ballistics expert, the same gun was used to shoot all four victims, but a gun was never found.

Two trials were held in this case, in each of which the only disputed issue was the identity of the shooter and his alleged accomplice. The prosecution's theory was that the shootings of Lopez, Mungia and Villa were related to gang warfare between the Longos and the Rolling 20s Crips (hereinafter "Rolling 20s"), an African-American gang with which both appellant Kiongozi Jones and his co-defendant, Melvin Sherman, had in the past been affiliated, and that Hernandez was an innocent bystander who happened to be in the wrong place at the wrong time.

The first trial, in which appellant was the sole defendant, resulted in a mistrial because the jury could not reach a unanimous verdict regarding guilt. The second trial, in which Melvin Sherman was joined as a co-defendant, resulted in appellant's conviction and death sentence.[3] No physical evidence tied appellant to the crime; the prosecution's evidence consisted of case eyewitness identification testimony.

No one identified appellant as the man who shot Lopez and Mungia, although Anna Granillo, a sister of Lopez and Mungia, testified that she saw appellant and Sherman shortly before the shooting occurred, as she was walking back to her apartment from the laundry room. Granillo's testimony conflicted with her statement to the police on the night of the crime that she had been in the bedroom of the apartment and had not seen anything. Granillo came forward with her changed story a year later on the first day of the first trial, one day after the prosecutor told Mungia that his case against appellant was weak and that appellant would likely be acquitted unless someone who was present at the time she and Lopez were shot identified appellant as the shooter.

Mungia was unable to persuade the men who had been socializing with Lopez outside the apartment at the time of the shooting to come forward. However, she contacted the prosecutor the next day and told him that Granillo was willing to help. Appellant was restricted, in both trials, from cross-examining Granillo and Mungia about whether Granillo had been informed by Mungia that

---

[3] As noted in the Statement of the Case, the prosecution did not seek the death penalty for Sherman.

the prosecutor was concerned about having insufficient evidence to prove appellant's guilt, despite the relevance such knowledge would have to establish Granillo's motive to falsely identify appellant in order to secure his conviction.

There were two eyewitnesses to the shooting of Villa and Hernandez: Maria Jaramillo, a woman who lived across the street from where the shooting took place, and Hernandez himself.[4] The charges against appellant were initially dismissed subsequent to a preliminary hearing conducted a month after the crime, in which Jaramillo identified Melvin Sherman instead of appellant as the shooter, and Hernandez testified that he could not be sure that appellant was the shooter. However, the charges were refiled and appellant was bound over following a new preliminary hearing, conducted pursuant to Proposition 115, in which homicide detectives testified that Jaramillo and Hernandez had identified appellant as the shooter from a "six-pack" photographic lineup (hereinafter "six-pack").[5]

By the time of the first trial, any doubt that Jaramillo and Hernandez had previously expressed regarding the certainty of their

---

[4] Hernandez's wife, Rosa, was in the car with him at the time of the shooting. She testified in the first trial that it was dark outside and everything happened so quickly she could not identify the shooter. (8RT 2070-2072.) Rosa Hernandez was not called as a witness in the second trial.

[5] According to the detective, when shown the six-pack, Hernandez pointed to photo no. 5 and said "that kind of looks like him." (1CT 36.) Jaramillo told the detective that the shooter looked like the man depicted in photo no. 5, "but without the hair on his chin." (1CT 37.)

respective identifications of appellant had been erased, and each testified that he/she was sure that appellant was the shooter.

By the time of the retrial (which commenced more than two and a half years after the crime), the eyewitnesses had become even more certain of their respective identifications of appellant. They also "remembered" things that they had not previously testified to that bolstered these identifications.

Appellant was again restricted from cross-examining Anna Granillo – the only prosecution witness who actually placed him near the scene of the Lopez shooting – about circumstances demonstrating her motive to lie.

To shore up its case in the second trial, the prosecution presented additional "gang expert" testimony.[6] It also introduced for the first time, over defense objection, a tape recording of a phone conversation between appellant and his brother, which took place shortly after the first preliminary hearing held in the case. Appellant, who during the phone call expressed anger and frustration that he was still being held even though the witnesses did not identify him, claimed innocence but also made inflammatory statements that the prosecutor argued demonstrated consciousness of guilt.

Appellant had the same attorney in both trials. She represented him *pro bono* in the first trial, having never previously tried a homicide case, and under court appointment in the second

---

[6] The trial court excluded evidence that would have established appellant was no longer an active gang member and that he was in the process of being hired as a counselor in a gang prevention program at the time of his arrest in the instant case. (See Argument II, post.)

trial, despite the fact that she was not a member of the panel of attorneys in Los Angeles qualified to handle death penalty cases. She did not seek appointment of qualified second counsel, and tried the case on her own. At the conclusion of the second trial, appellant's attorney filed a motion for new trial, alleging her own ineffective assistance for failure to hire an eyewitness identification expert.

B. The Lopez/Mungia Shooting

1. Eyewitness Testimony

The prosecution presented the testimony of three witnesses who were in the apartment at the time of the shooting, Veronica Mungia, Amber Gutierrez, and Anna Granillo. None of them of them actually witnessed the shooting itself.

(a) Veronica Mungia

Mungia was Mario Lopez's sister. On December 6, 1996, she was living at 1700 Pacific, Apartment No. 4 in Long Beach. She lived there with Mario, her sister Anna Granillo and two other brothers, Arthur and Robert. Anna's three year old daughter also lived there. (7RT 1834.) In the first trial Mungia testified that Mario was a member of the East Side Longos street gang. (7RT 1837.) In the second trial she testified that all of her brothers, *except for Mario*, were members of the gang.

Mungia's testified in the first trial that she heard gunshots shortly before 7 p.m. (7RT 2835, 1842.) She testified in the second trial that the shots were fired around 8 p.m. (14RT 3692), and it was dark outside. (14RT 3713.) At the time of the shooting, there were a number of people inside and outside of the apartment. (14RT 3691.) The group included Mungia, Lopez, Granillo, and other individuals,

whose names were "Casper," "Joker," "Tricky," Sunshine," "Sleepy," Amber [Gutierrez], two of Amber's friends and Anna Granillo. Mungia's young daughter and Amber's daughter were playing in the livingroom. (*Ibid.*) Mungia was in the bedroom at the rear of the apartment when the shooting began. In the first trial, Mungia testified that Anna Granillo was in the bedroom in the process of hanging up clothes when the shooting began. (7RT 1851.) In the second trial she testified that Anna had just walked into the bedroom with a laundry basket, which she dropped on the floor when the shooting started. (14RT 3698, 3713.) Mungia further testified that Anna had been going back and forth to the laundry room all day. (14RT 3717.) Mungia attributed her changed testimony in the second trial to a recent "flashback," and admitted that she discussed her new "recollection" with the prosecutor before testifying in the current trial. (14RT 3730.)

When the shooting began, Mungia ran for her daughter in the living room. Mario had already been shot, and pushed Veronica's daughter towards her as he ran inside the apartment. In the process, a bullet came through the wall and hit Veronica in the knee. (14RT 3698.) Mario collapsed in the hallway. (14RT 3699.) Mungia did not see who fired the shots. (14 RT 3707-3708.)

(b) Amber Gutierrez

Amber Gutierrez was a visitor who was sitting on the couch talking on the phone at the time of the shooting. (14RT 3631.) She testified that she had a clear view of the front door of the apartment from where she was sitting, and that the door was wide open. (14RT 3631-3632.) Gutierrez testified that she saw a man walk by the door slowly, look inside the apartment, and then continue walking towards

the alley behind the apartment complex. After he passed, she heard him say something to somebody in the direction of the alley, although she did not hear what he said because she was on the phone and not paying close attention. (14RT 3633-3644.) The man was African American and was wearing a white tank top. (14RT 3646, 3650.) Gutierrez identified Melvin Sherman as the man she saw. (14RT 3839.)

According to Gutierrez, Mario and Casper walked outside and were sitting in front of the apartment, talking, when the shooting occurred. (14RT 3647.) However, she contradicted herself regarding how long they were outside before she heard gunshots. She testified first that the shooting started immediately after the two went outside. (14RT 3635.) Later in her testimony, she stated that she did not know how long they were outside before the shooting started. (14RT 3647.) She testified subsequently that the shooting occurred within seconds of when the two stepped outside. (14RT 3664.) In the first trial she testified that she was not sure whether it was seconds or minutes; that she did not know how long it was. (14RT 3671-3672; 7RT 1961.)

Gutierrez was also vague regarding the length of time between when the man walked by the front door and when the shooting began, stating that she could not recall how much time elapsed between hearing the man talking to the person in the direction of the alley and the commencement of the gunshots (14RT 3655), although she had testified at the preliminary hearing that it was less than five minutes. (14RT 3656.) She was also unsure where Mario was when the man walked by the open door – at some point he had been in the living room, but she was not sure where. However, she testified that

the man walked by before Mario went outside. (14RT 3666.)

Although Gutierrez testified she never saw the shooter (14RT 3637), in the second trial – for the first time – she testified that she saw a gloved hand with a gun in it. (14RT 3657.) Furthermore, while she had testified in the preliminary hearing that she could not discern the direction from which the shots were coming (14RT 3654), she testified in the second trial that they were coming from the direction of the alley. (14RT 3651.)

Also for the first time in the second trial, Gutierrez testified that Anna Granillo entered the apartment and walked past Gutierrez in the living room, and that the shooting started right after Granillo had walked through. (14RT 3635-3636.) Gutierrez had previously testified that she did not recall having seen Granillo in the living room prior to the shooting. (14RT 3663.) In addition, while Gutierrez testified previously that she had never seen appellant before, during the second trial she claimed that she had seen him before on Pine Street, and that he had yelled "gang stuff," at Gutierrez and her friends. (14RT 3640, 3660, 3662.) In any event, Gutierrez did *not* see appellant on December 6, 1996. (14RT 3661.)

(c) Anna Granillo

When she was interviewed by the police on the night of the crime, Anna Granillo told them she was in the bedroom at the time of the shooting and therefore saw nothing. (15RT 3770.) On the witness stand Granillo told a different story. She testified she had been doing laundry, going back and forth from her apartment to the laundry room along the apartment complex walkway (14RT 3740-3741), and saw appellant and Sherman in the alleyway behind the apartment complex on an earlier trip to the laundry looking at her

apartment building as if they if they were scoping it out. (14RT 3754.)

Granillo further testified that on her last trip back to the apartment from the laundry room, she saw appellant and Sherman again in the alley by the back gate to the complex. (14RT 3752, 3755.) She stated that she saw them out of the corner of her eye, walking close behind her. (14RT 3757.) However later on in her testimony, Granillo denied having seen the two men come up the walkway and start shooting or having seen either of them with a gun. (15RT 3845.)

Granillo testified for the first time in the second trial, that she told her brother Mario to "watch out" as she walked by him into the apartment. She further testified she was in the middle of the livingroom when the first shots were fired, and that she ran to the bedroom and dropped her laundry basket. (14RT 3757, 15RT 3765.) When her sister Veronica ran out of the bedroom to get her daughter, Granillo testified she started to follow her, but Gregory Sinsun (a.k.a. "Sleepy), who was in the bedroom at the time, pulled her back. When the shooting stopped, Mario came running into the apartment saying "those fucking niggers shot me." (15RT 3768.). Granillo had made no mention of this during her testimony in the previous trial. (15RT 3823.)

At the time of Granillo's initial sighting of the two men it was close to dark, and by the second time it was fully dark. (15RT 3814.) She stated that the only light in the alleyway was attached to a building to the other side of the alley, and that it was dim. (15RT 3814-3815.) She estimated that the two men were about 38 feet, or approximately three car lengths, away from her when she saw them.

(15RT 3816.) Granillo conceded that she did not get a very good look at the men's faces because they were a ways away from her and she could not see them very well. What she saw was that they were both bald. (15RT 3805.)[7]

Granillo's explanation of why she had waited a year to come forward also changed by the second trial. In the previous trial she claimed she was so greatly affected by the loss of her brother that she started drinking heavily and lost her memory. (7RT 1926-1927; 15RT 37.) She testified then that her family began calling her a "wina" because she drank daily. (7RT 1926.) It was only after her sister Veronica told her that the case was going to trial and she needed to tell the "truth," that she decided to come forward and testify. (7RT 1932.) When asked why she had lied to the police in the first instance, Granillo cited hostility towards the police and fear of retaliation as her reasons. (15RT 3769-3776.)

By the time of the second trial, Granillo denied having had amnesia as a result of her drinking. Instead, she attributed her failure to come forward for a whole year to simply not wanting to think about this "horrible tragedy." (15RT 3824-3826.) Granillo additionally denied that she drank heavily during the months following the murder, and claimed that her family's calling her a :"wina" was not because she had become an alcoholic, but was just something her family members called each other as a joke. (15RT 3841-3843.)

2. The Forensic Evidence

(a) Dale Higashi

---

[7] Granillo testified that she also saw other people in the alley, including Angel Villa and his family, a couple of other Hipanics and a neighbor named Henry. (15RT 3828-3829.)

Dale Higashi, a criminalist with the L.A. County Sheriff's Department, testified that from the eight expended shell casings, the three intact bullets and several bullet fragments retrieved from the two crime scenes, he determined that a semi-automatic hand gun which could have been a Glock pistol, was used to commit both crimes. He could not say for sure that only one gun was used to commit both crimes, because he didn't have the gun itself, but from his microscopic examination of each of the shell casings he was of the opinion that all of the bullets were fired from the same gun. (15RT 3911-3918.)

(b) Suko Jack Wang, M.D.

Dr. Wang, a deputy medical examiner with the L.A. County Coroner's office performed the autopsy on Mario Lopez. He testified that Lopez sustained two gunshot wounds, one to the left forearm and the other to the chest. The chest wound was fatal; the bullet went through the chest and lodged in the heart. Because he saw no soot or stippling, Dr. Wang concluded that the gun used had not been shot from close range. (16RT 4151-4156.)

C. The Villa/Hernandez Shooting

1. Eyewitness Testimony

The prosecution presented the testimony of two eyewitnesses to the shooting of Jose Villa and Nery Hernandez, Maria Jaramillo, who lived across the street from where the shooting took place, and Nery Hernandez, the surviving victim. In the first trial, the defense presented the testimony of Robert Elder, a friend and neighbor of Nery Hernandez's, who lived on the block where the shooting occurred. Elder was unavailable at the time of the second trial, so his testimony from the first trial was read to the jury. (19RT 4781.)

(a) Maria Jaramillo

On December 6, 1996, shortly before 7 p.m., Maria Jaramillo was playing with her nephews in front of her house at 126 W. 16th Street in Long Beach. She heard gunshots in the distance coming from the direction of Pacific Avenue, so she took her nephews inside, and came back outside. She saw a man running towards her from the alley across the street. (16RT 4087-4089.) At the same time, a man on a bicycle rode by, and the man coming out of the alley grabbed him around the neck and shot him in the head, on the right side at eye level. (16RT 4090, 4092.) The shooter then walked away in the direction of Pine, towards a car backing out of a driveway with a man and woman inside, at which point Jaramillo went back inside her house. (16RT 4093, 4095, 4096-4097.) She heard more shots, and when she came back outside one of the shooting victims was dead and the other one – the driver of the car – was wounded. (16RT 4095.)

Three days after Jaramillo witnessed the shooting, the police showed her a six-pack photo lineup, and she signed a form stating, "It looks like [the person depicted in photo number five], without the hair on his chin." (16RT 4103-4104.) When she testified a month later at the preliminary hearing, she stated that if appellant had hair on his face the day the shooting occurred, then he would not be the man she saw. (16RT 4105.) She further testified at the preliminary hearing that she picked number five from the photo lineup, because the man depicted in that photo had more of the height and the profile of the shooter (16RT 4111), however, she conceded she was not very sure that number five was the shooter, because she saw him from far away and it happened very quickly. (16RT 4107-4108.) Jaramillo

also testified at the preliminary hearing that she only saw the shooter's profile, and acknowledged that photo number five was a full frontal view, not a profile view. (16RT 4112-4113.) When asked at the preliminary hearing whether she could make an in-court identification, Jaramillo identified Sherman – not appellant – as the shooter. (16RT 4101.)

Jaramillo's preliminary hearing testimony was significantly different from her testimony in the second trial. In the second trial, she identified appellant as the shooter, and testified that she recognized his photo when it was shown to her a few days after the crime as part of the photo-lineup. (16RT 4097-4098.) With respect to her previous testimony that if appellant had facial hair he could not have been the shooter, Jaramillo testified she did not see facial hair, but that it did not mean the shooter did not have any. (16RT 4105.)

Jaramillo acknowledged her misidentification of Sherman at the preliminary hearing, but claimed that she immediately tried to correct herself and was not given the opportunity to do so. She also claimed to have been very nervous and frightened when she testified at the preliminary hearing. (16RT 4100-4101.) Jaramillo testified that she was now able to distinguish between appellant and Sherman, and that she was now certain that appellant was the shooter. (16RT 4102.) Jaramillo did not explain what now made her certain of these things.

Jaramillo further testified that she had a frontal view of the shooter's face as he came out of the alley, and denied that she had only seen his profile. (16RT 4112.) She did concede that it was dark out and there was no lighting at the mouth of the alley. She also acknowledged that the events she observed lasted only a few

seconds, and that she was terrified. In addition, she was looking at the flash when the gun was fired, not at the shooter. (16RT 4121-4122.)

In the second trial, Jaramillo testified for the first time that a few days after the crime, she was approached in front of her house by a young black man who asked her whether she had witnessed the shootings. Jaramillo testified that she told the man she had not been there, because she was scared. (16RT 4099-5100.) She acknowledged that the district attorney's office had paid for her to move to another location. (16RT 4126.)

(b) Nery Hernandez

Nery Hernandez was backing out of his driveway with his wife and children in the car, shortly before 7 p.m. on December 6, 1996. As he got out of his car to close the gate, he saw two men, one Hispanic and one Black, about 10 to 15 feet away looking like they were arguing. The Hispanic man was on a bicycle. Hernandez got back in his car, and saw the Black man pointing his right hand towards the Hispanic man's head, and saw that the Black man was holding a gun. Hernandez tried to back his car out, but could not do so because there was a car passing behind him. Hernandez then heard two gunshots. (RT 4243-4246.)

Next, the Black man was standing directly in front of Hernandez's car, pointing his gun at Hernandez. The man shot Hernandez in the chest, after which the man ran towards Pine Avenue. Hernandez got out of his truck and started shouting for help. (RT 4247-4248.) Hernandez identified appellant before the jury as the man who shot him. (16RT 4249.)

Hernandez's trial testimony was inconsistent with his statement

to the police and his testimony at the preliminary hearing, and he was impeached on cross-examination with that prior testimony, which established the following: Hernandez was hurt badly and was in the hospital, heavily medicated, when the police came to interview him and showed him a photo lineup. He told the detectives that photo number 5 "kinda looked like him," because he was not 100 percent sure. Hernandez also admitted he remained unsure that appellant was the shooter, because it was dark when the shooting occurred, the events occurred very rapidly and he did not get a good look at the shooter's face. (16RT 4254-4259.) Hernandez's headlights were off as he was backing out of his driveway. (16RT 4252-4253, 4274.)

When he testified at trial, however, Hernandez insisted that he had seen the shooter's face and that he was able to recognize appellant's face as the face of the man who stood in front of his car and shot him. (16RT 4253, 4262, 4266.) He attempted to explain the discrepancy between his preliminary hearing testimony and trial testimony by stating that he had been frightened of retaliation at the preliminary hearing and that he also was confused when he was on the witness stand. (16RT 4263, 4265, 4270–4271, 4273, 4284.) However, Hernandez admitted that he had spoken repeatedly with the investigating detective since the preliminary hearing. (16RT 4272.) He also acknowledged that the District Attorney's Office was helping him to pay his hospital bills. (16RT 4282.)

(c) Robert Elder

As noted above, Robert Elder testified as a defense witness in the first trial. He was unavailable in the second trial, so his testimony from the first trial was read to the jury. (19RT 4781.)

Elder, an executive chef for Amtrak, lived on the corner of Pine

and Pacific, and was a neighbor of Nery Hernandez. (8RT 2323.) He testified that around 7 p.m. on December 6, 1996, he was upstairs in his bedroom. He heard three shots and looked out of the window over the hedges and could see a man walking towards his car, shooting westward down the street towards Long Beach Blvd. The man then got into a small Nissan and drove off. (8RT 2325-2326.) Elder could not see the shooter's skin color; all he could see was that the man was a muscular man with a large Afro hairstyle, and that he was wearing a large Navy peacoat. He also saw the man's gun, which he described as a gun with a long barrel that looked like one used by Clint Eastwood in the "Dirty Harry" movies. (8RT 2326.) The shooter was not wearing a hat. He had a stocky build and big shoulders, and looked like he might weigh about 300 pounds. Elder watched the man shoot and proceed down 16th towards Pine. The man got into the back seat of the car, which as about 15 feet from Pine. Elder could see two other people in the car. (8RT 2327.)

Elder's son was outside, so as soon as he saw the shooter get into car and the car drove off, he went outside looking for his son. When he got outside, he saw his friend and neighbor, Nery Hernandez, had gotten out of his truck and was walking towards him Nery said, "they shot me." At the same time Elder looked up the street and saw another man had been shot and was trying to get up. As he got up he collapsed. Elder then went back into his house and called 911. He gave a statement to the police that night, but no police ever came back to interview him after that. (8RT 2330.)

On cross-examination, Elder denied having told the police that that the shooter was a dark-skinned male; he recalled being asked about this and told the police that he could not discern the man's

complexion. (9RT 2341.) Elder saw the man fire at least two shots pointing backwards towards Pacific as he walked by. He could only see the man's back. The car the shooter got into was sitting on 16th Street facing west towards Pacific. The vehicle drove off towards Pacific. (9RT 2343.)

When Elder came downstairs after watching the car drive off, Nery Hernandez was the first thing he saw as he came down the steps. Hernandez collapsed in Elder's son's arms and said he'd been shot. (9RT 2344.) Elder next saw a man on the ground with his bike about 10 yards away. He identified the man as Angel Villa. Villa tried to stand up and pick up his bike, but he collapsed on top of it. As Elder began to walk towards him, Villa grabbed his head – or tried to – and then collapsed. That is when Elder went for the phone. (9RT 2345.)

On redirect examination, Elder testified that the area in which the Villa and Hernandez shootings occurred was not well lit. He explained that the street lamps did not have bright, white lights, but instead have yellow lights. Elder had no doubt in his mind that he heard three shots, that he looked out the window and observed the man shoot twice and get into a car. Elder was shown the photo six-pack that included a picture of Jones, and Elder denied having seen Jones or any one else depicted in the photos that night. (9RT 2349-2350.)

2. The Forensic Evidence

(a) Thomas Gill

Thomas Gill was the forensic pathologist who performed the autopsy on Angel Villa. Gill testified that Villa died of a single gunshot wound to his right eye. Based on stippling and soot deposits, Gill

determined that Villa was shot from a distance of six inches, and that he died instantly. (15RT 3927-3933.)

D. Appellant's Whereabouts On the Night of the Crimes

1. Officers Kohagura and Anderson

Patrol officers Ernie Kohagura and Peter Anderson, both testified that they received a call of a shooting at 1700 Pacific Avenue, on December 6, 1996 at 6:54 p.m. They were told that two black, male suspects had been seen running eastbound through apartment buildings towards Pine. Based on this information they proceeded directly to an apartment building at 1708 Pine, which they knew to be a Crips hangout. (15RT 4020-4023; 16RT 4297-4300.)

(a) Officer Peter Anderson

Anderson testified that when they entered the courtyard of the apartment building they saw appellant standing outside Apartment Four, and that when appellant saw them he turned and ran inside the apartment and closed the door. This raised the officers' suspicion so they knocked on the door. (15RT 4023-4025.) A minute to two minutes later, a black woman opened the door. Appellant was standing next to her. Anderson and Kohagura explained that there had been a shooting a block away and they wanted to speak to appellant. Anderson talked to Sherman and Kohagura talked to appellant. They respectively filled out Field Identification cards on Sherman and appellant. (15RT 4025.)[8] The officers then conducted a "protective sweep" of the apartment and saw no guns in plain view.

---

[8] Detective William Collette, who was in charge of the homicide investigation in the instant case, testified that he had not seen these Field Identification cards and did not know whether they had been destroyed. (8RT 2265.)

They left without making any arrests. (15RT 4026-4027.)

Anderson was impeached with the police report prepared by Kohagura. (15RT 4029-4032.) The report stated that appellant, who was wearing a dark jacket with a hood and a dark beanie and cap, was standing *inside the doorway* of the apartment and that he turned and shut the door when he saw them. (15RT 4031-4032.) The report did not say that appellant looked "startled" and "ran into" the apartment when he saw the officers. (15RT 4032.) Anderson conceded that "suspicion aroused by looking startled" would have been the type of significant fact typically included in a police report. (15 RT 4033.)

The police report also did not say that appellant "ran" into the apartment and "slammed" the door really hard; it stated only that appellant immediately closed the door. (15RT 4035.) The report also stated that *appellant* himself opened the door after they knocked on it. (15RT 4034.) Anderson's testimony was that a black woman opened the door and appellant was standing next to her. (15RT 4035.) Anderson further testified that he was focused on appellant because he felt that appellant was a threat, based on the information he and his partner had received that two black males were possible suspects in the shooting. However, no statement was made in the report that the officers felt appellant was "a threat." (15RT 4035-4036.) When filling out a Field Identification card, police officers include significant information, such as anything unusual that they notice about that individual's behavior. (15RT 4037-4038.) Anderson testified that there were three males in the apartment but one of them, Leslie Rainey, appeared to be older than the other two, and appellant and Sherman fit the general description of the two suspects seen running

towards Pine. (16RT 4070-4073.)

(b) Officer Ernie Kohagura

Officer Ernie Kohagura testified that he observed appellant standing about five to six feet in front of an apartment door; that he made eye contact with appellant and appellant appeared startled and ran inside the apartment and closed the door. (17RT 4301-4302.) Kohagura further testified that he and Anderson knocked on the door and a minute later a woman opened the door with appellant beside her. (17RT 4303.) In addition to appellant and Sherman there was another black male, four black females and a child. (17RT 4304.) Kohagra filled out a Field Identification card on appellant, which he gave to Detective Conant, who was with the gang detail. He also wrote a report that same evening. (17RT 4308, 4314.)

Kohagura claimed that his report inaccurately stated that appellant was standing in the doorway – he should have stated that appellant was standing *by* the doorway. He also testified that the report and his prior testimony were inaccurate in stating that appellant (instead of a black female) opened the door when the officers knocked on it. (17RT 4309-4314.)

Kohagura testified that he asked appellant whether he had seen someone running through the courtyard of the apartment building. Kohagura conceded that appellant himself was neither out of breath nor sweating, and that Kohagura saw no blood on his clothes. Kohagura further acknowledged that had he observed any of the latter he would have noted it on the Field Identification card. Kohagura explained that they did not do a Field Identification card for the third black male in the apartment, because that man was older than appellant and Sherman, and Kohagura was not interested in

people over 25 years old, because they were not as likely to fit the gang profile. However, Kohagura's reported listed appellant's date of birth as February 22, 1969, which would have made him 27 at the time of the crimes. (17RT 4314-4318.)

2. Leslie Rainey

Leslie Rainey was 27 years old at the time of trial and had known appellant for about 10 years. He testified that on December 6, 1996, he was visiting with friends, including appellant, Sherman and four women at 1708 Pine, Apartment four. He knew only one of the women by name – "Carlissa." (15RT 3961-3963.) After 6 p.m., they were watching television and listening to the radio. Before 7 p.m., appellant stepped outside the apartment and said he would be standing right there, and they should let him know when it was time to watch "Martin." (15RT 3963.)

Although appellant and Sherman were both inside the apartment when Anderson and Kohagura knocked on the door, they were not together. Sherman was at the kitchen table and appellant stepped outside the door for a few minutes. (15RT 3965.) Because the apartment door was partially open, Rainey could see appellant moving around. (15RT 3967-3968.) Rainey peeked out and told appellant that "Martin" would be coming on after a commercial, and appellant told him he would be coming right in." (15RT 3965.) When appellant reentered the apartment he was neither sweaty nor out of breath. He also did not change his clothes or his appearance in any way. (15RT 3969.) While they were watching "Martin," a breaking news bulletin came on about the shooting, and showed helicopters shining lights down on Pine. (15RT 3987.)

Rainey testified that when appellant came back into the

apartment he did not seem hurried. Appellant walked back in, closed the door and locked it. He then moved closer to the television, and about twenty seconds later the police knocked on the door. Appellant said nothing about the police being outside the door. He did not seem nervous or upset. When the officers knocked on the door, appellant answered it. (15RT 3985-3986.)

According to Rainey, when Kohagura entered the apartment he said, "Kio, Swoop, why did you do that man?" Kio laughed and asked Kohagura what he was talking about. Kohagura said something happened outside, and then said "No, I'm just playing." (15RT 3987-3988.)

Rainey was arrested and interrogated by Detectives Conant and Thrash on December 13, 1996. He was in the interrogation room for approximately 12 hours; during that time the detectives ran back and forth between the room where Rainey was sitting and another room where they had appellant. They would tell Rainey something appellant allegedly said and then go back to appellant and tell him something Rainey allegedly said. They never told Rainey what was going on. (15RT 4003.)

During his interrogation one of the detectives said to Rainey, "you know your homeboy killed three people." Rainey testified that he replied that appellant had not killed anyone, that he was at the apartment when the shootings occurred and did not do anything to anybody. The detective then accused Rainey of lying to protect appellant and started harassing Rainey, including calling Rainey's mother a liar, but Rainey did not rise to the bait. (15RT 3995.)

Rainey denied that he told the detectives appellant and Sherman left the apartment together and were gone about five

minutes. He also denied having told the detectives that upon returning to the apartment, appellant and Sherman stated "Man, something happened outside. There's a lot of cops out there!" (15RT 3964.)

Rainey further denied telling the detectives that appellant had been beaten up by a Mexican the previous week; he testified that one of the *detectives* told *him* that appellant claimed to have told Rainey about a fight with some Mexicans. In reality, the only conversation Rainey had with appellant was about Rainey going with appellant to sell his car because appellant had no license and could not drive. (15RT 3969-3970.)

E. Gang-related Evidence

The prosecution presented two forms of gang-related evidence. First, it presented two witnesses, both police officers to whom appellant allegedly claimed membership in the Rolling 20's gang, in order to establish that appellant was still an active gang member. Second, it called a Long Beach police officer as a witness to provide "expert" testimony regarding gang behavior, as there was no physical evidence tying appellant to the crimes or any evidence establishing that appellant knew or was known by any of the victims.

1. Detective Steven Lasiter

Detective Lasiter testified that he had contact with appellant in May, 1990, and appellant told Lasiter that he belonged to the Rolling 20's gang and went by the name "Chicken Swoop." (15RT 3939-3940.)

2. Officer Michael Schaich

Officer Schaich testified in May, 1990, he had contact with appellant, who said he was an R20's Crip and that his name was "Key

Loc." Schaich was impeached with a May 2, 1990 notation on a computer printout from the G.R.E.A.T. database, a system that tracks gang members,[9] stating that appellant said he did not gang bang anymore. Schaich, when confronted with this evidence, said he was not aware of the entry and did not know where the information came from. (17RT 4289-4294.)

3. Officer Freeman Potter

Officer Potter, a member of the Long Beach police department, testified as a "gang expert." He testified that the Rolling 20's were one of the two largest black gangs in Long Beach, and that the Longos were the largest Hispanic gang in that area. (17RT 4371.) Potter explained that a particular gang will "claim turf;" that is, its members will claim a particular area where they live and hang out as their gang's territory and mark it with graffiti on buildings, walls, utility poles, vehicles, sidewalks, etc., in order to communicate to other gangs that this is their turf. (17RT 4371-4373.) Accordingly, graffiti on the building where the first shooting took place marked the area as Longo turf, and reflected that gang's hostility towards the nearby black and Samoan gangs. (17RT 4374-4375.) The graffiti was intended to intimidate the rival gangs. (17RT 4376.)

Asked to expound on the subject of intimidation, Potter testified that witnesses to gang violence typically do not want to get involved because of fear and intimidation. Potter stated that he had also had witnesses who initially gave statements and then subsequently refused to testify or would not show up in court sometimes because of

---

[9] "G.R.E.A.T." is an acronym for "Gang Recognition Evaluation and Tracking." (17RT 4424.)

actual threats, but also simply out of concern for the fact that gang members would be present in court during their testimony. (17RT 4377-4380.)

Speaking in general terms, Potter explained that gang violence enhances a gang member's reputation and clout within his gang. Speaking "hypothetically," Potter opined that a black member of the Rolling 20s Crips who was "beaten down" by an Hispanic gang member would be required to retaliate with violence to avoid looking weak to his fellow gang members.[10] Also, killing a witness would give a gang member a "prestigious sort of status" within the gang. Walking up to a rival gang member's residence and shooting him shows that a gang member is "crazy," meaning "pretty heavy duty hardcore," and this carries a lot of clout with the other gang members." (17RT 4394-4397.)

In an attempt to explain why the murder weapon was never found and why appellant was not wearing blood stained clothing when Officers Anderson and Kohagura came upon him within minutes of the shootings, Potter testified that it is common for gang members to either change clothing or wear layers of clothing and discard them, and also to dispose of their guns after a shooting, in order to get rid of incriminating evidence. (17RT 4397.)

Potter further testified that it is very undesirable to be a "snitch," i.e., someone who talks about gang activities to outsiders, such as

---

[10] There was no evidence establishing that appellant had been "beaten down" by any Hispanic gang members, other than the testimony of Detective Victor Thrash that Leslie Rainey reported that appellant told Rainey he had recently been beaten up by a Mexican. (16RT 4176.) As noted above, Rainey denied having made any such statement. (15RT 3969-3970.)

police officers. He stated that most gang members are involved in acts of violence and plan criminal activities, and talking to outsiders can implicate fellow gang members and lead to their arrest and incarceration. Snitching also includes implicating rival gang members. To have a "snitch jacket" means that one cannot be trusted and is therefore vulnerable to being assaulted or killed. (17RT 4399.)

Asked to explain certain aspects of gang lingo, Potter testified that using the term "cuz," means that the person being addressed is a fellow Crip. (*Ibid.*) On the other hand, using the term "Nigga" is like saying "hey man," and when a gang member says "Nigga needs the D.A. hit, that's who nigga needs hit," he is referring to himself in the third person and is saying that means he needs the D.A. shot. (17RT 4400-4401.) Potter also testified that gang members can be identified by their tattoos, and that by looking at appellant's tattoos he could tell that appellant was a Rolling 20s Crip. (17RT 4404-4407.)

F. Penalty Phase Evidence

1. Aggravating Evidence

The prosecution's case in aggravation consisted of presenting evidence of seven unadjudicated crimes, and a prior robbery conviction. The prosecution also presented victim impact evidence.

(a) Carl Milling Murder

On August 27 1990, after 2 a.m. Sergeant Keith Gregfrow of the Long Beach police department was called to a homicide scene. The victim was lying face down on the steps with his hands tied behind his back with a phone cord, and two gunshot wounds in his upper back. (20RT 5279-5280.) A neighbor reported hearing gunshots and seeing two people running from the scene of the crime.,

one approximately 5'6" to 5'7" tall and 160 to 170 pounds, and the other 5'5" tall and medium weight.[11] (20RT 5283.) No one was prosecuted for this crime.

Lakisha Johnson was living with her boyfriend, Carl Milling, who, the evening of August 26, 1990, brought three friends to the house, one of whom was appellant. They stayed until after midnight. Johnson subsequently fell asleep on the couch, and was awakened by Carl about 2 a.m. He asked for her brother's phone number and then left. When Carl returned, masked men entered the house, put guns to their heads and told them to lie on the floor with their heads down. The men demanded money. One of the men took Johnson outside at gunpoint to the garage. While outside Johnson heard shots. Johnson testified that she recognized one of the men as appellant, because one of his eyes was "droopy." Johnson testified that there were three masked men, however, on the night of the crime she told the police that there were two men and that she recognized one of the men as a man named Brian Miller, who was about 5'10" and weighed about 200 pounds. In her statement to the police she stated that the other suspect was about 5'7," and that it was the second suspect who took her outside to the garage. Several days later she told the police that there was a third suspect. Johnson testified that the third suspect was appellant. (21RT 5304 -5327.)

Homicide Detective Dennis Robbins testified that he interviewed Alerey Ambrose, who told Robbins that appellant had said he was a Rolling 20s gang member and that he was going to do

---

[11] Appellant is 6'3" tall, and at the time of his arrest in the instant case weighed 175 pounds. (1CT151.)

a robbery. Robbins testified that Ambrose told him that appellant showed Ambrose a rag that he planned to use as a mask. According to Robbins, Ambrose told him that Ambrose, Carl Milling and appellant had met at someone's house and then all went over to Milling's house. Ambrose told Robbins that appellant subsequently left on his bike. (21RT 5345-5348.) Robbins testified that the case was still open and no one had been charged. (21RT 5350.)

Alerey Ambrose testified that he was at Milling's house with appellant on August 26, 1990, but denied having told Robbins any of what Robbins testified Ambrose told him. (21RT 5330-5338.)

(b) Sao Sarom Carjacking

Sao Sarom testified that he was carjacked at gunpoint on June 6, 1990 by a group of three to four black men. Sarom identified appellant as the one who held the gun, pulled Sarom out of his car by his collar and told him that he would shoot him if he called the police. Sarom's car was returned a week later. Although Sarom picked appellant's photo out of a photographic lineup, when he later came to court to testify against appellant he told the district attorney that appellant was not the man. Sarom testified that he lied to the district attorney about this out of fear. (21RT 5371-5377.)

Officer Terry Madison with the Long Beach police department testified that three days after the car was stolen Madison saw the car and stopped it. Appellant was riding as a passenger in the car. (21RT 5388-5390.)

(c) Artis Lisby Robbery

Artis Lisby testified that he was held up at gunpoint on May 15, 1991 by someone whom Lisby owed money for a drug transaction. The man shot his gun in the air and drove off. Lisby testified that the

man had a very dark complexion, and although he told the police that the man was appellant, appellant was not the man who held him up (21RT 5397-5408.) Officer John Stolpe testified that Lisby told him that he and appellant had argued over money Lisby owed appellant and appellant pulled out a gun and fired a shot and then took off running. Lisby further told him that appellant returned with a larger gun with a towel wrapped around it, and then took off in a black car with someone else. (21RT 5491-5496.)

(d) Ronald Broussard Murder

Several police officers testified that appellant was arrested on September 23, 1991, for the murder or Ronald Broussard, after he was identified in a photo lineup by an eyewitness to the shooting of Broussard, Armando Hernandez. Appellant told Timothy Cable, the investigating detective that he was asleep at his mother's house when the shooting took place and that his mother woke him up to tell him about the shooting. Appellant told Cable that Broussard (whom appellant referred to as "Chubby," had been shot by a Mexican who was killed the next night. Hernandez did not identify appellant in a subsequent live lineup, and the case was dismissed. (21RT 5411-5438.)

(e) Matthew Ferguson and Quincy Saunders Shootings

Matthew Ferguson testified that at 11:30 p.m. on April 25, 1990, he had just returned home from work as a security officer, when he heard shots being fired in the backyard and also in the front. One of the shots hit him in the foot, but he did not see the person who shot him. (21RT 5465-5467.) The same night Quincy Saunders was shot in the hand and buttocks. (21RT 5469-5473.) Appellant was

detained because he fit the description of the shooter. (21RT 5449.) A .38 revolver was found in the back seat of the car he was riding in. Appellant stated that he carried the gun for self-protection and that he had shot at a member of the Westside Longos who pulled a shotgun on him. (21RT 5271-5274.)

(f) Possession of a Loaded .32 Revolver

While serving a search warrant on June 14, 1990, as part of a drug investigation Long Beach police officer Garth Miller found a .loaded .32 revolver in appellant's pants pocket. (21RT 5499-5501.)

(g) Victim Impact Testimony

Angel Villa's sister and widow and Mario Lopez's mother testified about the impact of their respective loved one's murders. (21RT 5509-5534.)

2. Mitigating Evidence

(a) Valerie Williams

Valerie Williams, appellant's maternal grandmother testified that appellant was a sweet, obedient child and a good father to his own children. She testified that all of appellant's brother's had spent long periods in prison, and that appellant's father had been a drug addict and alcoholic. Williams noted that appellant's mother was a devout Christian, and that she and Williams had done the best they could raising appellant. (21RT 5538-5551.)

(b) Robert Robinson

Robinson testified that he worked for a gang prevention/intervention program, and that he had brought appellant in to talk to kids to dissuade them from joining gangs. Robinson determined that appellant was no longer an active gang member, and he was hoping to hire him to work in the program. He felt appellant

was sincere about wanting to help the community and changing his life. (51RT 5584-5581.)

(c) Helene Cummings

Cummings testified that she was a 29 year employee of the Parks and Rec Department and had know appellant since birth. She testified that appellant had been a good child. She saw him when he got out of prison and he hugged her and told her he was going to get his life together. Cummings was not aware that appellant was a gang member. (21RT 5590-5597.)

(d) Jonathan Chaney

Chaney, the teen director at the Boys and Girls Club of San Pedro and the JV coach at San Pedro High School testified that he and appellant grew up together and played basketball together. Appellant was involved in community efforts to stop gang violence and had participated in negotiating a gang truce about 1992 or 1993. (21RT 5602-5607.)

Several additional witnesses testified that appellant had been a good child and was a good father; that he had been a good athlete in school. Several also talked about his efforts to promote rap music (21RT 5618-5720.)

Appellant's mother, Doris Vaughn, testified about appellant's father's drinking and drug problems, and how appellant lost respect for his father because of them. She denied knowing about appellant's gang involvement. (21RT 5721-5736.)

Appellant's girlfriend and mother of his three children, Melissa Bedolla, testified that appellant was a devoted father. She noted that she was half-Mexican and that appellant was close to her Mexican

father. She also denied knowing about his gang involvement or criminal record. (21RT 5739-5749.)

*****

ARGUMENT

I.

APPELLANT WAS DEPRIVED OF HIS RIGHTS TO CONFRONT ADVERSE WITNESSES AND TO A FAIR TRIAL BY THE TRIAL COURT'S RESTRICTION OF CROSS EXAMINATION OF PROSECUTION WITNESSES REGARDING THE CIRCUMSTANCES LEADING UP TO ANNA GRANILLO'S ELEVENTH HOUR DECISION TO CHANGE HER STORY AND TESTIFY THAT SHE HAD SEEN APPELLANT ON THE GROUNDS OF THE APARTMENT COMPLEX SHORTLY BEFORE THE SHOOTINGS

A. Introduction

Appellant sought to cross-examine Anna Granillo, Veronica Mungia and Detective Collette, to elicit the fact that Mungia had been told by the Deputy District Attorney ("prosecutor") that without eyewitness testimony, appellant would "walk," and that within 24 hours of that conversation Mungia's sister, Anna Granillo, who had previously told the police that she was in the back bedroom at the time of the shootings and did not see anything, came forward and agreed to testify that she saw appellant in the area shortly before the shooting. Defense counsel argued that both the substance and timing of the discussion between the prosecutor and Mungia were relevant to impeach Granillo. Although the trial court allowed trial counsel to elicit the fact that Granillo came forward after Mungia spoke with the prosecutor, the court restricted counsel from asking Mungia and Detective Collette about what the prosecutor told Mungia during that conversation. Consequently, the jury was unaware that the prosecutor told Mungia the case against appellant was weak, and that without an eyewitness to identify him, appellant

would likely "walk."

Had the jury had this information, it would have revealed Granillo's strong motive to fabricate, and would thus have severely undermined the credibility of her testimony. Because Granillo was the only witness who placed appellant at the scene of the crime, her testimony identifying appellant was crucial to the prosecution's case. Appellant should therefore have been allowed to pursue the above-described line of cross-examination, and the court's ruling preventing him from doing so violated his Sixth and Fourteenth Amendment rights to confront adverse witnesses, to present a defense and to a fair trial. Moreover, because the jury was deprived of critical information bearing on Granillo's credibility, the error cannot be deemed harmless.

B. The Circumstances Leading up to Anna Granillo's Testimony

On December 9, 1997, after jury selection in the first trial had already commenced, the prosecutor announced that a new eyewitness had come forward who claimed to have seen two black men enter the apartment complex where crime occurred, shortly be the victims were shot. This witness was Anna Granillo, the sister of Mario Lopez and Veronica Mungia. (1RT 139.) Granillo had been interviewed by the police on December 12 1996, the day of the murder, and had told them that she was in the back bedroom of the apartment when the shootings took place and did not witness the shootings or have any idea who the culprits were. However, Granillo was now saying that she had been doing her laundry during the afternoon and early evening on the day of the crime; that she saw appellant and Sherman in the alleyway as she walked back and forth

from her apartment to the laundry room; and saw appellant and Sherman enter the apartment complex as she walked back from the laundry room to her apartment right before the shooting. (1RT 196.)

The prosecutor explained to the court that he met with Veronica Mungia on December 8th, to discuss "how the case looked" and the "state of the evidence." (1RT 138.) He told Mungia that he needed to talk to the two people sitting outside the apartment with Mario Lopez when he was shot, "Casper" and "Tricky." He also asked Mungia about a man named "Joker," whom he believed could provide a motive for the killing. (*Ibid.*) Mungia later called the prosecutor and told him that none of the aforementioned witnesses would cooperate, but that Anna Granillo had seen two men enter the apartment complex." Granillo subsequently gave a statement to one of the detectives and identified appellant and Sherman as the men she had seen. (1RT 138-139.)

Defense counsel, who apparently had never before been apprised of either Anna Granillo's existence or her December 1996 statement to the police, argued that the prosecutor had improperly concealed the identity of a witness. She further argued that the jury was entitled to hear about the events precipitating Granillo's new statement; specifically, that the prosecutor went to Mungia and told that he did not have enough witnesses, and when the witnesses the prosecutor said he needed refused to cooperate, Mungia instead presented Granillo as a witness. (1RT 197-198; see also 1CT Supp.V 81-84 [Declaration of Thomas Garvin, Private Investigator].) Defense counsel argued that the timing and circumstances under which Granillo came to change her story were "suspicious," and created an inference that she changed her story and agreed to testify

because she knew the prosecutor otherwise did not have enough witnesses to convict appellant. (6RT 1770-1773.)

C. The Trial Court's Ruling in the First Trial

In the first trial, prior to the opening statements defense counsel made an in limine motion seeking the court's permission to cross-examine Victoria Mungia about the December 8th conversation she had with the prosecutor. The latter objected on the grounds that such testimony would be "irrelevant hearsay."

Defense counsel explained that she was not offering the evidence for its truth, but rather to show that Mungia, based on what the prosecutor told her, was afraid that the prosecutor would be unable to get a conviction if she could not find witnesses for him. Counsel argued further that the evidence was "extremely relevant" to establish the events leading up to Granillo's coming forward with her new story. (6RT 1763-1773.) The prosecutor maintained that Mungia's state of mind was irrelevant. (6RT 1774.) The court thereupon ruled that defense counsel could cross-examine *Granillo* about the circumstances surrounding her change in statement, but that counsel could not bring up the conversation between Mungia and the prosecutor, and it would not allow any testimony regarding that conversation. (6RT 1774 -1775.)

When defense counsel cross-examined Mungia, she attempted to ask Mungia about the circumstances that led her to providing information to the prosecutor on December 8, 1996, about Granillo being a possible witness. The prosecutor objected, the court admonished defense counsel not to elicit testimony from Mungia regarding the content of the conversation she had with the prosecutor. (7RT 1856-1858.)

During defense's counsel's cross-examination of Granillo, defense counsel asked her whether Mungia told that she had met with the prosecutor at his office, at which point the prosecutor objected on hearsay grounds. He further complained that defense counsel was trying to accuse him of concealing evidence or presenting false testimony. (7RT 1927-1929.) The court told defense counsel that she could ask Granillo whether Mungia told Granillo that she had talked to the prosecutor about the case, and whether Mungia urged Granillo to come forward and testify, but could not ask her what the prosecutor said to Mungia about the strength of his case, because that was hearsay. (7RT 1929-1930.)

Granillo testified that Mungia told her to contact the prosecutor. (7RT 1932.) She claimed that on the day of the crime, she lied to the police about having been in the back bedroom and not having seen the shooters, because she wanted to get on with her life and not relive the experience. (7RT 1914.) She knew nothing about the trial until Mungia came to her house and told her, and she felt guilty about not having come forward before. (*Ibid.*)

D. The Trial Court's Ruling in the Second Trial

During defense counsel's cross examination of Mungia in the second trial, Mungia testified that she had a conversation on December 8, 1996, with a different prosecutor than the one trying the case, and afterwards she provided the other prosecutor with Granillo. At the time Mungia was of the "state of mind" that she needed to find additional witnesses. (14RT 3708-3709.) Defense counsel then asked Mungia whether, as a result of her December 8th conversation with the other prosecutor, she was of the state of mind that she needed to obtain additional witnesses because the case was weak.

The prosecutor objected to this question as calling for speculation and the court sustained his objection. (14RT 3709.)

Although Granillo acknowledged upon cross-examination that she had come forward because of a conversation Mungia had with Prosecutor on December 8, 1996, defense counsel did not attempt to ask Granillo any questions about the details of her sister's conversation with the prosecutor. (15RT 3801-3802.) However, counsel did attempt to elicit this information during her cross-examination of Detective Collette. The prosecutor objected on hearsay grounds and the court sustained his objection.

E. The Evidence Counsel Sought To Elicit Was Not Hearsay

"Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code § 1200(a).) As trial counsel explained, she was not offering the prosecutor's assessment of the strength of his case for its truth, but rather to show Veronica Mungia's state of mind when she spoke with Anna Granillo after meeting with the prosecutor and, more importantly, Anna Granillo's state of mind when she came forward with her new story. Counsel's purpose in eliciting this testimony was to prove that Granillo had a motive to lie. Evidence of motive is admissible under Evidence Code section 780, subd. (f),(*People v. Johnson* (1984) 159 Cal.App.3d 163,168), and is not hearsay. (*People v. Bolden* (1996) 44 Cal. App. 4th 707-714-715 [evidence offered to show motive is not hearsay]; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [evidence of declarant's statement is not hearsay when offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such

information to be true, acted in conformity with that belief].) Exclusion on hearsay grounds of what the prosecutor said to Mungia about the state of the evidence was therefore erroneous. (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392 (court erred in excluding as hearsay evidence that was offered for limited purposes of impeachment).)

F. Appellant Was Deprived Of His Right Under The Sixth And Fourteenth Amendments To Cross-examine Granillo, Mungia and Collette About What Granillo Had Been Told About Mungia's Conversation with the Prosecutor In Order to Establish that Granillo had a Motive to Fabricate

The trial court's restriction of defense counsel's cross-examination on the content of Mungia's December 8th conversation with the prosecutor, violated *Davis v. Alaska* (1974) 415 U.S. 308, in which the Supreme Court held that the right to confrontation guaranteed by the Sixth and Fourteenth Amendments, includes the right to cross-examine witnesses to show their possible bias or self-interest in testifying.

In *Davis*, the prosecution had moved for a protective order restricting the defense from making any reference to the juvenile record of the prosecution's key witness, Green, during the course of cross-examination. Green, like Anna Granillo in the instant case, was a crucial witness for the prosecution. In opposing the protective order, Davis' counsel argued that he was trying to establish – or at least argue – that Green had acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of Davis in order to shift suspicion away from himself as the robber, but he might have been subject to undue

pressure from the police, and made his identification under fear of possible probation revocation. (415 U.S. at pp. 310-311.) The trial court granted the protective order, and the Supreme Court ruled that such restriction of Davis' cross-examination of Green was a violation of Davis' right of confrontation; that Davis was entitled to show Green's susceptibility to undue pressure. The Court declared:

> The partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Green v. McElroy*, 360 U.S. 474, 496 . . . (1959) . . . (T)he jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas v. Alabama*, 380 U.S. at 419 . . . The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford v. United States*, 282 U.S. 687 . . . (1931), as well as Green's concern that he might be a suspect in the investigation.

(415 U.S. at pp. 316-318, emphasis added.)

The situation presented in the instant case is materially indistinguishable from that in Davis. In both cases, defense counsel were seeking to discredit testimony of a crucial prosecution witness, the accuracy and truthfulness of which were key elements of the prosecution's case. In both cases, defense counsel were seeking to

create an inference that the witness was giving false testimony as a result of undue pressure. As in *Davis*, the trial court's restriction of defense counsel's cross-examination, violated appellant's right of confrontation guaranteed by the Sixth and Fourteenth Amendments. (*DePetris v. Kuykendal* (9th Cir.2001) 239 F.3d 1057,1062 [where defendant's guilt hinges largely on testimony of prosecution witness, erroneous exclusion of evidence critical to assessing witness' credibility violates the Constitution].)

While a trial court retains discretion to impose reasonable limits on cross-examination based on concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679), it is has nevertheless been emphasized that where the prosecution's case turns on the credibility of a prosecution witness, defense counsel must be given a maximum opportunity to test the credibility of that witness. (*Banks v. Dretke* (2004) 540 U.S. 668, 688; *Murdoch v. Castro* (9th Cir. 2004) 365 F.3d 699, 704.) Appellant was denied an opportunity to effectively test Granillo's credibility by virtue of the trial court's improper restriction on the scope of defense counsel's cross-examination.

G. Appellant Was Also Deprived Of His Right To Due Process Of Law, His Right To Present A Defense, And His Right To A Reliable Penalty Determination, Due To The Trial Court's Improper Restriction Of Defense Counsel's Cross-examination

A state court cannot arbitrarily reject a defendant's evidence or impede his right to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284; *Green v. Georgia* (1979) 422 U.S. 95.) In *Chambers*, the Supreme Court declared that "[t]he right of an

accused to due process is, in essence, the right to a fair opportunity to defend against the State's accusations," and further observed that the right to confront and cross-examine witnesses has long been recognized as essential to due process. (410 U.S. at p. 294.) The Court explained that:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' [Citations omitted.] It is indeed 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. [Citations omitted.] Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases bow to accommodate other legitimate interests in the criminal trial process. [Citation omitted.] But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interests be closely examined. [Citation omitted.]

(*Id.* at pp. 294-295.)

In the instant case, the trial court's evidentiary ruling was legally erroneous and therefore arbitrary. Indeed, as has been shown above, the court had no "legitimate interest" in precluding cross-examination of Mungia and Collette about whether Granillo had been told by Mungia that the prosecutor feared that appellant would not be convicted unless a witness could place him at the scene of the crime. By contrast, the defense had a legitimate interest in placing that evidence before the jury, because it severely undercut Granillo's credibility, by showing she had a motive to change her story to provide the prosecutor with evidence connecting appellant to the crime. The court's erroneous ruling denied appellant the opportunity to establish this critical fact. Appellant was thus deprived

of his right to a fair trial under the Due Process Clause of the Fifth and Fourteenth Amendments, and his right to present a defense guaranteed by the Sixth Amendment. (*DePetris v. Kuykendal*, *supra*, 239 at p. 1062 [erroneous exclusion of critical corroborative defense evidence violates both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense].

In addition, to the extent that the jury convicted appellant of special circumstance murder on the basis of Anna Granillo's testimony, the reliability of such conviction and subsequent death sentence are substantially undermined by the fact that appellant was improperly precluded from subjecting Granillo's credibility to meaningful testing, in violation of appellant's right to a reliable penalty determination guaranteed by the Cruel and Unusual Punishment Clause of the Eighth Amendment. (*U.S. v. Cronic* (1984) 466 U.S. 648, 656 (without an opportunity to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results); *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed); *Beck v. Alabama* (1980) 447 U.S. 625, 638 (Eighth Amendment mandates invalidation of rules that diminish reliability of guilt determination in capital case).)

H. By Restricting Counsel's Cross-Examination, The Court's Erroneous Ruling Prevented Appellant From Pursuing Critical Impeachment And Was Therefore Highly Prejudicial

Although the jury was told that Granillo had changed her story,

and that she had done so following a conversation between her sister and the prosecutor, the jury was not told that during that conversation the prosecutor had told her sister that his case against appellant was weak, and that he believed that appellant would be acquitted unless Mungia could find witnesses to the crime who would identify appellant as the shooter. They also were not told that Mungia could not get "Casper," "Tricky," and "Joker" to testify, so she approached Granillo for help. This information was critical to impeach Granillo's testimony that her statement on the night of the crime was false, and that she was now telling the truth. It was also critical to impeach her explanation of why she had initially given a false statement, and why she decided to come forward with "the truth," a full year later, just as the case was going to trial.

Granillo's testimony was the only evidence placing appellant at the scene of the first shooting. It also bolstered Nery Hernandez and Maria Jaramillo's testimony identifying appellant as the man who shot Hernandez and Jose Villa. Without Granillo's testimony, the prosecution's case against appellant (as the initial prosecutor himself acknowledged) was extremely weak, and it is highly doubtful that the prosecution could have obtained a conviction. The court's arbitrary restriction of appellant's confrontation of Granillo regarding her decision to "come forward," thwarted appellant's ability to effectively impeach the credibility of this key prosecution witness. Respondent cannot establish that the court's error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, for all of the foregoing reasons, appellant's conviction and death sentence must be reversed.

*****

II.

THE ERRONEOUS EXCLUSION OF ROBERT ROBINSON'S TESTIMONY IN THE GUILT PHASE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO PRESENT HIS DEFENSE AND TO A FAIR TRIAL AND RELIABLE VERDICT

A. Introduction

The prosecution's theory was that appellant was a member of the Rolling 20s, and that the shootings in the instant case were motivated by gang rivalry between the Rolling 20s and the East Side Longos. To prove that appellant was a member of the Rolling 20s gang, the prosecutor presented the testimony of two police officers, that in 1990, appellant had claimed membership in that gang (15RT 3935, 3940), and appellant was ordered to show the jury tattoos indicative of such membership. (17RT 4405-4406.)

Appellant's defense was that by December 1996, when the crimes took place, he was no longer an active gang member, and was mistakenly identified as the killer in this case. In furtherance of that defense, appellant sought in the guilt phase to introduce the testimony of Robert Robinson, that at the time of appellant's arrest for the crimes herein, Robinson was in the process of hiring appellant to work as a counselor in a city-run gang prevention program, in which former (i.e., no longer active) gang members counseled young people against joining gangs and engaging in violence. (18RT 4701.) As part of the screening process, Robinson determined that appellant was no longer an active gang member. He did so on the basis of (1) his interview of appellant, in which appellant stated that he had left the gang, (2) discussions with numerous members of the community, and (3) his personal

observations of appellant's interactions with youth served by the program. (18RT 4694-4699.)

In a hearing held under Evidence Code section 402, Robinson testified that he was employed as a gang prevention outreach counselor with the Long Beach Parks, Recreation and Marine Department. The function of his program was to stop gang violence and find jobs for youth in the community to keep them from ending up in jail. (18RT 4691.) He added that the employees of the program worked closely with the Long Beach police. (18RT 4692.) In his job, Robinson worked primarily with gang members and former gang members. He himself was also a former gang member. (*Ibid.*)

Robinson testified that he became acquainted with appellant two years before when appellant came to Robinson's office in the process of trying to find a job. Robinson interviewed appellant and appellant told Robinson he wanted to work for Robinson's organization because he had seen how well their program was working. Because of appellant's strong interest Robinson wanted to give appellant a job as a violence prevention counselor. In the process of "screening" appellant, Robinson took him to some of the outreach programs to see how well he would do, and appellant did well talking to the kids, of whom a number were gang members. (18RT 4693.) Robinson explained that his objective was to hire an ex-gang member from one of the rival Long Beach gangs, who was familiar with the problems going on in the community, and would have "some kind of influence talking to some of these youngsters." In order to determine whether appellant was no longer an active gang member, Robinson stated that as part of his usual hiring practice he had thoroughly checked appellant out, talking to many

people in the community, including gang members – even those belonging to rival gangs. In doing so, Robinson learned appellant was no longer active and had been "pretty clean." Robinson also asked appellant himself whether he was still in the gang, and appellant told him that he was not anymore, and that he was trying to get his life together because he had children. Robinson noted that it was not uncommon for gang members to get out of the gang once they started having adult responsibilities. Had appellant not been arrested on the charges for which he was being tried, Robinson would have hired appellant. (18RT 4695.)

When asked on cross-examination how he knew that appellant was no longer active with the Rolling 20s, Robinson explained:

> Because I've been out in the community. I'm an outreach worker, and I know a lot of people out in the community. And what we do when we screen people is we check with both sides, the 20s, the Insanes,[12] and we find out really, you know, if this guy has been doing anything or he's been doing this. And a lot of people, they just give you straight answers, you know: "the dude been laying low. He ain't been tripping. I seen him the other day. We wave at each other." And that let (sic) us know that his mind is at a different level."

(18RT 4697-4698.) Robinson further explained that such an investigation involves talking to many different people in the community (18RT 4698.) Robinson also described how the manner in which appellant related to the teens served by the program persuaded him that appellant was no longer gang-banging:

Just seeing as reactions how he felt when we went on

---

[12] Reference to another Long Beach black gang known as the "Insane Crips." (17RT 4371.)

> little interviews or what we call our presentations. We do interviews, the kids, Parks, Recs., and Marine which we work with all the parks, the teen centers and stuff. Sometimes we even go to city colleges. And just by his conversation, the way he fitted in and was talking to the kids, letting them know there's other things out there letted (sic) me know that his mind was in a different place.

(18RT 4699.)

The prosecutor opposed the admission of Robinson's testimony on several grounds. He argued that appellant's statement to Robinson and the statements of others in the community were inadmissible hearsay. He further argued that Robinson could not offer the "expert" opinion that appellant was no longer active in the gang, and he also argued that Robinson's testimony was irrelevant.

The trial court disagreed with the prosecutor on the last point – it found the evidence relevant to rebut the prosecution's evidence that appellant was a gang member. (18RT 4709.) However, it agreed with the prosecutor that any testimony regarding statements made by appellant or others to Robinson would be inadmissible hearsay. (18RT 4710-4711.) In addition, although the court initially, ruled that Robinson could testify about his own observations of appellant during the time appellant was interacting with the youth (18RT 1411), it ultimately decided to exclude this testimony as well The court ruled as follows

> I am going to preclude the testimony of Mr. Robinson for the following reasons:
>
> Mr. Robinson when questioned concerning the bases for his opinion had three different bases for his opinion.
>
> The first was the defendant's own statement that he was

no longer a gang member;

The second, and apparently more important, was the – Mr. Robinson's interviewing other persons in the community with whom he has contact, both fellow Rolling 20s members as well as members of rival gangs, concerning the current activities of the defendant with respect to gang activity.

And, then, third, his observations of the defendant interacting with persons on the street during – apparently, during a (sic) outreach program.

And Mr. Robinson – it appears that that was a confirming factor in Mr. Robinson's mind that based upon what he had heard and based upon his observations together that he believed that the defendant was in the process or leaving the gang or had left the gang.

I believe that he did testify previously that he thought that Mr. Jones was in the process of breaking off his relationship with other gang members, and then today it was his opinion that he either had left the gang or had made a decision, at least, to leave the gang.

And because the opinion is based on three factors and not just a single factor, and because the (sic) two of the factors were apparently, according to Mr. Robinson's testimony, significant in his determination and his ultimate opinion with respect to the defendant's current gang membership, I don't believe that – I think that the jury would be misled if they were – because of the hearsay problem, if they were to hear from Mr. Robinson that the only basis about which he could testify would be the personal observations, and that would not give a complete record or complete information about Mr. Robinson's opinion.

And I don't believe that there is sufficient expertise established by Mr. Robinson. *He does have a*

> *significant history or involvement either personally or with a gang or now more recently since he is no longer an active gang member – no longer a gang member at all, his work with gang members on a daily basis gives him sufficient experience to be knowledgeable about gangs*, but not sufficient basis on observation alone of the defendant's interaction – and we don't know how many occasions – with persons on the street to form that opinion.

(18RT 4721-4723, emphasis added.)

As will be demonstrated below, the trial court abused its discretion in excluding Robinson's testimony. Due to his gang expertise (acknowledged by the trial court), Robinson should have been permitted to testify as an expert witness pursuant to Evidence Code sections 720 and 801, that, in his opinion, appellant was no longer an active gang member. As an expert witness, he could have cited as the basis of his opinion his interviews of appellant and of others in the community, as well as his own observations of appellant's conduct and demeanor.

However, even if this Court were to find that Robinson was merely a percipient witness, his testimony regarding appellant's reputation in the community at the time the crimes occurred, would still have been admissible as reputation evidence under Evidence Code sections 1102 and 1324, and his opinion based on his own perceptions of appellant's manner and conduct while interacting with the teens targeted by the program, would further have been admissible under Evidence Code sections 800 and 1102.

The following discussion will further establish that the erroneous exclusion of Robinson's testimony deprived appellant of his constitutional rights to present his defense, to due process of law

and to a fair trial and reliable verdict. The error was also extremely prejudicial and requires reversal under both state and federal law.

B. Robinson Should Have Been Permitted to Testify As a Gang Expert That, In His Expert Opinion, Appellant Was No Longer An Active Gang Member

1. Robinson Was Qualified to Testify as a Gang Expert

The Evidence Code defines an expert witness as a person who has "special knowledge, skill, experience or training to qualify him as an expert on the subject to which his testimony relates." (Evidence Code § 720 (a).) The latter attributes may be established by the witness's own testimony." (Evidence Code § 720 (b).)

In the instant case, defense counsel argued that based on his extensive experience as both a gang member himself and someone who worked on a daily basis with gangs and gang members, Robinson was indeed an expert on gangs. (18RT 4701-4702.) The prosecutor did not dispute this, and the court acknowledged that Robinson had substantial experience with and, therefore, knowledge of gangs. (18RT 4723.) Therefore, while Robinson was not formally qualified as gang expert, the court made a finding that was, for all intents and purposes, functionally equivalent.

2. A Gang Expert Is Permitted To Testify Whether, In His or Her Opinion, the Defendant Is or Is Not an Active Gang Member

This Court has upheld the use in criminal trials of gang experts; i.e., individuals with knowledge of gang culture and behavior, matters which are "sufficiently beyond common experience that the opinion of an expert witness would assist the trier of fact." (Evidence Code § 801(a); *People v. Gardeley* (1997) 14 Cal.4th 605,

617; *People v. Ward* (2005) 36 Cal.4th 186, 210. Moreover, a gang expert may permissibly testify that, in his or her expert opinion, the defendant is an active participant of a particular gang and his behavior is consistent with the practices of that gang. (*People v. Gardeley, supra,* 14 Cal.4th at pp. 613, 624; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Gamez* (1991) 235 Cal.App.3d 957, 964, (disapproved in part on other grounds in *People v. Gardley, supra*, 14 Cal.4th at 624, fn 10); *People v. Garcia* (2007) 153 Cal.App.4th 1512-1514; *People v. Zermeno* (1999) 21 Cal.4th 927, 929-930; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464; 185 Cal.App4th 309, 318.)

Had he been allowed to testify, Robinson would have stated his opinion that appellant was an ex-gang member who was no longer participating in gang activities. If it is permissible for a gang expert to testify that the defendant *was* an active gang member when the crime occurred, it must also be permissible for him to state the opinion that the defendant *was not* an active gang member at that time. There is no logical basis upon which the two can be distinguished. The trial court therefore abused its discretion when it precluded Robinson from testifying accordingly.

3. As a Gang Expert Robinson Could Rely On Hearsay, Including Appellant's Own Statements, In Forming His Opinion, And Could Testify as To the Basis Of That Opinion

An expert witness may, on direct examination, describe the reasons for his or her opinion and the matter on which the opinion is based. (Evidence Code § 802.) Assuming that it meets the threshold requirement of reliability, "matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion

testimony." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618, emphasis in original). This includes hearsay. (*Ibid.*)

Thus, statements of unidentified gang members, together with personal observations and experience, as well as conversations with the defendant himself, have been held sufficiently reliable to be admissible as a basis for a gang expert's opinion. (*Id.* at p. 620); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Gonzalez* (2006) 38 Cal.4th 932, 949; *People v. Gamez*, *supra*, 235 Cal.App. 3d at p. 968; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904.) As explained by the court of appeal in *Gamez*:

> We fail to see how the officers could proffer an opinion about gangs, and in particular about gangs in the area, without reference to conversations with gang members. While the credibility of those sources might not be beyond reproach, nevertheless, as the court in *McDaniels* and the Law Revision Commission to Evidence Code section 801 note, '[t]he variation in the permissible bases of expert opinion is unavoidable in light of a wide variety of subjects upon which such opinion can be offered.' (*Ibid.*) To know about the gangs involved, the officers had to speak with members and their rivals. Furthermore, the officers did not simply regurgitate what they had been told. Rather, they combined what they had been told with other information, including their observations, in establishing a foundation for their opinions. The statements of gang members, which in part formed the bases of the officers' opinions, were not recited in detail during the officers' testimony but were referenced in a more general fashion, along with other corroborating information.

(235 Cal.App. at p. 968; see also *People v. Gonzalez*, *supra*, 38 Cal.4th at p.949 ["A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable"].)

The kinds of sources that Robinson relied upon in forming his opinion that appellant was no longer an active gang member were the same as those relied upon by the gang experts in *Gamez*, *Gonzalez*, and the other cases cited above. Furthermore, the reliability of the information Robinson cited as the basis for his opinion, was enhanced by the fact that Robinson had himself used it to determine whether appellant would be suitable to counsel youth against joining gangs and engaging in violence. Robinson stated clearly that he made his determination on the basis of a thorough investigation that involved consultation of multiple sources.[13] Under the circumstances, the trial court's ruling that it was inadmissible because it was hearsay was legally erroneous, and the court therefore abused its discretion in excluding the evidence.

C. Even If Merely a Percipient Witness, Robinson Should Still Have Been Allowed to Testify That (1) Appellant Had a Reputation When the Crimes Were Committed as Someone Who Had Eschewed the Gang Lifestyle, and (2) Robinson's Opinion, Based Upon His Personal Perception of Appellant's Behavior, Was That Appellant Was Not an Active Gang Member

1. Reputation Evidence

Robinson clearly qualified to testify as an expert on Long Beach gangs, but even if he were strictly a percipient witness, he should have been permitted under Evidence Code sections 1102

---

[13] Robinson explained that when his organization hires former gang member to work as gang prevention counselors they screen potential candidates by interviewing "many different people" to determine whether or not the candidate is truly no longer actively involved with a gang. (18RT 4697-4698.)

and 1324, to testify that appellant's reputation in the community was that he was not a gang member at the time of the crime. Decisions of this Court establish that reputation testimony is admissible even though based on hearsay. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1312; *People v. Eli* (1967) 66 Cal.2d 63, 78; *In re Freeman* (2006) 38 Cal.4th 630, 640.)[14] In *McAlpin*, *supra*, 53 Cal.3d at pp. 1311-1312, in which the defendant was charged with molesting his girlfriend's daughter, the Court held that it was error for the trial court to exclude character testimony that appellant had a reputation for "normalcy in his sexual tastes" and was a person of "high moral character." The Court held that the reputation evidence was both relevant to the charge and admissible under Evidence Code section 1102, subd. (a), which provides that a criminal defendant may present evidence of character or a character trait in the form of an opinion or by reputation evidence, to prove his or her conduct in conformity with such character or character trait.

In the present case, Robinson knew from his investigation that appellant's reputation was that he had was "clean" and no longer an active gang member. Such traits were directly relevant to refute the prosecution's allegation that appellant shot the victims for some (undefined) gang-related purpose. As in *McAlpin*, the reputation testimony was also admissible under Evidence Code section 1102,

---

[14] See also Evidence Code section 1324, which provides:

> Evidence of a person's general reputation with reference to his character ora trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated, is not made inadmissible by the hearsay rule.

subd. (a), and its exclusion was therefore error.

2. Lay Opinion Testimony

As a percipient (i.e., non-expert) witness, Robinson could also properly testify that, based upon his personal observation of and interaction with appellant, it was his opinion that appellant had repudiated his former gangster lifestyle and become a person of suitable character to counsel young people not to join gangs or engage in violence. Lay opinion testimony is admissible under section 1102, subd. (a) of the Evidence Code, when it is based on the witness's personal observation of the defendant's course of behavior. (*People v. McAlpin*, *supra,* 53 Cal. 3d at pp. 1306-1310; *People v. Felix* (1999) 70 Cal.App.4th 426, 430.)[15]

In *McAlpin*, *supra*, 53 Cal.3d at p. 1309, this Court held it was error for the trial court not only to exclude the reputation evidence described above, but also to exclude the testimony of the defendant's former girlfriends that in the course of their relationship with the defendant they observed his conduct with their daughters and saw no unusual behavior by the defendant or their daughters, and that it was their opinion, based on those personal perceptions,

---

[15] See also Evidence Code section 800, which provides:

> If a witness is not testifying as an expert, his testimony in the form of opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

that the defendant was not a person given to lewd conduct with children.

In the instant case, it was similarly erroneous for the trial court to have barred Robinson from testifying as to his personal perception of appellant, and how based upon that perception, it was his opinion that appellant was no longer an active gang member.[16]

D. The Erroneous Exclusion of Robinson's Testimony Deprived Appellant of His Constitutional Right to Present His Defense

The compulsory process clause of the Sixth Amendment and article I, section 15 of the California Constitution, and the due process clause of the Fourteenth Amendment and article I, sections 7 and 15 of the California Constitution provided appellant with the rights to produce witnesses on his behalf and to present a complete defense. (See *Holmes v. South Carolina* (2006) 547 U.S.319, 324; *Taylor v. Illinois* (1988) 484 U.S. 400, 409; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 22-23.) "Few rights are more fundamental than that of an accused to present witnesses in his own

---

[16] Although the trial court did not specifically invoke Evidence Code section 352 as a grounds for barring Robinson from offering his opinion, it found that "the jury would be misled if they were – because of the hearsay problem, if they were to hear from Mr. Robinson that the only basis about which he could testify would be the personal observations, and that would not give a complete record or complete information about Mr. Robinson's opinion." (18RT 4723.) Because there was no "hearsay problem,"and Robinson's personal observations were *not* "the only basis about which he could testify," the trial court's reasoning was flawed, and its finding is not entitled to any deference on appeal.

defense." (*Chambers v. Mississippi*, *supra*, at p. 302.) Furthermore, notions of fundamental fairness inherent in the due process clause require "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta*, *supra*, at p. 485, quoted in *Crane*, *supra*, at p. 690.) The exclusion of Robinson's testimony in the instant case violated appellant's constitutional rights to present witnesses and a complete defense.[17]

Although a trial court's evidentiary rulings do not ordinarily implicate a defendant's constitutional rights (see *People v. Kraft* (2000) 23 Cal.4th 978, 1035), the Constitution does not tolerate bars on defense evidence if the evidentiary bar infringes a defendant's weighty interest and is arbitrary or disproportionate to the purposes the evidentiary bar was designed to serve. (*Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324.) United States Supreme Court precedents indicate that exclusions of defense evidence violate a defendant's rights to present a defense if the evidence is exculpatory

---

[17] Although the rights to elicit testimony from defense witnesses and to present a complete defense have separate constitutional sources, courts have analyzed claims arising under each of those rights similarly. (See *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324 ["'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'"], quoting *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690 and *California v. Trombetta*, *supra*, 467 U.S. at p. 485.) When proffered defense testimony is excluded from the defense case-in-chief, the rights to present defense witnesses and to present a complete defense are coextensive. In this brief, where appellant refers explicitly only to the violation of his rights to present a defense, he alleges violations of both his rights to present defense witnesses and to present a complete defense.

and critical to the defense, so long as the state lacks an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence. To ensure that the exclusion of evidence prejudiced a defendant, the excluded evidence must be favorable to the defense. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.) The primary mechanism for differentiating between ordinary state-law evidentiary error and a constitutional violation is the requirement for a rights-to-a-defense claim that the excluded evidence be crucial to the defense. In most cases finding a violation of the rights to a defense, the United States Supreme Court has emphasized the centrality of the excluded evidence to the defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 57; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.)

Lastly, recognizing that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials" (*United States v. Scheffer* (1998) 523 U.S. 303, 308, quoted in *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324), the United States Supreme Court has concluded the exclusion of crucial exculpatory evidence would not violate a defendant's constitutional rights if the exclusion advances state interests in maintaining the integrity of the adversarial process sufficiently to outweigh the defendant's interest in presenting crucial exculpatory evidence. (See *Taylor v. Illinois*, *supra*, 484 U.S. at pp. 414-415; *Rock v. Arkansas*, *supra*, 483 U.S. at p. 56.) Accordingly, a defendant's Sixth and Fourteenth Amendment rights are not violated by the exclusion of unreliable scientific evidence (see *United States*

v. Scheffer, *supra*, at pp. 308-317), or untrustworthy hearsay (see, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 724-725; *People v. Ayala* (2000) 23 Cal.4th 225, 269), or the exclusion of evidence as a sanction for failure to give timely notice of a witness or evidence (see *Michigan v. Lucas* (1991) 500 U.S. 145, 149-153; *Taylor v. Illinois*, *supra*, at p. 415).

In the instant case by contrast, the State had no legitimate interest in excluding Robinson's testimony, which as demonstrated above was both highly relevant and legally admissible. Excluding the evidence did not impede the fair administration of justice or prejudice the truth-determining function of the trial process. (See *Taylor v. Illinois*, *supra,* 484 U.S. at pp. 414-415.)

The trial court's exclusion of Robinson's testimony infringed appellant's constitutional rights. As discussed above, the prosecution's case against appellant was premised upon the allegation that he was a member of the Rolling 20s gang, and that he committed the crime as part of a gang "war" between the Rolling 20s and the East Side Longos. Robinson's testimony would have established that appellant was no longer an active gang member and was in fact seeking employment as a counselor in a program aimed at quelling gang violence, thereby rebutting his alleged motive for shooting the victims. Robinson's testimony was therefore both favorable and central to appellant's defense of mistaken identity.

This Court's pronouncement in *People v. Cudjo* (1993) 6 Cal.4th 585, 611, that the rights to present a defense can be infringed only by general rules of evidence, and not a trial court's misapplication of the evidentiary rules, finds no support in United States Supreme Court precedent, the principles of constitutional law,

or logic. In *Cudjo*, this Court rested its conclusion that the trial court's erroneous exclusion of an alleged alternative perpetrator's jailhouse confession, which was admissible under the declaration-against-interest exception to the hearsay rule, did not violate the defendant's constitutional rights to present a defense on the premise that a trial court's misapplication of the rules of evidence to exclude crucial defense evidence does not implicate those constitutional rights. (Id. at pp. 604-612.) That premise is fundamentally flawed.

The United States Supreme Court has never restricted the rights to present a defense to cases in which an evidentiary rule, rather than a trial court's application of the rule, was the source of the exclusion of crucial defense evidence. Although in several cases in which the United States Supreme Court has found infringements of the rights to a defense, an applicable evidentiary rule facially foreclosed the admission of defense evidence (see *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 61-62; *Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303; *Washington v. Texas*, *supra*, 388 U.S. at pp. 22-23), the United States Supreme Court has found such constitutional violations where the exclusion of defense evidence was not foreordained by a codified evidentiary rule. (*See Holmes v. South Carolina*, *supra*, 126 S. Ct. at pp. 1733-135; *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 689-691.) The United States Supreme Court has never hinted, let alone held, that the exclusion of crucial, exculpatory defense evidence is constitutionally permissible whenever it is due to the trial court's application or misapplication of an evidentiary rule. To the contrary, the United States Supreme

Court has concluded that it is immaterial whether a trial court's exclusion of defense evidence was consistent with state law, because the trial court's ruling had the effect of a state-law rule precluding the defendant from introducing evidence. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 7.)

Furthermore, this Court's distinction between whether the rules of evidence or a trial court's misapplication of the rules of evidence is the source of the exclusion of defense evidence lacks support in the principles of constitutional law. The identity of the state actor infringing somebody's constitutional rights is not material. (See *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373-374 [holding discriminatory application of a law, in addition to law that discriminates on its face, may violate equal protection clause].) The United States Supreme Court has long held that a state officer, as well as a statute, may violate a person's rights under the due process clause of the Fourteenth Amendment. (See *Saunders v. Shaw* (1917) 244 U.S. 317, 320; *Home Teleph. & Teleg. Co. v. Los Angeles* (1913) 227 U. S. 278, 287-288.) In the context of an equal protection claim, the United States Supreme Court recently reiterated that a person's constitutional rights are violated regardless of whether the express terms of a statute or improper execution of a law caused the discrimination. (See *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) As stated above, the United States Supreme Court has explained that a state court's evidentiary ruling, even if idiosyncratic or inconsistent with state law, has the effect of a state-law rule. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.) It matters little to appellant that the trial court, rather than the framers of the Evidence Code, was responsible for barring powerful exculpatory evidence

central to his defense. Regardless of whether the Legislature or the trial court primarily caused the exclusion of evidence, appellant was hamstrung from presenting his defense.

Furthermore, insulating a trial court's erroneous evidentiary rulings, but not a trial court's rulings correctly made under the Evidence Code, from constitutional scrutiny makes little sense. A state has a far greater interest in maintaining the vitality of its evidentiary rules than in immunizing a trial court's erroneous ruling from being deemed federal constitutional error. Principles of federalism require that greater deference be given to a law enacted by a state legislature than to a state trial court's ruling that violates state law. This Court's rationale in *People v. Cudjo*, *supra*, 6 Cal.4th at p. 611, was not premised on a distinction without a difference; it was based on a distinction for which the difference undercut the distinction. Accordingly, this Court should reject its pronouncement in Cudjo and hold that the trial court's rulings excluding the proffered evidence infringed appellant's Sixth and Fourteenth Amendment and article I, section 7 and 15 rights to elicit testimony from defense witnesses and to present a complete defense.

E. The Erroneous Exclusion of Robinson's Testimony Also Deprived Appellant of His Rights Under the Fifth, Eighth And Fourteenth Amendments to a Fair Trial and Reliable Guilt and Penalty Determinations

As argued above, the exclusion of Robinson's testimony impeded the integrity of the adversarial process by preventing the jury from considering reliable, potent evidence that was central to appellant's defense. Without this evidence appellant could not rebut the prosecution's allegation that appellant was an active Rolling 20s gang member and as such, had a motive to kill members of the rival

East Side Longos gang. Exclusion of Robinson's testimony thus left the jury with a distorted picture of appellant, and prevented them from considering evidence that would have caused them to have reasonable doubt about his guilt.

The erroneous exclusion of Robinson's testimony thus not only violated appellant's Sixth and Fourteenth Amendment right to present his defense as argued above, it also deprived him of his Fourteenth Amendment right to due process of law and a fair trial. (*Washington v. Texas, supra*, 388 U.S.at p. 19; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Rock v. Arkansas*, *supra*, 483 U.S. at p. 51, fn. 8.) This error further deprived appellant of his right under the Eighth and Fourteenth Amendments to a reliable determination of guilt and penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case].)

F. The Erroneous Exclusion of Robinson's Testimony Was Extremely Prejudicial to Appellant's Defense, and Under Both the Federal and State Harmless Error Tests Requires Reversal

The prosecution had little, if any evidence that appellant had a motive to shoot Mario Lopez or Jose Villa. There was no evidence of a precipitating gang-related incident, merely a general allegation of gang rivalry and incidents of violence between the Longos and Rolling 20s. There was also no evidence that the victims knew appellant or that he had had any previous dealings and/or

encounters with them.[18]

In any event, the prosecution's tenuous theory of motive was wholly dependent on being able to prove that appellant was an active gang member at the time the shootings occurred. If appellant had already left the gang by that point in time, the prosecution's theory was utterly baseless. Being able to refute the prosecution's allegation that appellant was an active member of the Rolling 20s when the murders took place, was therefore essential to appellant's defense, and appellant needed Robinson's testimony to do that.

If appellant had taken the stand to testify that he left the gang prior to when the shootings occurred, his testimony would have appeared self-serving and therefore not very credible. Moreover, it is highly doubtful that any other gang members would be willing to testify that appellant was no longer "gang banging," but even if they were, their testimony could easily be perceived by the jury as lying to help a fellow gang member, and therefore discredited. Robinson was a witness who ostensibly had no personal stake in lying to help

---

[18] Witness Leslie Rainey was asked about a notation in one of the police reports stating that appellant told Rainey that the week before the crime appellant was beaten up by "a Mexican." Rainey testified that this was not true; that the only conversation he had with appellant was a phone conversation in which appellant asked Rainey to come with him to sell his car, because Rainey had a driver's license. Rainey explained that during his lengthy interrogation at the police station, *he* was told by one of the many detectives and police officers who filtered in and out of the interrogation room that *"Mr. Jones said* he told you about he had a fight with some Mexicans, and I said no I didn't." (15RT 3969-3970, emphasis added.) There was no other evidence presented regarding the alleged fight; i.e., when it allegedly occurred; what precipitated the fight; what happened during the fight, and who the "Mexican" or "Mexicans" were.

appellant. He was older and more responsible, and he had a job running a gang prevention program, working collaboratively with the Long Beach Police Department. His testimony would therefore be inherently much more credible that appellant's or any gang members.

Had the jury heard Robinson's testimony, they would more than likely have had a reasonable doubt as to whether appellant was actually an active gang member at the time the crimes were committed. If appellant was *not* an active gang member any more, there was no credible evidence of motive, giving the jury more reason to doubt the accuracy of the eyewitness identifications.

Furthermore, notwithstanding the flimsiness of the prosecution's theory of motive, the mere allegation of gang involvement carries the risk of improper inferences of criminal disposition. This Court has recognized that evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)[19]

---

[19] The reality of that risk was poignantly illustrated by the declaration of the foreperson of the deadlocked jury from the first trial, who stated in her declaration that the jury was initially deadlocked 10-2 for not guilty on several counts and 11-1 not guilty on another, but that several jurors changed their vote despite acknowledging that the evidence of guilt was weak. The foreperson stated that one of the jurors who voted guilty, "indicated that the *gang implications cast a darkness over the case* and that in order to find answers you must look into the darkness. He implied that you would never find the answers in the evidence but would need to look beyond." (2CT 404, emphasis added.) Although the evidence of guilt in the retrial was no stronger, the jury found appellant guilty.

In any event, under these circumstances the State cannot prove beyond a reasonable doubt that the trial court's error in excluding Robinson's testimony was harmless, as it must do pursuant to *Chapman v. California*. However, even assuming the error was not of constitutional proportions, and the harmless error standard set forth in *People v. Watson* applies, appellant still prevails because there is more than a reasonable probability that appellant would not have been convicted had Robinson been permitted to testify in this case. This Court must therefore reverse appellant's conviction and death sentence, so that appellant may be afforded a new trial.

****

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE PROSECUTION TO INTRODUCE A TAPE RECORDING OF APPELLANT'S PHONE CONVERSATION WITH HIS BROTHER CONDUCTED WHILE APPELLANT WAS HOUSED IN THE LOS ANGELES COUNTY JAIL

A. The Record Below

Before opening statements in the second trial, the prosecution moved *in limine* for permission to play a tape recording for the jury of a phone conversation between appellant and his older brother, Tony Frazier, on January 12, 1997, while appellant was housed in the Los Angeles County Jail. (14RT 3566; 17RT 4541.) The conversation took place two days after the conclusion of the initial preliminary hearing, in which the eyewitnesses had been unable to positively identify appellant as the man who shot Angel Villa and Nery Hernandez. (14RT 3575.)

The recorded phone conversation began with Tony expressing confusion as to why appellant remained in custody after the preliminary hearing. Appellant stated that he had no idea why he was being accused of having committed these crimes. Tony asked him, "Well who are these people? Get the transcripts," to which appellant responded, "Yeah, I'm fixin' to tell my lawyers Man." Appellant then said, ***"I ain't do this."*** Tony responded that he was still worried because "I know how the folks is." Appellant agreed, and then blurted out, "Nigger need that DA hit that's who the nigger need hit." (3CTSupp.IV 512-513, emphasis added.) The conversation next shifted to a discussion of Tony's parole status. Tommy told appellant that he was supposed to visit a psychiatrist as

a parole condition, but he did not want to take the pills that had been prescribed for him. Appellant expressed concern about Tony receiving a parole violation, following which Tony mentioned having found two pistols "in the garage here," and giving them to an individual named "Troub." (3CTSupp.IV 514.) Appellant admonished Tony that he should not be discussing such things over the phone, because "they got my girl's phone tapped." (*Ibid.*)

The prosecutor argued that the statements made by appellant and Tony during the phone conversation were admissible as admissions and statements of a co-conspirator (14RT 3576),[20] and were " highly relevant as to three areas concerning consciousness of guilt: disposing or hiding evidence, witness intimidation [and] murdering a district attorney as well." (14 RT 3581-3582.)

Appellant and co-defendant Sherman together opposed introduction of the tape evidence on several grounds. They individually and jointly argued that the statements made in the recording were irrelevant to the question of their guilt or innocence of the crimes charged. Counsel for Sherman pointed out that her client was in custody in Modesto at the time and therefore could not possibly have been the person to whom Tony gave the two pistols. (14RT 3569, 3579.) She subsequently noted that witnesses had referred to Sherman specifically as"Baby Troub," not "Troub" or "Li'l Troub" (15CT 3859-3860), which was corroborated by testimony. (16RT 4175.)

They further argued that even assuming the conversation

---

[20] Tony Frazier had not been, and never was, charged as a co-conspirator.

might have some probative value, the latter would be far outweighed by the prejudice engendered by the recording's admission, and therefore it should be excluded under Evidence Code section 352. In opposing the tape's admission, appellant's counsel argued:

> The people do not have the evidence to get a conviction in this case. So what do they do, they find a tape that is so farfetched saying, 'I found some pistols and gave it (sic) to someone. We can't allow them to make up evidence. Make the people prove the case. We can't let them make stuff up. This is remote and I strongly object.

(14RT 3574.)

In addition, appellant and Sherman objected on the grounds that the recorded statements constituted inadmissible hearsay. They also objected to the recording itself on the grounds that it was so poor in quality to be unintelligible, and further challenged the accuracy of a transcript of the recorded conversation prepared by the District Attorney's Office and objected to its use by the jury while listening to the tape. (14RT 3567-3574.)

The trial court ruled that the recording could be played for the jury (14RT 3586), and that copies of the transcript could be handed to the jurors to read while they listened to the tape, but that the transcript would not be admitted into evidence. (*Ibid.*) The trial court did not address the specific objections raised by the defense, and instead ruled summarily.

The prosecutor referenced the taped conversation in his opening statement (14RT 3609-3611), and subsequently played the tape for the jury. (15RT 3897.) The jurors were given a transcript interlineated with the court's own corrections, to help them better

understand what was being said on the tape. (15RT 3889.) The court instructed the jury that the transcript was merely an "aid," and was not evidence; that the jury was to use its "own interpretation [of what was being said on the tape] as the evidence." (15RT 3895-3896).

After the tape was played, the defense called Tony Frazier to explain the statements he made during the phone conversation. (17RT 4540.) Tony explained that he had been excluded from the courtroom during the preliminary hearing on January 10, 1997, but had been told that the witnesses had pointed out some other guy and did not identify appellant. He therefore wanted to read the transcript in an effort to figure out why appellant had not been released. (17RT 4542-4543.) Based upon his own experience with the criminal justice system, Tony believed that appellant would be provided with a transcript from which the names of the witnesses would be redacted. (17RT 4543, 4551.) Moreover, Tony had no intention to "do anything to anybody anyway, that ain't going to help my brother." (17RT4543.)

Tony further explained that he was released from prison December 4th, 1996, and would be on parole for three years. (*Ibid.*) He had been placed on "high risk" parole, which meant that his parole officer was coming to his house twice a week, and was authorized to conduct a search of the house and in any place to which Tony had access. While getting ready for a garage sale he found two old revolvers. Despite the fact the guns no longer worked, he was forbidden from having them on the premises. He therefore gave the two guns to his neighbor. (17RT 4544.)

Tony testified that he had been worried about what would

happen to his brother, having himself dealt with the Long Beach courts since the age of 11 or 12. Although appellant told Tony he should not worry because appellant had a good lawyer, Tony was nevertheless afraid that if appellant was going to be prosecuted without evidence, "they were going to try to railroad him, if not try to kill him inside there." For this reason Tony told appellant, "Man, I'm worried about it, Man. I know how folks is." (17RT 4545-4546.)

With respect to appellant's comment regarding the district attorney, Tony explained that appellant was angry with the D.A. for not allowing him to be released after the preliminary hearing. He testified, "you know, people say things in the heat of the moment when they mad, when they upset. How he gonna hit somebody, is he gonna throw a rock at them?" (17RT 4546-4547.)

Tony's wife, Darlene Frazier, testified next and corroborated her husband's testimony regarding the two guns. She stated that the guns had belonged to her former boyfriend and had been in her garage since 1993. (18RT 4576-4577.) The guns were stored in a dresser. (18RT 4585.) While she and Tony were cleaning out her garage in preparation for a garage sale, she discovered the guns were missing from the dresser. (*Ibid.*) Darlene described the guns as small revolvers that were in poor condition. One gun had parts missing and the other one was corroded and rusty. (18RT 4588-4590.) Tony subsequently told Darlene that he had found the guns and given them away to someone. (18RT 4592-4593.)

The prosecutor argued to the jury that the taped conversation provided significant evidence of appellant's guilt. He argued that it (1) explained what appellant had done with the missing murder weapon; (2) revealed appellant's intent to intimidate the

eyewitnesses to deter them from testifying against him; and (3) revealed his intent have the prior prosecutor murdered in order to prevent the case from going forward. In his opening argument, he stated, as follows:

> Insofar as the People's evidence. . ., **one particularly significant, compelling thing is People's [Exhibit] 17.** There are a number of significant aspects to it. I'm not going to go through all those now, but it's important for a couple of reasons. Number one, listen to the defendant, to his tone, to his demeanor, to how he deals with this. Because you had some testimony about how upset he was and about his attitude. Listen to him and how he comes across there. Listen to the language and the context in which the statements are being made because there's some real important things here.
>
> **You have a conscious attempt. That is, a reference to guns, to pistols, to hiding those things. There is a statement made by Mr. Frazier, the person on the other line, that he got these guns from Troub. We know who Troub is. Troub is the co-defendant seated at the Counsel table.**
>
> He says, "I got the guns," and immediately at that point defendant Jones says, hey, hey, wait a minute. My girlfriend's phone is tapped or might be tapped. Better be careful what you're saying.
>
> Now, the significance of that, of course, is we learned about what happens when these crimes take place. They do them repeatedly so there are techniques which are employed to avoid detection, to avoid the ability to have them caught and prosecuted. One of them is wearing layered clothing to be able to change their appearance shortly there after. One of those things is to make sure that a gun goes a different direction, that it's hidden in some other location.
>
> Of course, we have shell casings here, but a gun is not

found. There's warrants executed and that gun is never located. And that's for a reason.

What you have, of course, is the defendant, who is in custody – and that tape, I believe, is made on January the 12th, some month after the incident – who wants to be sure that wherever it went, that that gun is not located so the efforts have to be made by the people on his behalf outside.

And what we hear about is that those guns were given to Troub. And who is Troub? Troub is the co-defendant who is here in court.

Also, on that tape we have a reference to the very sort of intimidation that we've been talking about here. The conversation with his brother, Mr. Frazier, is: well, they pointed the other guy out, referring to Maria Jaramillo identifying Melvin Sherman, but they let him go and why did they do that?

And you have the questioning from Mr. Frazier, essentially saying, well, who are these people? Who are they? Now, there's two ladies and a dude, you know. Well who are they? Get the transcript.

Now, you remember when I asked him questions, it was, nah, nah, I didn't care who they were. I just wanted to know what they had said. That's what I was interested in.

That's not what he's asking. Listen to the tape. Listen to the conversation going back and forth. He wants to know who these people are because they were at that time – or, at least, at the time of the shootings – right there in the neighborhood. And that purpose isn't so he can conduct interviews. It's not so he can do investigation. It's not so he can resolve in this own mind what the evidence is.

It's for a specific purpose. It's to find those people and

to let them know that the Rolling 20's know who they are.

Finally, of course, the defendant's mindset is truly revealed when he talks about what he needs. And he refers to himself in the third person, but he says that essentially what he needs is for the District Attorney to be hit, that that's what he really needs.

Now, when his brother testified, Mr. Frazier, he's being brought in for a reason. He's got to put some spin on these things because there it is on tape. You hear the defendant. You hear Mr. Frazier talking. And he's got to somehow rationalize, well, you know, okay, he said that, but what does hit mean? Hit could mean throwing a rock at him or something.

Well, we know it's nonsense. A hit is a term – it's not – we don't need a gang expert to tell us what "hit" is. Anyone who has existed in this country and seen television, movies, or anything of the sort in the last twenty or thirty years knows what a hit means. Hit means to kill someone.

He says, well, he was just angry when he said that. Listen to him. Listen to the whole conversation and I think what you're going to find is that it's essentially a very – an astoundingly casual and cavalier demeanor about all these things, about him being in jail facing these murder charges, about the whole situation. That's very cavalier.

Mr. Frazier is an interesting witness, though, because he – he's got to explain a couple of things. He's got to talk about these guns. It's there in the tape and the name Troub is there. So what does he say? Well, okay, I had just gotten out of prison. I came back on the 4th.

And you kind of have to compare what he says to what Miss Frazier says for the distinctions because they both

have some different recollections about time, but I was there for a while and then it was time to have a garage sale.

And, essentially, we have the picture of the two of them looking through the garage, combing through things. And we have Miss Frazier apparently finding the guns missing from the dresser where she's put them, but not inquiring of him while he's there looking through, then looking in the jacket where she had them before, still missing but not inquiring of him.

And then independently of that we have Mr. Frazier finding the guns and giving them away. And he doesn't know whose guns they are, supposedly. The testimony from both are that he found out afterwards. But he gives them away. And who does he give them to? He gives them to a neighbor, okay, who, amazingly enough, is named Troub. What a coincidence.

And the funny thing about that is the person who lives there who has been then previous resident, Miss Frazier, doesn't even know she has a neighbor named Troub. That part apparently wasn't discussed before they testified.

At any rate, some sort of rationalization has to be given and that's what's given. He's just angry when he's talking about hitting the District Attorney. I just happened to find these guns and appropo of nothing came up with this conversation, and then I gave them to this guy named Troub. There's a lot of guys named Troub.

(19RT 4876-4881, emphasis added.)

The prosecutor hammered these points further in his rebuttal to the defense closing arguments:

Okay. The infamous tape. Now, this tape is not something that the people concocted This tape is the

words of – I'm sorry. I'll bring that a little closer. I know it's hard to follow.[21]

As counsel and the court have said, the transcript is not evidence. The tape is. I am simply using this to help illustrate what I'm pointing out at this point.

As counsel said, there's a lot of language here. There's a lot of street language. References to "cuz" and that sort of thing. I'm not suggesting that that is the issue here. The reason that we're talking about the tape is because this tape gives us a number of important issues in terms of the attitude of the defendant.

One of the arguments that's made is that the defendant is angry when he does this, that he's upset about what happened and he's blowing off steam. You've got to listen to him. Regardless of the words themselves, listen to him with the demeanor: "Don't even worry about it. Don't worry about it. It's not a problem."

This is not a guy who is saying, my God. How can I be in this position? An innocent man wrongly accused there. He's not panicked there. "Don't even worry about."

And you know the tape is important for another reason, because it's not a production that's being made for you. He starts out talking on that tape. It's just a conversation with his brother Tony. So we have a very casual demeanor, and it's revealing. Okay.

Now, as I said, the first issue is this is a gang case. I'm not waving that flag to cause to you go into a fits of hysteria, but it's an issue because the intimidation affects all aspects of it.

---

[21] Although the record is silent regarding what the prosecutor was referring to, it would appear that it was a blow-up of the tape transcript.

And remember what Tony Frazier was saying when he talks about why he was asking for the transcripts. He said, they will blank it out. He says, who had said something? Who is this person? A lady? Not what did they say, but who said it? Who are they?

Because Tony is out there and Tony can go and Tony can find out and Tony can confront. Two ladies and a dude. But they aren't saying shit. And he goes through all of that. But, remember that's the context in which that conversation starts.

And then he tells what happened in the prelim. He talks about evidence at the prelim, that they had seen the glove and saw a blast, and they dropped the one murder and now they got me for the attempt and another murder. Doesn't make any sense.

Okay. The conversation continues. They got him for one murder and an attempt. And then, well, who are these people? Get the transcripts.

Okay. Remember, when I talked to him he said, no, no. I just wanted to know what happened. I just wanted to know what they said. That's not what he's asking. Those are his words. Who are those people? Get the transcripts.

What's the point? Does he want to see if he knows them? Does he want to see if they are a celebrity or something? He knows what neighborhood this happened in. Those are people who are going to be in the neighborhood. **He wants to know who these people are for a reason. He does not want those people to come forward. That's why he's asking for the transcripts.**

We continue further. Now, this is the point, remember, at which defendant is upset, he's angry that the District Attorneys have done this horrible thing to him. They

twisted the evidence. "Don't even worry about it. Don't even worry about it."

Listen to him as he's talking. Is this an innocent man who is panicked about being put in this position? "Don't even worry about it." And that's what he says.

Referring to himself in the third person, he needs the District Attorney hit. That's who he needs hit. That was when Debra Cole-Hall was the District Attorney on this case.

Why does an innocent man say that? Is he blowing off steam? Listen to him. Listen to his voice there. Is he – is he angry about what's happened? No. He's talking about what he needs or what would help him out and help his case. Okay.

And I know I'm going to keep apologizing throughout, but I – honestly I'm down to the last half a page or page and a half here so we're very close. And, you know, under other circumstances I might cut it off, but this is too important, folks. It's too important. So please bear with me.

Okay. The last point about the tape. And, again, you're going to have the tape. I'm going to ask you to listen to it and pay close attention, listen to it all you want because it becomes clearer as we listen to it and you also get a feel for the defendant. His voice, his demeanor during the course of that.

What does Tony Frazier tell us? Now, he says in his testimony here, I just mentioned out of the blue that I found these guns and gave them to the neighbor apropos of nothing. It had nothing to do with anything else.

How does it come up here? He's talking about, I gave little Troub – I gave him something – again, this not the evidence. It's what on the tape. And I

found two pistols in the garage.

Because there is something interesting that has happened. I mean, there is no explanation for it. No introduction for it. Who is he talking about, Troub? Melvin Sherman. We know who that is.

Now, he says in his testimony here in court, hey, I just found those things. I gave them to my neighbor like so many so many other people whose names happened to be Troub.

Does the defendant go, "Who is Troub?" no. Nothing about that because he knows who Troub is. He knows what the guns are. He knows why he gave them to him. That's why it's significant. And it's even more significant that all of a sudden the light goes on in the defendant's head: Now, wait a minute now.

He doesn't know about the wire tap on the County Jail phone, but a light goes on because this is critical. This is key. That's a murder weapon that's out there. That's something that he does not want the police to find. That can only come back to his crime. So a light goes on in his head only then at that point, and he says, well, wait a minute.

He thinks maybe his girlfriend's phone might be tapped. **The light goes on because it's a critical nature of what's being said there. We're talking about a murder weapon on a double murder. Hey, hey, easy, easy. Don't talk about that.**

That's why he realizes it and realizes it only at that moment.

(20RT 5070-5075.)

For the reasons stated below, admission of the recording

constituted prejudicial error requiring reversal.

B. The Taped Phone Conversation Was Irrelevant and Should Not Have Been Played for the Jury and Admitted into Evidence

It is extremely well-settled that only relevant evidence is admissible. (Evidence Code § 350; *People v. Heard* (2003) 31 Cal.4th 946, 972; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) A trial court lacks discretion to admit irrelevant evidence. (*People v. Heard*, *supra*, 31 Cal.4th at p. 973; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 132.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally and by reasonable inference' to establish material facts such as identity, intent or motive." *(People v. Heard*, *supra*, 31 Cal.4th at p. 973, citation omitted.) A trial court's determination of relevance is reviewed for abuse of discretion. (*People v. Davis* (2009) 456 Cal.4th 539, 603.)

As noted above, the prosecutor argued that the recorded conversation was relevant to prove appellant's consciousness of guilt, however careful analysis of the statements made during that conversation reveals that none of them – neither individually nor collectively -- actually had any tendency whatsoever to prove consciousness of guilt on appellant's part. In fact, as noted above, appellant expressly stated that he did not commit the crime and did not know why he was being held. (3CT Supp.IV 513.) There is also

no indication from anything said either by appellant or Tony, that appellant (or anyone else) wanted to find out who the witnesses were to try to intimidate them from testifying against him. What appellant actually said was that he wanted his *lawyers* to "go out there and *investigate*." (*Ibid*, emphasis added.)

Furthermore, when appellant's remark that the D.A. should be "hit," is viewed within the context of the entire conversation, it shows that appellant was angry that he was being charged with a crime he did not commit. Not one statement in the entire conversation supports any inference that he actually sought to kill the DA to prevent her from prosecuting him for a crime he in fact committed. Neither was there any *other* evidence presented during the trial to support such an inference.

Finally, by the time Tony stated that he "found two pistols in the garage here," and "gave them to Troub," he and appellant were no longer discussing appellant's case, but were instead talking about Tony's parole status. (3CT Supp. IV 514.)[22] Moreover, nothing said

---

[22] The following is the relevant excerpt as it was transcribed:

T: Tomorrow I'm off, but I have to go back, I have to go to see the psyche tomorrow at the parole office.

KJ: The psyche for what?

T: You know, that's got to be a condition of parole is seeing a psyche.

KJ: (Unknown)

T: Uhh?

KJ: That funky place?

by either Tony or appellant even remotely suggested that the two pistols Tony told appellant he found in the garage belonged to appellant, or that the "Troub" he had given them to was anyone related to appellant's case. In fact, the evidence disclosed Sherman was in custody during the pertinent time period and that his nickname was "Baby Troub," not "Troub" or "Li'l Troub." No reasonable inference could therefore be drawn that either of the guns Tony was talking about was used to shoot the victims herein.

The theories upon which the prosecutor relied to support his

T: Yeah. But see I fixin' to take these pills that they've been trying to push on me back up here. Cuz I ain't taking the shit. So I don't know what they are gonna do.

KJ: Are you crazy?

T: No I ain't crazy.

KJ: Oh...Well you should let it roll, it might get you...

T: No I ain't fittin' to play nothin'.

K: Yeah.

T: Yeah I gave little Troub.

KJ: Yeah.

T: Yeah I give him some and I found two pistols in the garage here.

KJ: Yeah. Don't be talkin' over the phone cuz, they've got my girl's phone tapped.

T: But anyway I gave them to Troub.

(*Ibid.*)

claim of relevance lacked any evidentiary basis and rested entirely upon unfounded speculation. By introducing the taped conversation, the prosecutor sought to have the jury infer appellant's guilt of the murders, by *speculating* (1) that appellant's brother was helping him conceal or dispose of the murder weapon and (2) that appellant was attempting to avoid prosecution for his crimes by intimidating the witnesses from testifying against him, and having the prosecutor killed.

"Speculation is not evidence" (*People v. Waidlaw* (2000) 22 Cal.4th 690, 735), and it is error to admit evidence whose relevance can only be established on the basis of speculation. (*People v. Hamilton* (1986) 41 Cal.3d 408, 426, overruled on other grounds.) As explained in *People v. Louie* (1984) 158 CalApp.3d Supp. 28:

> 'Evidence is irrelevant if it has a tendency to prove or disprove a disputed fact of consequence only by reason of drawing speculative or conjectural inferences from such evidence. The concept of a "tendency in reason" to prove a disputed fact required by *Evid C §210*, necessarily means that the deduction or inference to be drawn from the proffered evidence to the existence or nonexistence of a disputed fact is a reasonable inference. *If the inference of the existence or nonexistence of a disputed fact which is to be drawn from proffered evidence is based on* ***speculation****, it cannot be considered* ***relevant*** *evidence. If proffered evidence can cause the trier of fact only to speculate from such evidence as to the existence or nonexistence of a disputed fact, such evidence is irrelevant and inadmissible,* since it does not come within the definition of "relevant evidence" set forth in *Evid C §210.*'

(*Id.* at p.47 (emphasis in original) [quoting from Jefferson, 1 *California Evidence*, section 21.3, p. 502].)

Accordingly, the recorded conversation was irrelevant and

inadmissible, and the trial court abused its discretion in allowing its admission into evidence over appellant's objection.

C. At a Minimum, the Trial Court Should Have Excluded the Tape Pursuant to Evidence Code Section 352, Because Any Probative Value It Might Arguably Have Had Was Far Outweighed by Its Prejudicial Impact

Evidence Code section 352, subdivision (b) provides that the court in its discretion 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 misleading the jury. "Evidence is probative if it is material, relevant and necessary. '[H]ow much probative value proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20, citation omitted.) "Prejudice for purpose of section 352 means evidence that tends to evoke an emotional bias against the defendant . . . ." (*People v. Crew* (2003) 31 Cal.4th 822, 842) or that may be misused by the jury. (*People v. Filson* (1994) 22 Cal.App. 4th 1841, 1851, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 448-450.) A court's failure to exclude evidence under this section is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

As demonstrated above, inferences the jury was asked to draw from the tape-recorded conversation regarding appellant's guilt,

were purely speculative and lacked evidentiary support. The conversation therefore had no probative value. In spite of this, the tape played a central role in the prosecution's case against appellant in the retrial. In his closing arguments to the jury, the prosecutor emphasized the significance of this evidence at length, and urged the jury to infer that statements made during the conversation constituted admissions of guilt. (See prosecutor's arguments quoted in full at 79-86, *ante*.) For example, the prosecutor asserted three separate times that "Troub is the co-defendant [Sherman]," and argued that appellant's brother helped appellant conceal the murder weapon by giving it to "Troub." (19RT 4877-4878, 4881; 20RT 5073-5075.) The prosecutor also argued appellant and his brother were conspiring to intimidate, and thereby silence the witnesses against him. (19RT 4879; 20RT 5070-5072.) Finally, he argued that appellant was seeking to have the Deputy D.A. assigned to prosecute him assassinated in order to "help his case." (19RT 4879-4880; 20RT 5072.)

Without a doubt, the tape recording, together with the prosecutor's argument emphasizing its significance, greatly influenced the jury's verdict. It diverted the jury's attention from the weakness of the prosecution's case – the previous jury without having heard the tape voted initially voted ten to two for acquittal -- and encouraged the jury to draw conclusions regarding appellant's guilt *and* his bad character, that were unsupported by any actual evidence. The tape and argument not only unfairly misled and inflamed the jury, it also confused the issues. Appellant was on trial for murder and attempted murder, not threatening witnesses or prosecutors or being a gang member, yet the prosecutor used the

tape to inject these issues into his case. For example, in his rebuttal argument, he stated as follows:

> Now, as I said, the first issue is this is a gang case. I'm not waiving that flag to cause you to go into fits of hysteria, but it's an issue because the intimidation affects all aspects of it."

(20RT 5070.)

Under the circumstances, the trial court should have excluded the tape under Evidence Code section 352, and it abused its discretion when it failed to do so.

D. The Tape Recording and Transcript Should Also Have Been Excluded Because the Tape Recording Was Unintelligible.

As noted above, appellant and Sherman objected to both the tape and the transcript prepared by the district attorney's office on the grounds that the tape was unintelligible, making it impossible to tell whether the transcript was accurate. They argued that the tape should therefore be excluded under Evidence Code section 352. (14RT 3569, 3580.)

There was no dispute that it was difficult to make out what was being said on the tape (14RT 3568-3569, 3571-3572, 3576-3578, 3580, 3582-3584), and that no effort had been made to enhance the quality of the tape to make it more intelligible. (14RT 3583.) As Sherman's attorney summed it up, " I would say that if three or four different transcribers were to listen to this tape, they would come up with different versions than were said." (14RT 3571.) With respect to the section of the transcript dealing with the pistols – the most critical part of the conversation for the prosecution's case -- she stated:

> I think that some liberty has been taken as to the words on page 4 between lines 22 and 26. There is some clarity to some of the words, but a lot of the words are just missing. *I think it is speculation as to what actually is being said.* I would ask the court not to permit this being used for any reason.

(14RT 3580, emphasis added, referring to 3CTSupp.IV 514.)

The prosecutor conceded that it was difficult to understand what was being said on the tape (14RT 3577-3578), and in reference to the tape's ambiguities, stated, "there is always going to be a subjective element and there may be different twists on whatever words are in there." (15RT 3853.)

Before the tape was played for the jury, the court listened to the tape and, by interlineation, made corrections to the transcript. (15RT 3850.) Over further defense objection (15RT 3852) the "corrected" transcript was distributed to the jurors to read as they listened to the tape. (15RT 3897.)

(1) The Tape Was Not Sufficiently Intelligible To Be Relevant Without Creating an Inference of Speculation

To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness. (*People v. Demery* (1980) 104 Cal.App.3d 548, 559.)

In the instant case the very statements the prosecutor claimed were incriminating; i.e., those concerning the pistols that the prosecutor argued were the murder weapons, were insufficiently audible to be intelligible. For this reason, the instant case is distinguishable from cases such as *People v. Siripongs* (1988) 45 Cal.3d 548, 574, where this Court found that in spite of unintelligible

portions, tape recordings of the defendant's phone conversations clearly demonstrated his efforts to remove incriminating evidence from his home. (Also compare *People v. Polk* (1996) 47 Cal App. 4th 944, 955 [clearly audible portions of tape were incriminating]; and *People v. Von Villas* (1992) 11 Cal.App.4th 175, 225-226 [Although portions of recordings were unintelligible, intelligible portions were probative and testimony of witness who was party to conversations filled in gaps with respect to inaudible portions].)

Appellant has argued above that no incriminating statements concerning the murders were made during the phone conversation, and that the recording was irrelevant and should not have been played for the jury and admitted into evidence. However, even if incriminating statements *were* in fact made during that conversation, because of the poor quality of the tape recording, the determination of what was actually said by appellant and his brother during the taped conversation was dependent upon "subjective" interpretation. Consequently, the tape was not "sufficiently intelligible to be relevant without creating an inference of speculation" (*People v. Demery*, *supra*, 104 Cal.App.3d at p. 559), and should accordingly have been excluded.

(2) The Trial Court's Error In Allowing It To Be Played Was Compounded by Permitting Use by the Jury of the Contested Transcript as a Guide While Listening To the Tape

The trial court further erred by permitting the jurors to use the transcript, the accuracy of which was disputed, as a guide while listening to the tape as it was being played in the courtroom. Giving jurors a transcript to read as they listened to a tape recording was held to be an abuse of discretion under circumstances similar to

those herein in *United States v. Robinson* (6th Cir. 1983) 707 F.2d 872, 877.

In *Robinson*, the prosecution was permitted to play tape recordings of conversations between the defendants and an undercover agent. Critical portions of the tapes were inaudible, however the trial judge allowed the jury to use prosecution-prepared transcripts of the recordings as a "guide" while listening to the tapes as they were played in the courtroom. The court held that the trial court had abused its discretion when it allowed the tapes to be played for the jury in this manner. After listening to the tapes, the court of appeals found that several of the tapes were so inaudible they could not reliably be transcribed unless the transcriber had an independent recollection of the conversations. (*Ibid.*)

As in the instant case (14RT 3577-3578), the prosecution in *Robinson* argued that the appellate court "should give deference to the fact that the transcripts [were] mere aids which were not introduced into evidence." (*Id.* at p. 878.) However the appellate court rejected that argument:

> This Court is keenly aware that there is a distinct difference between evidence and an aid used to assist the jury in understanding the evidence. However, the distinction becomes nebulous where, as here, the evidence is unintelligible. The practical effect of using an aid to comprehend unintelligible matter is that the aid becomes the evidence.

(*Ibid.*) The same conclusion applies to the use of the transcript given to the jury in the instant case to read while listening to the tape.

The use of a transcript has been upheld in cases which are factually distinguishable from the instant case. For example, in *People v. Miley* (1984) 158 Cal.App.3d 25, 36-37, the defendant

argued on appeal that transcripts of taped phone conversations between the defendant and the man he hired to kill his wife were speculative, because the tapes when played were partially unintelligible. The court of appeal held there was no abuse of discretion by the trial court in allowing the jury to "read along" while listening to the tapes, because (1) the jury received no transcription of the unintelligible portions of the tapes(those portions were left blank) and (2) the intelligible portions were accurately transcribed and incriminated the defendant by "memoriali[zing] appellant's cold-blooded solicitation of the murder of his wife and, if necessary, her daughters." (*Id.* at p. 37.)

In *People v. Brown* (1990) 275 Cal.App.3d 585, 598-599, the court of appeal upheld the use of a transcript of a surreptitiously taped conversation between the two defendants, despite the fact that there was some dispute as to its accuracy. However, in that case, unlike the instant one, the parties to the tape-recorded conversation acknowledged that the transcript was a reasonable translation of what they said, and one of the parties admitted having made incriminating statements during the conversation.

In contrast to *Miley*, the jury in the instant case received a disputed transcription of an unintelligible portion of the tape that the prosecution argued contained appellant's admission of guilt. Furthermore, unlike *Brown*, neither appellant nor his brother conceded that their conversation had been accurately transcribed, and there was no admission by appellant that he had admitted guilt during that conversation. Under these circumstances, not only was it an abuse of discretion for the trial court to allow the tape to be played, but it was a further abuse of discretion to allow the jury to

use the disputed transcript as a "guide" while listening to it.

E. Admission of the Tape and Use of the Transcript Violated Appellant's Constitutional Rights

The improper admission of the tape recording and use of the contested transcript violated standards of California law and denied appellant his right to due process of law under both the state and federal constitutions. (U.S. CONST., 8th and 14th Amends.; CAL. CONST., Article I, §§ 7 and 15.) The trial court's erroneous ruling admitting this evidence also denied appellant his state and federal constitutional rights to a fair trial and a reliable judgment of death. (U.S. CONST., 6th, 8th and 14th Amends.; CAL. CONST., Article I, §§ 7, 15 and 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.

The United States Supreme Court has recognized that due process can be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Here, the jurors were allowed to consider the irrelevant telephone conversation between appellant and his brother as proof of appellant's guilt. Indeed, the tape recording featured prominently in the prosecution's case, and the prosecutor argued to the jury at length that it provided significant evidence of appellant's guilt.

In particular, the prosecutor unfairly exploited appellant's irrelevant, but highly inflammatory comment that the D.A. needed to be "hit," to bolster the testimony of witnesses whose credibility was dubious, and to otherwise shore up his weak case against appellant by trying to show that appellant had a propensity for violence. As established above in subsection C of this argument, admission of the

tape was extremely prejudicial to appellant's case, because it effectively allowed the prosecutor to divert the jury's attention from the weakness of the prosecution's case, and encouraged the jury to draw conclusions regarding appellant's guilt *and* his bad character, that were unsupported by any actual evidence and entirely speculative. In this regard, trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, and thereby violated the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.)

Furthermore, the inclusion of the irrelevant, inflammatory and overwhelmingly prejudicial tape recording effectively distorted the fact-finding process to such an extent that the resulting verdict could not possibly have possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638, fn.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 335.)

F. The Erroneous Admission of the Tape Recording and Transcript Was Highly Prejudicial and Requires Reversal Under Both Federal and State Standards

The prosecution's evidence establishing appellant's identity as the shooter was confined to the identification testimony of two eyewitnesses, Maria Jaramillo and Nery Hernandez. While both witnesses identified appellant as having been the shooter, the record in this case makes clear that they both were initially uncertain as to whether appellant was the man they saw. However, more than two years after the occurrence of the crime, after repeated court

appearances and meetings with the investigating officers and, possibly the prosecutor himself, these witnesses had become more convinced they identified the right man. Nevertheless, they were both impeached with prior inconsistent statements reflecting their uncertainty regarding the accuracy of their respective identifications.

The situation herein is similar to that in *People v. Cardenas* (1982) 31 Cal.3d 897. In *Cardenas*, this Court reversed the defendant's conviction of attempted murder and attempted robbery, because the prosecution had been permitted to introduce evidence of the defendant's gang membership and drug addiction. The Court held that the evidence in question should have been excluded under Evidence Code section 352, on the grounds that it had minimal probative value but created a substantial danger of undue prejudice. (*Id.* at pp. 904-907.) The Court further held that the error in admitting the evidence was prejudicial, requiring reversal under *People v. Watson*, *supra,* 46 Cal.4th at p. 836. The Court noted that the only incriminating evidence was eyewitness identification testimony, which, as in the instant case was inconsistent, and that the prosecutor, being aware of the weakness of that evidence, stressed the defendant's gang membership and drug addiction in his closing argument. The Court according concluded that had the gang membership and drug addiction evidence not been introduced, there was a reasonable probability that the jury would not have voted to convict the defendant. The Court's comments concerning the eyewitness identification testimony apply equally to the instant case:

> The only incriminating evidence introduced by the prosecution against appellant was the identification testimony of eyewitnesses. [fn. omitted] Both this Court and the United States Supreme Court have recognized

> that eyewitness identifications are often unreliable. *United States v. Wade* (1967) 388 U.S. 218, 228 [parallel citations omitted]; *People v. Bustamante* (1981) 30 Cal.3d 88, 98 [parallel citations omitted.]
>
> As the Supreme Court noted in *Wade*, '[t]he vagaries of eyewitness identification are well-known; tha annals of criminal law are rife with instances of mistaken identification. [fn. omitted] Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted. The identification of strangers is proverbially untrustworthy." [Citation.]' Eyewitness identifications are especially unreliable where the witnesses identify a member of a race or ethnic group other than their own. (See, e.g., Note, *Did your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification* (1977) 29 Stan.L.Rev. 969, 982; Sobel, Eyewitness Identification: Legal and Practical Problems (2d ed. 1981) §9.7(b).)

(*Id.* at p. 908.)

The weakness of the eyewitness identification testimony in the present case is reflected by the outcome of the first trial, in which a number of jurors were not convinced beyond a reasonable doubt that appellant had been correctly identified as the shooter. Therefore, there can be little doubt that the tape recording as interpreted and emphasized by the prosecutor in closing argument during the retrial, played a key role in the second jury's guilt determination.

Under the circumstances, respondent cannot prove beyond a reasonable doubt that the court's error in allowing the evidence to be introduced was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. .24) However, even under state law, appellant has shown that there is a reasonable probability that he would not have been found guilty had the tape been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant's conviction and death sentence must

therefore be reversed.

*****

IV.

APPELLANT'S CONVICTION OF CAPITAL MURDER MUST BE REVERSED BECAUSE CALIFORNIA'S MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL

The multiple murder special circumstance must be overturned because it violates the Eighth and Fourteenth Amendments by encompassing an overly-broad class of persons with vastly different levels of culpability.

"To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 725, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 877; see also *Lewis v. Jeffers* (1990) 497 U.S. 764, 774; *People v. Moon* (2005) 37 Cal.4th 1, 44, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of Stewart, J.) ["To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'"].)

Thus, in order to meet the demands of the Eighth Amendment, a special circumstance that makes a defendant eligible for the death sentence under California law must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (*People v. Green* (1980) 27 Cal.3d 1, 61; see also *Zant v. Stephens*, *supra*, 462 U.S. at p. 879 [factors that make a defendant eligible for the death

penalty must "differentiate [his] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed"].) Stated differently, a special circumstance that makes a defendant eligible for the death penalty must be one that "permit[s] the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers*, *supra*, 497 U.S. at p. 776; see also *Arave v. Creech* (1993) 507 U.S. 463, 474.)

California's multiple murder special circumstance, which applies in cases where the defendant has been convicted of one or more offenses of murder in the first or second degree (Pen. Code, § 190.2, subd. (a)(3)), does not achieve the constitutional goal of distinguishing in any meaningful or principled way the few cases in which the death penalty may be imposed from the many cases in which it may not. In order to achieve this goal, a valid special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (*United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1445.) The multiple murder special circumstance in California fails to foreclose this prospect.

The narrowing factor for the multiple murder special circumstance is not the defendant's mental state, but the act which was committed. Because death eligibility is based entirely upon the fact that more than one murder in the first degree has been committed, this special circumstance encompasses a broad class of individual defendants who possess wildly disparate levels of

culpability. Thus, for instance, California's multiple murder special circumstance applies equally to a defendant who, motivated by racial hatred, deliberately kills several minority children in separate incidents, as well as to a defendant who, in the course of a robbery, accidentally kills one woman and her nine-week-old fetus, which the defendant did not know the woman was carrying. (See, e.g., *People v. Davis* (1994) 7 Cal.4th 797, 810 [person responsible for death of eight-week-old fetus may be convicted of murder]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [intent to kill not required for the actual killer under the multiple murder special circumstance].) Under California's statutory scheme, one jury could sentence the accidental killer to death, while another could spare the life of the defendant who deliberately killed his victims based on their race. "The prospect of such 'wanton and freakish' death sentencing is intolerable under *Furman* and the cases following it." (*United States v. Cheely*, *supra*, 36 F.3d at p. 1444.)

In *People v. Coddington* (2000) 23 Cal.4th 529, 656, this Court rejected a constitutional challenge to the multiple murder special circumstance by stating that "the United States Supreme Court recognized multiple murder as a narrowing factor in *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246." The question presented in Lowenfield, however, was whether an aggravating circumstance at the penalty-selection stage of a capital trial may duplicate an element of the capital crime that, under Louisiana law, was the equivalent of a special circumstance creating death eligibility (namely, murder with intent to kill or inflict great bodily harm on more than one person). The United States Supreme Court held that such duplication was constitutionally permissible because the jury's guilt verdict, which

effectively amounted to a special circumstance finding that the defendant had killed more than one person with the intent to kill or inflict great bodily harm, accomplished the narrowing required by the Eighth Amendment. The fact that the sentencing jury was additionally required to find the existence of an aggravating circumstance before imposing a death sentence was not part of the constitutionally-required narrowing process, and therefore the fact that the aggravating circumstance duplicated an element of the crime that essentially amounted to an eligibility factor did not make the defendant's death sentence unconstitutional. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 246.) The high court did not decide the question of whether Louisiana's equivalent to the multiple murder special circumstance adequately narrowed the class of persons eligible for the death penalty, as that issue was neither raised by the defendant nor discussed by the Court.

Moreover, even assuming that the high court's opinion in Lowenfield could be read to hold that Louisiana's statutory equivalent of the multiple murder special circumstance was a proper narrowing factor, the Louisiana statute differs from the California special circumstance by making eligible for the death penalty a distinct sub-class of persons of comparable culpability – specifically, those murderers who act with the "specific intent to kill or to inflict great bodily harm upon more than one person." (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 242, citing La. Rev. Stat. Ann., § 14:30(A), subd. (3).). As described in the above example of the racially-motivated killer of several children and the accidental killer of a woman and her unknown fetus, the California multiple murder special circumstance encompasses an overly-broad class that is

composed of persons of immensely different levels of culpability, and allows the jurors to decide who among this vast class deserves death, thereby creating the possibility of aberrational life-or-death decisions. Thus, regardless of whether the Louisiana statute in Lowenfield sufficiently narrowed the class of murderers eligible for the death penalty by reasonably justifying the imposition of a more severe sentence on those who commit certain types of multiple murders, the California multiple murder special does not.

In *People v. Sapp* (2004) 31 Cal.4th 240, 287, this Court again upheld the constitutionality of the multiple murder special circumstance, this time stating that the special circumstance "narrow[s] the class of death-eligible first degree murderers to those who have killed and killed again." However, this classification permits death eligibility for an overly-broad class of defendants whose crimes are of vastly disparate levels of culpability, without providing any rational basis for distinguishing between those defendants who possess levels of culpability that make them deserving of the death penalty and those who do not.

In short, California's multiple murder special circumstance fails to differentiate in an objective and rational manner those murderers who deserve to be considered for the death penalty and those who do not, and thereby creates the type of "wanton and freakish" death sentencing found intolerable in *Furman v. Georgia*, *supra*, 408 U.S. 238, and the cases following it. This Court should reexamine its prior holdings to the contrary, declare this special circumstance unconstitutional, and reverse appellant's conviction of capital murder.

*****

V.

THE TRIAL COURT'S IMPROPER EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR 3389 REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Summary of Argument

Applying an incorrect legal standard, the trial court erroneously granted the prosecution's challenge for cause of Prospective Juror 3389 ("Juror 3389") during the death qualification portion of voir dire. As will be spelled out more fully below, Juror 3399's questionnaire and voir dire responses established that he would favor a sentence of life without parole, but that he felt that the death penalty would be warranted in a case where there was an issue of future dangerousness. The trial court granted the prosecution's challenge for cause on the grounds that Juror 3389 "has a definite bias in favor of . . . life without parole," and "would not fairly consider both options in this case if given the opportunity to do so." (13RT 3246.)

A penalty phase juror is not disqualified merely because he or she has a preference for one penalty over the other (*People v.McDerrmott* (2002) 28 Cal.4th946, 980), or because his or her personal beliefs about the death penalty would lead him or her "to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult to impose the death penalty." (*People v. Stewart* (2004) 33 Cal.4th 425, 447.) A juror may only be excluded if his or her feelings about the death penalty would "prevent or substantially impair his [or her] performance of his duties as a juror in accordance with his [or her] instructions and his [or her] oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 433.) "The circumstance that a juror's conscientious

opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is *not equivalent* to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, emphasis added.) A penalty juror who can set aside his or her personal feelings, follow the law and consider the evidence is qualified to serve. (*People v. Ledesma* (2006) 39 Cal.4th 641, 674-675.)

Because Juror 3389 said nothing either in his questionnaire or during voir dire that suggested he would be unable or unwilling to set aside his personal views, to consider and weigh the evidence presented and follow the court's instructions, the trial court erred in excusing him for cause. Appellant is therefore entitled to reversal of his death sentence.

B. The Record Below

Juror 3389 stated in his jury questionnaire that he was "moderately against" the death penalty, and that "[t]he death penalty should be used rarely, only when society cannot depend upon life in prison without the possibility of parole being 'absolutely' implemented." (16CT Supp.II 4418.) He explained that his views regarding the death penalty were based on the teachings of his Catholic faith. (16CT Supp.II 4419.) Juror 3389 responded "yes" to the question "Do you feel California should have the death penalty today" (16CT Supp.II 4421), and responded "no" to the question, "If the trial reached the penalty phase would you automatically, in every case, regardless of the evidence, vote for life without the possibility of parole?"

During voir dire, Juror 3389 clarified that he was not

categorically opposed to the death penalty. He stated, "My inclination is to avoid the death penalty, inclination but not an absolute." After explaining to Juror 3389 that a sentence of life without possibility of parole means that the defendant will never be released from custody, the court asked Juror 3389 whether he could foresee any circumstances under which he would choose the death penalty over life without the possibility of parole. Juror 3389 responded as follows:

> I think it's possible that certain circumstances could allow me to do that if there were –I'll just invent one. If there were individuals that were incarcerated and had ended up killing three of the guards, you know, where the system was having difficulty with that individual and where that individual's existence is hazardous to some segment of society, even though it happens to be inside within the prison, then I could find – I would find that an easy decision to say, hey, I would go the other way.

(13RT 3222.) The court then asked him whether he could think of any other circumstances under which he would choose the death penalty over life without possibility of parole, and he stated, "I don't have any obvious. If you want to ask me about one." (*Ibid.*) Neither the court nor the prosecutor took him up on this invitation, however further questioning by the prosecutor elicited that absent a situation where he felt that a person would still pose a threat to others even if incarcerated, Juror 3389 would be inclined to vote for life without the possibility of parole. (13RT 3223.) When questioned by defense counsel, Juror No. 3389 affirmed that he would vote for a death sentence if he felt that the facts and evidence warranted it. (13RT 3224.) Notably, Juror 3389 was *never* specifically asked, either in his questionnaire or during voir dire, whether or not he could set aside his personal feelings about the death penalty, consider the evidence in

mitigation and aggravation, and follow the court's instructions.

The prosecutor challenged Juror 3389 for cause, arguing that Juror 3389 did not have an "open mind" towards the death penalty and would only impose it if he felt that life imprisonment would not sufficiently protect society. (13RT 3245.) Defense counsel opposed the challenge on the grounds that while Juror 3389 "may have an inclination to life in prison, he was open, depending on the circumstances and facts of the case, to render a verdict if he felt it was warranted." (13RT 3245-1346.) In response to the prosecutor's assertion that Juror 3389 should be excluded because he only described one scenario under which he would vote for a death sentence, defense counsel pointed out that he had invited the court to ask him questions about other hypothetical scenarios, thus demonstrating his willingness to consider a death sentence under circumstances beyond those he described. (13RT 3245.)

The trial court ruled as follows:

> I am going to grant the motion as it relates to Mr. 3389. It appears from his answers that *he has a definite bias in favor of the* (sic) *life without parole* and that the only situation he could foresee himself, the only one he gave as an example – even when I asked him for additional situations where it might occur – the only one that came to mind for him is a situation where someone was already serving a life sentence and had committed further murders while in custody in serving that life sentence. I believe that based upon his expression of his strong religious beliefs[23] that *he would not fairly*

---

[23] Juror 3389's religious beliefs were not discussed at all during voir dire. In his jury questionnaire responses, Juror 3389 noted that he was a "Roman Catholic," and stated that "I try to practice what the Church teaches regarding capital punishment." He also stated (in response to a question asking for his opinion as to which punishment is worse, death or

> *consider both options* in this case if given the opportunity to do so.

(13RT 3246, emphasis added.)

C. The Trial Court Exceeded Its Constitutional Limitations When It Excluded Juror 3389 on the Grounds That He Had a "Bias in Favor of Life," and the Death Judgment Must Be Reversed Because Juror 3389 Was Qualified to Serve Under the Governing Standard

1. The *Witherspoon-Witt* Doctrine Sets Forth a Standard, a Procedure on Review, and a Constitutional Limitation of Trial Courts' Power to Exclude Potential Jurors in the Context of a Capital Trial

Under ordinary trial procedure, both civil and criminal, courts observe the basic rule that a potential juror may be excluded "for cause," and myriad circumstances are adequate to justify such exclusion. However, in a capital case, the United States Constitution places a limitation on the trial court's power to exclude a potential juror for cause based on the juror's feelings about capital punishment. This limitation is defined in the line of precedent that includes *Witherspoon v. Illinois* (1968) 391 U.S. 510, *Adams v. Texas* (1980) 448 U.S. 38, and *Wainwright v. Witt* (1985) 469 U.S. 412.

> As an initial matter, it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow

---

life in prison without the possibility of parole), "My religious beliefs include the fact that God demands justice, but God is also all forgiving to those who warrant forgiveness. Life in prison provides the opportunity to earn forgiveness. Society must be *absolutely* protected from a possibility of parole." (16CT Supp.II 4419.)

> the law or abide by their oaths, the death sentence cannot be carried out.

(*Witt*, 469 U.S. at p. 436, Justice Stevens, concurring, quoting *Adams*, 448 U.S. at pp. 47-48, and noting that dissent by Justices Brennan and Marshall also endorses the standard.) If a trial court exceeds its power in this regard, the penalty judgment must be reversed. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 660; *People v. Heard* (2003) 31 Cal.4th 946, 966.) That is precisely what the trial court did in this case and therefore appellant's penalty judgment must be vacated.

The legal framework stems from the United States Supreme Court's decision in *Witherspoon*, *supra*, 391 U.S. 510. Therein, the Court held that "for cause" dismissal of half the venire at the defendant's trial based on their "qualms about capital punishment," pursuant to a state law disqualifying jurors with "conscientious scruples against capital punishment, or are opposed to it," violated the defendant's right to trial by an impartial jury under the Sixth Amendment. In footnotes 9 and 21, the Court in *Witherspoon* stated that a veniremember could be excluded only if he or she would "automatically" vote against the death penalty, and that this state of mind should be "unambiguous" or "unmistakably clear." The statement in the footnotes, construed as a two-pronged test, later was embraced as precedent by United States Supreme Court opinions in *Maxwell v. Bishop* (1970) 398 U.S. 262, and *Boulden v. Holman* (1969) 394 U.S. 478.

In *Adams v. Texas*, *supra*, 448 U.S. 38, the United States Supreme Court applied *Witherspoon* and invalidated the disqualification of jurors under a Texas statute. Texas Penal Code

Annotated Section 1231(b), required each juror to state under oath that the possibility of the death penalty would not "affect [his or her] deliberations on any issue of fact." The Court held that *Witherspoon* is not a ground for exclusion, but rather a limitation on the state's power to exclude prospective jurors because of their views on capital punishment.[24] (*Id.* at pp. 47-48.) Rather than resting its holding on language in footnotes 9 and 21 of the *Witherspoon* decision, the Court in *Adams* set forth the doctrine as follows:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

(*Id.* at p. 45.) Applying the test, the Court held that a potential juror's views about the death penalty might influence the manner in which he or she performed his or her role, yet without exceeding the "guided jury discretion" required under the state's capital penalty scheme considered as a whole, and thus the exclusion of certain jurors under section 1231(b) violated the precepts of *Witherspoon*. (*Id.* at p. 46.)

In *Wainwright v. Witt*, *supra*, the United States Supreme Court endorsed the basic principles set forth in *Witherspoon*, reaffirmed that the doctrine amounts to a constitutional limitation on trial courts'

---

[24] This distinction is subtle, yet important. If the doctrine were but one ground for exclusion, then state laws regarding the qualification of capital jurors permissibly could provide additional grounds to exclude potential jurors in capital cases. By emphasizing that the doctrine provides a limitation on the power the exclude, the United States Supreme Court made clear that trial court's cannot supplement that constitutional test with other, different standards.

power to exclude jurors based on their death penalty views, and set forth the modified two-prong test that governed the jury selection process at appellant's trial. On habeas review, the Court in *Witt* reversed the federal appellate court's finding of Witherspoon error and reinstated the Florida state court's judgment.[25] The Court stated that the governing standard no longer would be the one derived from *Witherspoon* footnotes 9 and 21, which asked whether a potential juror would "automatically" vote against the death penalty, but rather one set forth in *Adams v. Texas*, which asked whether the excluded juror's views on the death penalty would "substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." (469 U.S. at pp. 422-423.)

In addition to modifying the standard, at the first prong, the Court in *Witt* altered the second prong, that is, the procedure applicable to *Witherspoon* claims. Instead of asking whether it was "unmistakably clear" that the potential juror indeed lacked qualifications to serve, a reviewing court must treat the trial court's determination in that regard as a factual finding, entitled to deference and to be affirmed if supported by substantial evidence.

The *Witt* decision referred several times to jurors' "impartiality" or "bias," but in context it is clear that the United States Supreme Court used these terms as a shorthand for the standard to be applied at prong one of the *Witherspoon-Witt* analysis. The Court stated: "Here, as elsewhere, the quest is for jurors who will conscientiously

---

[25] The juror at issue in *Witt* had been excluded after stating that her views against the death penalty would "interfere with" her sitting as a juror in the case, and "interfere with" judging the guilt or innocence of the defendant. (469 U.S. 412, 416.)

apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." (469 U.S. at p. 423.) The Court continued:

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds v. United States*, 98 U.S. 145, 157, 25 L.Ed. 244 (1879). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in *Adams*, but it is equally true of any situation where a party seeks to exclude a biased juror. See, e.g., *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984) (where a criminal a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed"). ¶ We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." [fn. omitted.] We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because questions of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

(469 U.S. at p. 423-424.)

In a separate section, the majority in *Witt* held that on habeas review, the trial court's "finding of bias" in excluding a juror was a factual determination entitled to a presumption of correctness under the federal habeas statute. (469 U.S. at pp. 431-435.) Here again, the Court used the term "biased" as a shorthand for a potential juror who failed the *Adams* test. The Court stated, "[t]he standard in this case is the easily understood one enunciated in *Adams*; whether the juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (469 U.S. at p. 433, quoting *Adams*, 448 U.S. at p. 45.) Thus, the Court reversed the grant of habeas relief, on the ground that "[t]he trial court's finding of bias was made under the proper standard, was subject to § 2254(d), and was fairly supported by the record." (469 U.S. at p. 435.)

Therefore, under United States Supreme Court precedent, in the context of for-cause exclusion under the *Witherspoon* doctrine, a "biased" or "partial" juror is one whose views on the death penalty would "prevent or substantially impair" a juror from performing his duties in accordance with his instructions and his oath. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 658 [noting that the *Witt* test refined the standard for claims under the *Witherspoon* rule]; see also *Lockhart v. McCree* (1986) 476 U.S. 162, 178 ["impartial jury consists of nothing more than "jurors who will conscientiously apply the law and find the facts," internal quotes omitted, emphasis added].) In other words, the "bias" that merits exclusion is nothing more, nor less, than the state of mind that merits disqualification under *Witt*. It means nothing for the trial court to determine that a prospective juror possesses a preference, predilection, tendency to favor, or "bias" for

one penalty or the other. To warrant disqualification, the trial court must go a step further, and assess and determine whether the "prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*Wainwright v. Witt, supra*, 469 U.S. at p. 426.)

The United States Supreme Court recently reaffirmed that the *Adams* "prevents or substantially impairs" test is the standard to be applied at prong one of the *Witherspoon-Witt* analysis. (*Uttecht v. Brown* (2007) 127 S.Ct. 2218, 2229.) In *Uttecht*, the United States Supreme Court summed up the precedents of *Witherspoon*, *Witt*, *Gray*, and *Darden v. Wainwright* (1986) 477 U.S. 168, for purposes of habeas review, as follows:

> These precedents establish at least four principles of relevance here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S. at 521, 88 S.Ct. 1770. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S. at 416, 105 S.Ct. 844. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.* at 424, 105 S.Ct. 844. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.* at 424-434, 105 S.Ct. 844

(*Id.*, 127 S.Ct. at p. 2224, emphasis added.) As to the second prong, procedure on review, the Court noted that deference must be shown

to fact-finding, based on the trial court's superior position to assess demeanor, and that an additional layer of deference is required under the federal habeas statute, 28 U.S.C. sections 2254(d)(1)-(2). (*Ibid.*) As it had done in *Witt*, the Court deemed the question of "partiality" to be subsumed within application of the constitutional standard: "Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." (*Id.* at p. 2231.)

This Court has adopted the *Witherspoon-Witt* doctrine and applied it in many decisions. At the second prong, this Court has added the procedural gloss that a judgment will be upheld on appeal so long as "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Wilson* (2008) 44 Cal.4th 758, 779, quoting *People v. Roldan* (2005) 35 Cal.4th 646, 696.) On that score, a reviewing court shall "uphold a trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Cunningham* (2001) 25 Cal.4th 926, 976, citations omitted.)

On the first prong, the standard for disqualifying a prospective juror, this Court consistently has hewn to the line established by the United States Supreme Court. This Court recently stated:

> As we have explained in numerous recent decisions in capital cases, "[t]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or

> against capital punishment 'would "prevent or substantially impair the performance of his [or her] duties as a juror"' in accordance with the court's instructions and the juror's oath.'" [citations omitted.]

(*People v. Wilson*, *supra*, 44 Cal.4th at p. 779.)

Although numerous decisions of this Court refer to a disqualifying "bias" for or against the death penalty, each of them use the term only as a shorthand for those who fail testing under the *Witherspoon-Witt* standard – viz., whether the juror's beliefs would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (See e.g. *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Crittenden* (1994) 9 Cal.4th 83, 121, citing *Morgan v. Illinois* (1992) 504 U.S. 719, 733-736; *People v. Coleman* (1988) 46 Cal.3d 749, 764, 768, fns. 11 & 12; *People v. Williams* (1997) 16 Cal.4th 635, 666-667; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Johnson* (1989) 47 Cal.3d 1194; *People v. Cunningham, supra*, 25 Cal.4th at p. 979; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Cooper* (1993) 53 Cal.3d 771, 809; *People v. Abilez* (2007) 41 Cal.4th 472, 497-498.)

2. This Court's Precedent Makes Clear That a Juror is Not Disqualified Under the *Witherspoon-Witt* Standard Simply Because He or She Does Not Believe in the Death Penalty and Would Find It Very Difficult to Sentence Someone to Death

In *People v. Stewart*, *supra*, this Court made clear that trial courts violate constitutional requirements when they disqualify jurors on the ground that they would find it "very difficult" ever to impose the death penalty or would impose a "higher threshold" on the prosecutor

in the penalty phase of a capital case. (33 Cal.3d at pp. 442-443.)

> In light of the gravity of [the] punishment, for many members of society their personal and conscientious views ... would make it 'very difficult' ever to impose the death penalty. So long as such juror can follow his or her oath, he or she is "entitled – indeed, duty bound to sit on a capital jury."

(*Id.* at p. 446.)

Prospective jurors in *Stewart* responded to an inquiry on a written questionnaire asking whether they held conscientious opinions or beliefs about the death penalty that would "prevent or make it very difficult" to ever "vote to impose the death penalty." (33 Cal.4th at pp. 442-443.) Those who answered "yes" to this question were disqualified, without any "clarifying follow-up examination . . . during which the court would be able to *further explain the role of jurors in the judicial system*, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision." (*Id.* at pp. 447-448, 449, emphasis added.) Exclusion of such jurors for cause lacked an adequate basis, and was error requiring reversal of the death judgment. (*Id.*)

The Court in *Stewart* elucidated that a juror's disqualification from a California capital jury under the *Witherspoon-Witt* doctrine can be determined only by taking into consideration the state's unique capital sentencing process:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that

> such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412, 106 S.Ct. 844. In other words, the question as phrased in the juror questionnaire did not directly address the pertinent constitutional issue. A juror could find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(33 Cal.4th at p. 447, emphasis in original.) The Court accordingly emphasized that "[b]efore granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath) . . . 'in the case before the juror.'" (*Id.* at p. 445, citations omitted.) The Court noted that under *Witt*, the prosecution, as the moving party, bore the burden of demonstrating to the trial court that the above-stated standard was satisfied as to each of the challenged jurors, and that the trial court then had a duty to determine whether the challenge was proper. (*Id.* at pp. 445-446.) The Court held that the trial court in that case did not have sufficient information regarding the excluded jurors' states of mind to reliably make such a determination. (*Id.* at p. 451.)

The instant case is similar to *Stewart,* in that the trial court made no attempt to ascertain whether or not Juror 3389, despite his personal feelings about the death penalty, was willing and able to

follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death was the appropriate penalty under the law. The prosecutor's questions during his voir dire of Juror 3389, as well as those asked by the trial court, focused entirely upon Juror 3389's personal views and not upon whether he could set them aside in order to perform his duty as a juror. Therefore, as was the case in *Stewart*, the trial court herein had insufficient information to make a reliable determination that Juror 3389's personal beliefs concerning the death penalty would prevent or substantially impair the performance of his duties – as defined by the court's instructions and Juror 3389's oath – in the case before him.[26] The trial court's exclusion of Juror 3389 thus failed to comport with the constitutional standard.

3. The Trial Court Applied the Wrong Legal Standard and Disqualified Juror 3389 Merely Because He Had a Preference for Life Without the Possibility of Parole

A qualified juror must be able to consider both penalties, and to impose the death penalty if he or she determines it is appropriate in the case for which he or she is serving as a juror. (*People v. Heard*, *supra*, 31 Cal.4th at p. 958.) However, as noted above, a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, citing *People v. Kaurish* (1990) 52 Cal.3d 648.)

---

[26] The prosecution failed to meet its "burden of demonstrating to the trial court that this standard was satisfied as to . . . [the challenged juror]." (*Stewart*, 33 Cal.4th at p. 445.)

The prior decisions of this Court illustrate that jurors with a preference in favor of one penalty or the other are qualified to serve. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 488-490 [juror who "strongly supported" death penalty and felt that person who commits multiple murders or murder during a burglary or sexual assault should "always receive the death penalty," not disqualified]; *People v. Hamilton* (2009) 45 Cal.4th 863, 892-894 [juror who felt that death penalty should be imposed in every case of intentional murder, and stated that "it would have to be an awful, awful strong case" on behalf of the defendant to sway him from voting for the death penalty, and juror who stated that she would "lean in the direction of the death penalty" for robbery, burglary and killing of a young mother, not disqualified]; *People v. McDermott*, *supra*, 28 Cal.4th at p. 980 [juror who favored the death penalty and said he would give more weight to circumstances of crime than other factors, not disqualified]; *People v. Riggs* (2008) 44 Cal.4th 248, 286-288 [juror who stated that she would vote for death in all cases of intentional, deliberate or premeditated murder, and that she did not see the relevance of mitigating evidence concerning defendant's background, not disqualified].[27] The trial court's exclusion of Juror 3389 on the grounds that he appeared to have "a definite bias in favor of life

---

[27] As to the juror's strong preference for the death penalty and her skepticism regarding the value of mitigating evidence, the Court in *Riggs* observed that "[t]he fact that this preexisting view might have made it more difficult for defendant to *convince* Juror A.M. of the relative strength of a mitigation case that included evidence of defendant's background does not prove that she would automatically vote for the death penalty, or that her belief prevented or substantially impaired the performance of her duties as a juror to follow the trial court's instructions to weigh the evidence to be offered." (*Id.* at p. 287, emphasis in original.)

without parole," was thus legally erroneous.

4. Under the Correct Constitutional Standard the Trial Court's Disqualification of Juror 3389 is Unsupported by Substantial Evidence and the Death Judgment Must Therefore Be Reversed

Not only did the trial court apply an erroneous legal standard granting the prosecutor's challenge for cause of Juror 3389, but also its determination that Juror 3389 was not qualified to serve in this case is not supported by substantial evidence. This court has articulated the standard of review when a trial court has granted a "for cause" challenge as follows:

> The trial court's determination of the juror's state of mind is binding on appeal if the juror's statements are equivocal or conflicting. If the juror's statements are not inconsistent, we will uphold the court's ruling if it is supported by substantial evidence.

(*People v. Harrison* (2005) 35 Cal.4th 208, 227, internal citation omitted].) A trial court's exclusion of a juror for cause is not supported by substantial evidence if no rational trier of fact could find juror was unqualified (*People v. Ochoa* (2001) 26 Cal.4th 398, 432, disapproved on other grounds); i.e., that he or she "'would invariably vote . . . against the death penalty . . . without regard to the strength of aggravating and mitigating circumstances.'" (*Id.* at p. 431, citation omitted.)

Juror 3389's statements concerning his views on the death penalty were neither inconsistent nor equivocal. Juror 3389 stated that he did not like the death penalty, and preferred life without possibility of parole, but that he nevertheless felt a death sentence

would be warranted in a case where the defendant might pose a future threat to others.[28] The record thus reflects that Juror 3389 had thought a lot about the death penalty, and despite his moral and religious beliefs, had come to the conclusion that it was an appropriate punishment in some cases. Consequently, this is *not* a case where the trial court's factual determination regarding the juror's state of mind is binding on appeal.

Furthermore, as discussed above, nothing Juror 3389 said either in his questionnaire or upon voir dire indicated that he was

---

[28] Future dangerousness was, in fact, an issue in this case. During trial, the prosecution went to great lengths to portray appellant as an active member of a ruthlessly violent street gang, and to create an inference in the minds of the jurors that he posed a continuing threat to others despite the fact that he was no longer "on the street." During the guilt phase, the prosecutor played a tape recording of appellant's pretrial phone call from the jail to his brother, in which he spoke of having the Deputy D.A. who was then prosecuting him "hit" (14RT 3609-3610; 15RT 3897-3898), and subsequently elicited testimony that the original Deputy D.A. was replaced due to the "death threat" made by Jones during that call. (17RT 4479.) In his penalty phase closing argument, the prosecutor specifically argued that future dangerousness was a factor justifying imposition of the death penalty in this case. The prosecutor stated:

> I know you saw this before, but I want to touch upon it again because it is something you should consider in making your decision as to the appropriate decision. Future dangerousness. Is it over? Did it end with the murder of Villa and Lopez and the attempted murder of Mr. Hernandez? Where does it go on? I focus you on the one line of the defendant when he is in county jail, has been arrested and not on the street and doesn't have a gun on him anymore. What is he doing? He is on the phone saying, "we need that D.A. hit. ¶ Now I am not appealing to you as a district attorney, but the point is it's not over. This is someone who continues to be a violent predator.

(22RT 5808.)

"'unable to conscientiously consider all of the sentencing alternatives, including the death penalty'" in the case before him. (*People v. Heard*, *supra*, 31 Cal.4th at p. 958.) As in *Heard*, the trial court "did not explain what there was in [Juror 3389's] responses that indicated that he would not be willing or able to follow the law in determining whether life in prison without the possibility of parole, or death, was the appropriate punishment in light of all the evidence presented." (*Id.* at p. 965.) Indeed, no rational trier of fact could find, based on the record, that Juror 3389 was unqualified to serve on the jury in this case. The trial court's finding otherwise is therefore not supported by substantial evidence and, accordingly, not entitled to deference on appeal.

D. Conclusion

As demonstrated above, the trial court erred in granting the prosecution's challenge for cause of Juror 3389. The court incorrectly ruled that Juror 3389 was disqualified by virtue of his "bias" in favor of life with out possibility of parole," and it improperly excluded him without having any evidence whatsoever that Juror 3389's personal feelings about the death penalty would "prevent or substantially impair his performance of his duties as a juror in accordance with his instructions and his oath," the constitutional standard set forth in *Wainwright v, Witt*, *supra*, 469 U.S. at p. 433. Because he trial court's finding that Juror 3389 was unqualified to serve was neither "made under the proper standard" nor "fairly supported by the record" (*Id.* at p. 435), appellant's death sentence must be reversed. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660; *People v. Heard*, *supra* 31 Cal.4th at p. 966.)

VI.

THE ADMISSION OF EVIDENCE OF PRIOR UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. Introduction

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of seven incidents of alleged prior criminality under factor (b) of section 190.3: the murder of Carl Milling in 1990; the carjacking of Sao Sam in 1990; the shootings of Matthew Ferguson and Quincy Saunders in 1990; the robbery of Artis Lisby in 1991, the murder of Ronald Broussard in 1991 and the possession of a concealed, loaded revolver in 199_. There had been no prior adjudication of any of these allegations.

Reliance on such unadjudicated criminal activity during the penalty phase deprived appellant of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable and non-arbitrary penalty determination, in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution. In addition, even if (arguendo) a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the particular evidence of unadjudicated criminal activity in this case was especially unreliable and therefore violative of appellant's rights to due process and a reliable penalty determination. Appellant's death judgment must therefore be reversed.

////

B. The Use of Unadjudicated Allegations Violated Appellant's Constitutional Rights, Including His Fifth, Sixth, Eighth and Fourteenth Amendment Rights to Due Process and a Reliable Penalty Determination

Section 190.3, subdivision (b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (3CT 609.) Pursuant to that factor, the prosecution presented evidence of seven incidents of alleged criminal activity by appellant, and the jury was instructed that it could consider the presence or absence of this alleged criminal activity. (*Ibid.*) The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587 [prior conviction that had been set aside was used in aggravation]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [to permit state to present evidence of murders other than convictions violates constitutional rights]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [to present facts of a previously untried murder during sentencing hearing denied defendant due process].) Admission of the unadjudicated prior criminal activity also denied appellant the right to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, under the Sixth and Fourteenth Amendments, and

to equal protection of the law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b) is an open-ended aggravating factor that allows arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted the section in an overly-broad fashion that cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be more rigorous than those provided non-capital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606), decisions by this Court have reversed this mandate and singled out capital defendants for less procedural protection than that afforded other criminal defendants. For example, this Court has ruled that, in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); it has held that the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and it has held that the trial court is not

required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes (*People v. Hardy (1992) 2 Cal.4th 86, 205-207*). This Court has ruled that unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but that felony convictions, even for violent crimes, rendered after the capital homicide are not admissible (*People v. Morales* (1989) 48 Cal.3d 527, 567); and it has ruled that a threat of violence is admissible if, by happenstance, the words are uttered in a state that has made such threat a criminal offense. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261). Juvenile conduct is admissible under this factor (*People v. Burton* (1989) 48 Cal.3d 843, 862); as is an offense dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659).

In sum, this Court has indeed treated death differently by lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585) and the jurors must give the exact same level of

deliberation and impartiality as would have been required of them in a separate criminal trial, for when a state provides for capital sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury be impartial. (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509; where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand); *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of appellant's guilt of the previously unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether unrelated but similar violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).) Moreover, two of the unadjudicated offenses appellant's jurors were asked to impartially evaluate involved alleged murder, making it impossible for the jury that had just convicted appellant of murdering four people to fairly evaluate the evidence.

Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced."]; *United States v. Aguon* (9th Cir. 1987) 813 F.2d 1413, 1421, mod. (en banc 1988) 851 F.2d 1158 ["The presence of even a single partial juror violates a defendant's rights under the Sixth

Amendment to trial by an impartial jury."].)

A finding of guilt by such a biased fact finder clearly would not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. 1998)(en banc) 151 F.3d 970, 973, and citations therein.) In this case, counsel for appellant chose not to question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and counsel may have felt that questioning the potential jurors about other violent crimes could have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices with respect to the prior unadjudicated crimes–in particular, those involving murder--without forfeiting appellant's constitutional right not

to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in non-capital sentencing (California Rules of Court, rule 4.421.5), the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. It also violated appellant's Fourteenth Amendment right to due process because the State applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

For all the foregoing reasons, use of the evidence of unadjudicated criminal activity against appellant requires reversal of the judgment of death. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Finally, as shown elsewhere (see Argument VII, post), the failure to require jury findings with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty.

*****

VII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, consistently has rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's opinion in *Schmeck*, appellant briefly presents the following challenges to California's capital sentencing scheme in order to urge reconsideration and preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 3CT 609 [CALJIC No. 8.85].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is

the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide, facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court repeatedly has rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

California law does not require that a reasonable-doubt

standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before determining whether or not to impose a death sentence, except as to proof of prior criminal acts. (3CT 615-616 [CALJIC No. 8.87 (1989 rev.)].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, Ring v. Arizona (2002) 536 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 871, now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make factual findings: (1) that aggravating factors were present; and (2) that the aggravating factors were so substantial as to make death an appropriate punishment. (3CT 624-625 [CALJIC No. 8.88 (1989 rev.)].) Because these additional findings were required before the jury could impose the death sentence, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10; see *Carter*

v. Kentucky (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Ring*, and *Blakely* impose a reasonable-doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Appellant also submits that the Due Process Clause and the Eighth Amendment require that the sentencer in a capital case be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the argument that the Due Process Clause and the Eighth Amendment require that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that this Court reconsider its rejection of this argument.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Cal. Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant therefore is constitutionally entitled under the Fourteenth

Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation and the appropriateness of the death penalty, and that it was presumed that life without the possibility of parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here, fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutionally-minimal standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the reasonable possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, supra, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of the Ring reasoning mandates jury unanimity 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* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal Constitution. In California, when 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., Pen. Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S.

957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances constitutionally is required. To apply the requirement to an enhancement finding that may carry only a maximum 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 of the federal Constitution, and by its irrationality violate both the Due Process Clause and Cruel and Unusual Punishment Clause of the federal Constitution, as well as the Sixth Amendment's guarantee of a fair trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (3CT 616 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court routinely has rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.)

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington, supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim in *People v. Ward* (2005) 36 Cal.4th 186, 221-222, but asks this Court to reconsider its decision in *Ward*.

The question of whether to impose the death penalty upon 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." (3CT 625.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that holding.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

Penal Code section 190.3 directs the jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate

of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without the possibility of parole is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that the jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.)

That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity also was required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal also is required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams (1976)* 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however,

although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const., 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction constitutionally is required.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate

review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) This Court has rejected these arguments. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see 3 CT 645 [CALJIC No. 8.85]; Pen. Code, § 190.3, factors (d) and (g)) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that this Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

A number of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, including factors (e) [victim a participant in or consented to homicide] and (f) [offense committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct]. The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks this Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

In accordance with customary state-court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which

could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, though, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks this Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are relevant only as mitigators.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro*, (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause of the Fourteenth Amendment. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks this Court to reconsider them.

This Court repeatedly has rejected the claim that the use of the death penalty at all, or, alternatively, that the *regular* use of the death penalty, violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; see *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a

regular form of punishment and the United States Supreme Court's recent citation of international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

*****

VIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Numerous errors, many of federal constitutional dimension, occurred at appellant's trial. Appellant has explained why each of those errors was prejudicial in itself. Even assuming that none of the errors identified by appellant is prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in a death judgment against appellant. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282F.3d 1204, 1211; *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.)

The trial court's erroneous rulings in the guilt phase (1) restricting appellant's cross examination concerning the substance of the conversation between Anna Granillo and Veronica Mungia that precipitated Granillo's decision to change her story and (2) excluding Robert Robinson's testimony establishing that appellant was no longer an active gang member arbitrarily and unfairly deprived appellant of his right to subject the prosecution's case to meaningful adversarial testing. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53

[exclusion of exculpatory evidence without valid state justification deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing].) The devastating impact of these errors on the fairness of appellant's trial was exacerbated by the trial court's further error in permitting the prosecution to introduce the irrelevant, yet highly prejudicial tape recording of appellant's telephone conversation with his brother.

The combined errors also deprived appellant of his right under the Eighth and Fourteenth Amendments to a reliable determination of guilt and penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed]; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638 [applying Eighth Amendment requirement of reliability to guilt determination in capital case].)

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.)

In the instant case, it certainly cannot be said that the errors had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Given the severity of the errors in this case, their

cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Appellant's conviction and death sentence must be therefore be reversed.

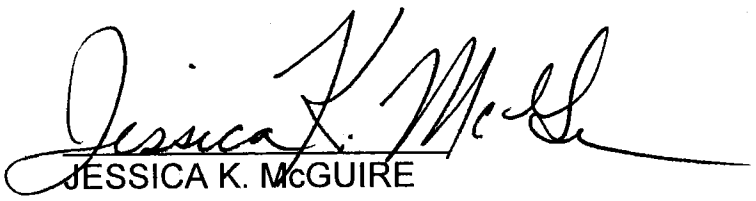
*****

CONCLUSION

For all of the reasons stated above, appellant's conviction and death sentence must be reversed

Dated: October 14, 2010

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



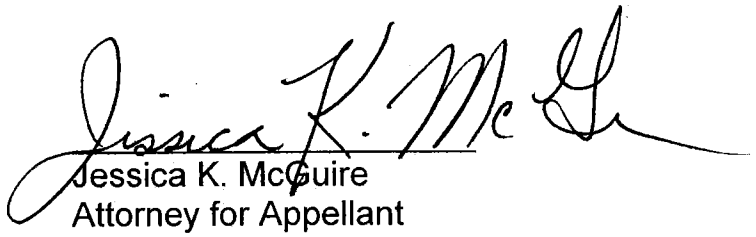
JESSICA K. McGUIRE
Assistant State Public Defender

Attorneys for Appellant
Kiongozi Jones

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b) (2))

I am the Assistant State Public Defender assigned to represent appellant, Kiongozi Jones, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of the generated word count, I certify that this brief, excluding the tables and certificates, is 42,022 words in length.

Dated: October 14, 2010



Jessica K. McGuire
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Kiongozi Jones***
Case Number: **Los Angeles Superior Court No. NA-031990-01**
Supreme Court No. S075725

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing them in an envelope and
/ / depositing the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **October 14, 2010,** as follows:

Kiongozi Jones
Post Office Box P-21100
San Quentin State Prison
San Quentin, CA 94974

Beverly Falk
Deputy Attorney General
300 South Spring Street,
Los Angeles, CA 90013

Geraldine S. Russell
P.O. Box 2160
La Mesa, CA 91943

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 14, 2010**, at Sacramento, California.

Saundra Alvarez