IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. GARY GRIMES, Appellant.	S076339 Superior Court (Shasta) 95F7785

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Shasta County

Honorable Bradley L. Boeckman, Judge

CLIFF GARDNER
(State Bar No. 93782)
CATHERINE WHITE
(State Bar No. 193690)
LAZULI WHITT
(State Bar No. 221353)
19 Embarcadero Cove
Oakland, CA 94606
Tel: (510) 534-9404
Fax: (510) 534-9414

Attorney for Appellant
Gary Grimes

DEATH PENALTY

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INTRODUCTION: THE WEAKEST LINK

This capital case involved a robbery and murder which occurred in 1995. Trial began in October 1998.

The year is significant. In 1989, nearly ten years earlier, the United State Supreme Court held that the Eighth Amendment *permitted* the state to execute defendants who were mentally retarded. (*Penry v. Lynaugh* (1989) 492 U.S. 302.) In 2002, four years after trial in this case, the Supreme Court addressed this issue once again, but this time concluded that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." (*Atkins v Virginia* (2002) 536 U.S. 304, 306.) Accordingly, the Court overruled *Penry* and held that the Eighth Amendment *precluded* the state from executing the mentally retarded.

As noted, trial here occurred in 1998, squarely in the time period when execution of the mentally retarded was deemed permissible. As discussed more fully in the statement of facts, all parties agree that John Morris, Patrick Wilson and appellant Gary

Grimes broke into the home of Betty Bone in Shasta County to commit robbery. All parties also agree that during the robbery, John Morris killed Mrs. Bone. Thus the prosecutor conceded repeatedly during her closing argument that Mr. Grimes was *not* the actual killer.

As the penalty phase evidence would later show, Mr. Grimes was given a series of psychological tests after his arrest including the Wide Range Achievement Test, the Weschler Memory Scale III, and the Raven's Colored Progressive Martrices test; *defendant tested mentally retarded or severely impaired in virtually all levels.* His overall IQ was 73, his working memory score was 67, his Wide Range Achievement test score was 62 and he generally tested in the range of a third to fourth grader. According to the testing, Mr. Grimes should have been placed in special education classes when he was a child.

And that is exactly what happened. Special education was new to Modesto in 1975; the school district selected 12 of its neediest children out of 3000 for the special education program. Gary Grimes was one of the 12 children selected. Several of Mr. Grimes's special education teachers testified in the penalty phase. When Mr. Grimes was in the seventh and eighth grades, he was reading at the level of a seven year old. His teachers remembered him as a passive and quiet child who would follow more aggressive

children. Perhaps for obvious reasons, and as state witnesses at trial would themselves confirm, Mr. Grimes's nickname was "Slow."

Morris, Wilson and Grimes were all arrested within days of the offense. The day after his arrest, Morris -- the actual killer -- committed suicide in his jail cell. That left Wilson and Grimes. Wilson eventually pled guilty and the state agreed not to seek death.

As to Mr. Grimes, the state initially made clear it had decided "not to seek the death penalty . . . ." (4 CT 667.) Later, when a replacement district attorney changed his mind and decided to seek death, he gave Slow a total of 21 days within which to either plead guilty to murder or face death. Of course, as the Supreme Court noted in *Atkins*, the impairments of the mentally retarded "can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." (*Atkins v Virginia supra*, 536 U.S. at p. 306.) Here, when Slow did not plead guilty at the end of this 21-day window, the state -- true to its word -- shifted positions and sought his death.

Trial began nearly 16 months later. Prior to trial defense counsel made clear that Slow was finally ready to plead guilty. Of course, 16 months earlier, Mr. Grimes could have entirely avoided a death sentence by pleading guilty to murder. According to the prosecutor, however, with the trial date looming, it was too late. A plea would no longer

satisfy the state; the state continued to seek death. But because there was no defense to the murder charges themselves, defense counsel nevertheless formally conceded Mr. Grimes's guilt to the jury in both his opening and closing arguments.

Ultimately, the only person the state placed on death row for this crime was "Slow," Gary Grimes. This appeal follows.

As this case winds its way through the state post-conviction system, of course, this Court will do its best to locate, appoint and pay habeas counsel for Mr. Grimes. And because the trial here occurred prior to *Atkins*, funds will no doubt be requested to investigate and present an *Atkins* claim and the claim will be extensively investigated and thoroughly litigated in state habeas proceedings. But as discussed below, there should be no reason to even reach such a proceeding; given that all parties recognized defendant was not the actual killer, there are numerous reasons on the face of the appellate record to reverse both the special circumstance and penalty phase verdict the state was able to obtain against "Slow" Gary Grimes.

STATEMENT OF THE CASE

On February 15, 1996, the Shasta County district attorney filed a six-count information against appellant Gary Grimes. (2 CT 183-189.) The information charged as follows:

1) Count one charged an October 18, 1995 murder in violation of Penal Code section 187. (2 CT 183.) The information added robbery and burglary special circumstance allegations as to this count. (2 CT 186-187.)

2) Count two charged an October 18, 1995 robbery in violation of section 211. (2 CT 184.)

3) Count three alleged an October 18, 1995 burglary in violation of section 459. (2 CT 184.)

4) Count four alleged an October 18, 1995 conspiracy to commit robbery in violation of section 182. (2 CT 184-185.)

5) Count five alleged an October 15, 1995 conspiracy to commit burglary in violation of section 182. (2 CT 185-186.)

6) Count six alleged an October 15, 1995 vehicle theft in violation of Vehicle Code section 10851(a). (2 CT 186.)

As to counts one through five, the information added enhancing allegations that (1) great bodily injury was inflicted on an elderly person in violation of section 1203.09(a) and (2) defendant committed the offenses while on parole in violation of section

1203.085(b). (2 CT 187.) As to counts one through six, the information added enhancing allegations that defendant served four prior prison terms in violation of section 667.5(b). (2 CT 187-188.) Because defendant was indigent, he had counsel appointed to represent him.

In January 1997, Shasta County district attorney Dennis Sheehy wrote defense counsel informing him that "our death penalty review committee has decided not to seek the death penalty . . . ." (4 CT 667, emphasis in original.) Later, Mr. Sheehy would explain he decided not to seek death because Mr. Grimes was not the actual killer, and Mr. Sheehy did not think a jury would impose death. (5 RT 2435-2436.)

Mr. Sheehy resigned in April 1997. (5 RT 2431.) His replacement was former Contra Costa deputy district attorney McGregor Scott. (3 CT 322; 5 RT 2388.) Mr. Scott advised defense counsel that he reached a different conclusion than had Mr. Sheehy. (3 CT 323.) Prosecutor Scott said he *would* seek death unless Mr. Grimes pled guilty to the then-current charges within 21 days. (3 CT 323-324.) When Mr. Grimes refused to plead guilty in that time frame, prosecutor Scott announced "[t]he district attorney will be seeking the death penalty . . . ." (3 CT 336.)

Trial began in October of 1998. (25 RT 6914). Before trial started, defendant

offered to plead guilty but th estate refused. (22 RT 6149.) The jury found Mr. Grimes guilty as charged on November 25, 1998. (6 CT 1296-1297.)

Opening statements in the penalty phase began on December 3, 1998. (6 CT 1336.) The jury began deliberations in the penalty phase on the afternoon of December 17, 1998. (6 CT 1380.) On December 22, 1998, the jury sentenced Mr. Grimes to death. (6 CT 1438.) The trial court denied a subsequent new trial motion, and imposed a death sentence, on January 26, 1999. (7 CT 1581, 1591.) This appeal is automatic.

STATEMENT OF FACTS

A. Introduction.

In *Furman v. Georgia* (1972) 408 U.S. 238, the Supreme Court held that in order to pass constitutional muster, a death penalty scheme must meaningfully narrow the class of murders as to which the death penalty can be imposed. In *Woodson v. North Carolina* (1976) 428 U.S. 280, the Court held that a death penalty scheme must also permit consideration of evidence about defendant's character and the crime which may call for a sentence less than death. Taken together, *Furman* and *Woodson* -- and many of the Court's subsequent capital cases over the years -- establish that the goal of a functioning capital punishment scheme is to isolate from the all-too-many murders which occur those that are the "worst of the worst" -- the worst murders and the worst defendants. These are the cases for which the death penalty should be reserved.

In this case, as noted above, three men participated in an October 1995 robbery of Betty Bone: Patrick Wilson, John Morris and Gary Grimes. Morris -- who had committed another robbery three or four days earlier -- confessed to killing Ms. Bone. He committed suicide the day after he was arrested. Wilson and Grimes participated in the robbery but did not participate in killing Ms. Bone. Wilson was eventually permitted to plead guilty

and got life without parole. Ultimately, Mr. Grimes was not permitted to plead, though he offered to do so prior to trial. He was tried and sent to death row.

With all due respect for the power of the state, Gary Grimes was an easy mark. Gary Grimes was in the very first class of special education students ever instituted in Modesto County. As his teachers would later confirm, at his best he functioned as a third to fourth grader. He was diagnosed as mentally retarded as a teenager, and after a full battery of tests administered prior to trial, he was again diagnosed as mentally retarded by both a neuropsychologist and a psychiatrist. *At trial here the state introduced no contrary expert testimony at all.* And as the uncontradicted expert testimony would also show, his early life contained numerous signs of organic brain disorder; subsequent tests confirmed this.

Despite these extreme cognitive handicaps, the record would also show that Mr. Grimes coped as well as he could and even managed to improve the lives of some around him. He was married for a short period of time; his teenage step-son Michael came forward to testify at the penalty phase that Mr. Grimes repeatedly warned him against getting in trouble with the law, and urged him to get his high school diploma -- advice Michael followed. Numerous witnesses testified that Mr. Grimes often assisted his disabled father-in-law, aided senior citizens and even helped a fellow prison inmate

injured in a fight.

To be sure, Mr. Grimes was certainly no saint -- he had had his own difficulties with the law. He had been involved in a prior robbery, assault, and twice possessed dangerous weapons. Indeed, in light of his difficult childhood and cognitive impairments, it would perhaps be a surprise had he no experience with the law.

But the goal of a fairly administered capital punishment scheme under *Furman* and *Woodson* is to reserve the death penalty for the "worst of the worst" in society. Here, the state did not reserve death for the "worst of the worst." Here, the state did not even reserve death for the worst of the three originally charged defendants. Here, the state reserved death for the easiest mark.

B. The Guilt Phase.

On October 18, 1995, Betty Bone was found in her home on Deacon Trail in Redding. (25 RT 6930; 7039-7048.) Police arrived shortly thereafter, finding the home in disarray and Ms. Bone's truck and belongings stolen. (25 RT 6932-6945, 6957-6977, 6979-6980, 7001-7006, 7011, 7135-7138.) Ms. Bone had been beaten, strangled and stabbed. (25 RT 6930, 7039-7048.)

Within days, police arrested appellant John Morris, Patrick Wilson and Gary Grimes. (30 RT 8295-8297; 32 RT 8634, 8637.) Mr. Grimes immediately confessed his involvement in the crime. (26 RT 7312-7347.) A tape of his confession was played for the jury. (30 RT 8288.)

Mr. Grimes explained that on the day of the crime, Morris said he wanted to commit a burglary. (27 CT 8130.) As the record would later show, Morris was on a crime spree; he had committed a robbery three or four days earlier. (32 RT 8655.) Morris now wanted to get money so he could pay the insurance on his Nissan. (27 CT 8136.) Morris and Mr. Grimes got Wilson, who was sleeping on his friend Sheila Abbott's couch. (27 CT 8182.) Morris drove the Nissan, with Mr. Grimes in the front passenger seat and Wilson in the back, to go find a house to burglarize. (27 CT 8130, 8135-8136.)[1]

Morris drove to Helen Miller's home. (27 CT 8136.) Miller was a friend of Mr.

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[1] At some point that day, Morris picked up a .38 revolver from his apartment. (27 CT 8137.) Morris told Mr. Grimes he wanted to sell the gun, asking him if he knew anyone who wanted to buy it. (27 CT 8139.) Witness Shane Fernald testified that he saw Morris, Wilson and Mr. Grimes leave the Abbott home together. (27 RT 7460.) Morris and Mr. Grimes were trying on bandannas and he thought Mr. Grimes had a gun. (27 RT 7471-7473.)

Grimes. (27 CT 8137.) Her daughter Janelle was supposed to give Mr. Grimes a Firebird to sell for $50. (27 CT 8132, 8136, 8137.) Morris told Mr. Grimes, "Let's rob her." (27 CT 8137.) Mr. Grimes refused telling him "I'm not robbing my family, I'm not robbing my friends." (27 CT 8137.)

Morris "got mad." (27 CT 8141.) He was "bitchen and moanin" because Mr. Grimes refused to rob Miller. (27 CT 8141.) He declared, "You know what I'm gonna do this house . . . right after Miller's." (27 CT 8141.) He drove by a house where "some little short-haired lady" was taking out her trash. (27 CT 8142.) He stuck his gun in his pants and said, "Fuck it, we'll just fuckin' kill her an' look at the house, we got all day long." (27 CT 8142.) Mr. Grimes again resisted, telling Morris, "Dude, I'm not into killing people." (27 CT 8142.)[2]

The three then arrived at Ms. Bone's house. (27 CT 8142.) Mr. Grimes held back, while Morris and Wilson knocked on the front door. (27 CT 8132, 8133, 8142.) When no one answered, Morris said, "Okay, there ain't no one there, let's do the place." (27 CT

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[2] Gina Gilmer was the woman Morris was referring to. In October 1995 she lived on Deacon Trail. (26 RT 7241.) She confirmed that on the afternoon of October 18, she was taking her trash out on the when she saw a red Nissan sports car slowly passing with two men -- one with long black hair and one with blonde hair -- inside. (26 RT 7242, 7245, 7250-7252.) One of the men looked at her while the other hid his head so she could not see him. (26 RT 7244.)

8142.) But moments later Morris said, "Oh, no, there's someone in there." (27 CT 8142.) Mr. Grimes said, "You know what you guys are fuckin' blowin' it, I'm not into this." (27 CT 8142.) He got back into the car when he saw an "ol' lady" answer the door. (27 CT 8133, 8142.) She spoke to Morris and Wilson, then "Wilson rushed the door when the lady tried closin' the door, and knocked her down." (27 CT 8133, 8143.) According to Mr. Grimes, it was "Boom! Jimmy rushed the door, knocked her down and Johnny was on top of her." (27 CT 8144.)

Mr. Grimes followed inside the house. (27 CT 8133.) He saw the woman laying by the doorway unconscious. (27 CT 8134.) When the woman regained consciousness, Morris put his knee on her back and demanded money and jewels. (27 CT 8134.) He was tying the woman up with a phone cord while she begged for her life. (27 CT 8147.) He put one of three bandannas they brought with them into her mouth. (27 CT 8181.) Mr. Grimes "couldn't deal with it so [he] went into the back of the house, and [he] stayed there." (27 CT 8134.) He never touched the woman. (27 CT 8144.) He wanted "to leave five minutes after we were in the house." (27 CT 8144.)

Mr. Grimes walked back in the kitchen when he heard a sound "bomp, bomp." (27 CT 8152.) He saw Wilson was "ghostly white." (27 CT 8145.) He also saw that Morris had repeatedly stabbed the woman. (27 CT 8151.) Morris said, "That bitch wouldn't die.

Fuckin' bitch wouldn't die." (27 CT 8145.) He had a camping knife which he had brought and a butcher knife from the kitchen. (27 CT 8146, 8151.) He put them in a paper bag, telling Mr. Grimes and Wilson, "You fucking' never leave weapons behind." (27 CT 8146.) The woman had phone cord around her neck because Morris "was trying to strangle her out" with his hands, then the cord, before he stabbed her. (27 CT 8146, 8148.) He said, "You don't never leave no witnesses." (27 CT 8147.)

Mr. Grimes did not argue; Morris had the gun. (27 CT 8152.) He ran for the front door. (27 CT 8152.) Morris told him to take the woman's truck. (27 CT 8152, 8153.) They loaded up the truck with their stolen items. (27 CT 8153.) Mr. Grimes took Wilson with him. (27 CT 8153.) They drove back to Abbott's house where they had picked Wilson up. (27 CT 8154.)

When they arrived, Sheila Abbott, her sister Misty, and Shane Fernald unloaded the truck. (27 CT 8154.) Wilson kept a gun stolen from the house. (27 CT 3168.) Mr. Grimes did not know what happened to a rifle stolen from the victim's home. (27 CT 8173.) Wilson siphoned the gas out of the truck. (27 CT 8155.) Fernald burned the latex gloves used during the burglary, along with the victim's stolen checks and "other stuff."

(27 CT 8158, 8165.)[3]

Then Mr. Grimes, Morris, and Misty took the truck to the lake. (27 CT 8154, 8155.) Morris wanted Misty to come because he liked her and wanted to tell her about the killing. (27 CT 8155.) Morris ordered Mr. Grimes to drive the truck into the lake. (27 CT 8156.)[4]

On their return from the lake in Mr. Grimes's car, they were stopped by a police barricade. (27 CT 8166.) Before they stopped, Morris threw his gun out the window. (27 CT 8166.)[5] Police took their names, then let them drive away. (27 CT 8166.) They then drove to meet a man who was interested in buying Janelle Miller's Firebird. (27 CT

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[3] Police later searched Abbott's property. (29 RT 7854.) Deputy Thomas O'Connor found a long kitchen knife and a pocket knife buried in the yard. (29 RT 7855.) One knife had a mixture of DNA belonging to Ms. Bone and Wilson; Mr. Grimes was eliminated as a possible donor. (29 RT 7949, 7955.)

[4] Two independent witnesses confirmed this part of Mr. Grimes's statement. Gregory Kockrow was fishing that day. (28 RT 7679.) He saw the truck floating in the lake and called 911. (28 RT 7679-7680.) Deputy sheriff Terrisa Montgomery recovered the truck from the lake. (28 RT 7812-7815.)

[5] Again, several witnesses confirmed this part of Mr. Grimes's account. Deputy sheriffs John Carelli and Richard Woolf testified that they had set up a barricade to look for potential witnesses to Ms. Bone's murder. (27 RT 7293-7264, 7303.) When Carelli asked the three for identification, Mr. Grimes initially gave a false name. (27 RT 7297, 7305-7307.) A gun was later found in the bushes; a stolen gun was found near the victim's house. (28 RT 7757, 7766-7770, 7819-7823.)

8160.)[6]

Mr. Grimes and Fernald left Redding for Sacramento later that day. (27 CT 8172, 8173, 8175.) Morris and Misty, along with her baby, followed in Morris's car. (27 CT 8175.) They stopped at Morris's aunt's home; Morris gave the jewelry to his aunt. (27 CT 8172, 8175.) Mr. Grimes also left a stolen boom box in his friend "Wolfie's" apartment. (27 CT 8164.)[7]

Wilson too spoke with police after his arrest and confessed his involvement in the

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[6] Terry Crismon and his girlfriend Janeen Forrester confirmed this portion of defendant's statement, testifying that they met with "Slow"and his friends to discuss the Firebird. (27 RT 7263-7264, 7276.) Although Forester told police Slow had a bandage on his hand, she later thought it was actually just a glove. (27 RT 7265-7266.)

[7] Dianna Lamb was Morris's aunt. (28 RT 7741-7742.) She confirmed Mr. Grimes's statements that Morris brought her the bag of jewelry. (28 RT 7746.)

Shane Fernald also confirmed this portion of Mr. Grimes's statements to police. Fernald drove Mr. Grimes up to Sacramento, with Morris and Misty following them in a separate car. (27 RT 7464.) Mr. Grimes would not tell him what happened; he was quiet the entire way. (27 RT 7466.) Although Fernald told police that Mr. Grimes told him that "the old bitch deserved it," he thought Mr. Grimes actually said she "didn't" deserve it. (27 RT 7478-7479; 30 RT 8126.) He also corroborated that Morris left items with "some lady" and Mr. Grimes left a boom box with a friend. (27 RT 7467.)

Sheila Abbott testified that when Morris, Wilson and Mr. Grimes returned with the truck, she told them to leave her house with the guns and the stolen items. (28 RT 7702, 7705.) She denied giving the three a box of latex gloves before leaving the house; she told police she had. (28 RT 7697; 30 RT 8175.) Pieces of latex gloves were later found in the victim's house. (26 RT 7141-7142.)

burglary. (32 RT 8632.) He admitted he pushed Ms. Bone aside at the front door. (32 RT 8632.) Ms. Bone fell backwards and hit her head, falling unconscious. (32 RT 8635.) He watched the woman for ten minutes, then went into all the rooms of the house. (32 RT 8634.) He stole a gun from inside a closet. (32 RT 8632.) He later siphoned off the gas from the truck. (32 RT 8633, 8635.)

Morris did not confess to police. Instead, he first called Sheila Abbott. (32 RT 8701.) Abbott's daughter Ginger answered and told him Sheila was not home. (32 RT 8670, 8701, 8702-8703.) Morris was frantic and asked Ginger to give him an alibi. (32 RT 8670, 8702, 8703.) He got angry when Ginger refused to lie for him. (32 RT 8703.) Later, he called his grandfather Jess Blankenship. (32 RT 8667.) He was upset and said his "friends had turned on him" and "were going to say he did it and he had not done this." (32 RT 8667.)

But according to Misty Abbott, Morris himself had already admitted the killing. On the way to the lake to dump the truck, Morris told her that he had tried to strangle Ms. Bone, but it did not work, so he got a knife from the kitchen and stabbed her. (27 RT 7590.) Misty told the same to police. (30 RT 8120-8121.) Unable to arrange for an alibi, and within a day of his arrest and placement in county jail, Morris committed suicide by

hanging himself with his bed sheet. (32 RT 9637.)[8]

As discussed in greater detail in the argument section of this brief, because Morris had confessed that he was the actual killer, in order to prove the felony special circumstances true against Mr. Grimes the state had to prove either that he (1) intended to kill or (2) acted with reckless indifference to human life. To do this the state relied, at least in part, on the remarkably fortuitous testimony of jailhouse snitch Jonathan Howe. Howe testified about a conversation he had with Mr. Grimes in jail in May or June of 1998.

Howe was a curious witness for the state to rely on. Howe had nine felony convictions with ten aliases. (31 RT 8352-8353.) Howe only recalled this May or June conversation in July, after he and Grimes had been in a fight at the county jail and the two had threatened each other. (5 CT 1022-1023; 31 RT 8500-8501.)

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[8] Diane Davis was a defense investigator hired by Wilson's defense team. (28 RT 7771.) She testified that Misty Abbot made a number of statements which incriminated both Morris and Grimes but not Wilson.

Specifically, defense investigator Davis claimed Misty said (1) both Morris and Grimes were laughing about the crime, (2) Grimes was excited about the killing and (3) Morris and Grimes called each other "down white boys." (28 RT 7797- 7798.) There were no eyewitnesses (or earwitnesses) to this conversation; it was not tape recorded. In fact, when asked about this conversation, Misty Abbot testified in no uncertain terms that (1) none of what Davis described was, in fact, true and (2) she did not recall making *any* of these statements to Davis. (27 RT 7589-7590, 7605; 28 RT 7624-7625.)

Because of these inherent reliability problems, the state did what it could to test Howe's credibility. First, the state gave Howe a voice stress test. (30 RT 8228.) Howe failed this test: three different expert examiners concluded he was lying. (5 CT 1026; 30 RT 8228-8229.)

Then the state gave him a separate lie detector test. (30 RT 8228.) Howe failed this test as well. (5 CT 1026; 30 RT 8228-8229.)

Howe eventually passed a second lie detector test, his third test overall. (31 RT 8344.) Apparently, this was good enough and he was called as a witness at trial. (31 RT 8379.)

At trial, Howe said he received no benefits for his testimony. According to Howe, he was told "there's no special deals or any considerations whatsoever for the information" and he "had asked for none." (31 RT 8384.) Instead, he simply came forward "[b]ecause he felt it was the right thing to do." (31 RT 8428.) But the district attorney who prosecuted Howe testified Howe could indeed get a shorter prison term depending on the helpfulness of his testimony. (31 RT 8385-85, 8405, 8445-8446.) According to the district attorney, "[he] could receive less [prison time] if he testifies truthfully." (31 RT 8446.)

Despite Howe's lack of credibility, the state called Howe as a witness. (31 RT 8379.) Howe testified that Mr. Grimes confessed to ordering Morris to kill Ms. Bone. (31 RT 8381.) There were no other witnesses to Howe's purported conversation with Mr. Grimes. Nevertheless, the prosecutor urged the jury to rely on Howe's uncorroborated testimony, both in finding the special circumstance true based on an intent to kill theory, and in sentencing Mr. Grimes to death. (35 RT 9212-9214; 41 RT 10879-10880.)

C. The Penalty Phase.

1. The state's case in aggravation.

The state presented two general types of aggravating evidence at the penalty phase of this trial. First, the state presented evidence of prior misconduct on Mr. Grimes's part. In summary, this consisted of evidence as to four prior incidents: (1) a 1985 robbery, (2) a 1985 possession of a dangerous weapon, (3) a 1991 possession of firearm by a felon and (4) a 1993 assault. Second, the state presented victim impact evidence.

a. Prior misconduct.

In connection with the 1985 robbery, the state presented evidence that in 1985, Mr.

Grimes and Anna Cline robbed James Leonard. (36 RT 9583.) At the time Mr. Grimes barely knew Cline, having met her just a day or two before. (36 RT 9583.)

Cline worked for Leonard's wife and thus she knew he had recently sold his car for $300. (36 RT 9584.) Cline and Mr. Grimes wanted the money to buy drugs. (36 RT 9584.) That day, they were shooting either cocaine or heroin. (36 RT 9584, 9589.)

Cline admitted it was *her* idea to rob Leonard. (36 RT 9584.) Indeed, she did not recall even discussing the robbery plans with Mr. Grimes prior to committing the crime and remembered little more than that one of them (she could not remember who) brought a pipe wrapped in a towel to make it look like a gun and then they tied up Leonard, stole the $300, and left without anyone getting hurt. (36 RT 9583-9587.) Both she and Mr. Grimes pled guilty to robbery. (36 RT 9601.)[9]

Mr. Grimes's probation officer Christine Little confirmed much of Cline's

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[9] In speaking with police after her arrest in 1985, however, Cline had told a different story. At the time, while still facing prosecution, she said it was Mr. Grimes who planned the robbery and carried it out, bringing the pipe, tying up the victim, and forcing her to participate. (38 RT 10014.) When interviewed about this incident by detective Ashmun again in 1996 she repeated this version (36 RT 9705-9706), making clear that she was angry with Mr. Grimes because she thought "he rolled over on her when they got busted" and only received county jail time. (36 RT 9711-9712.) She explained that speaking to Ashmun was "pay back for what he did to me . . . ." (36 RT 9712.)

testimony. Mr. Grimes spoke with her shortly after pleading guilty to the robbery. (36 RT 9608.) Mr. Grimes explained Cline picked the victim and planned the robbery. (36 RT 9608-9610.) He did, however, admit that he brought the pipe wrapped in a towel to look like a gun and took the money from Leonard's wallet. (36 RT 9609-9610.) Officer Little also noted not only that Mr. Grimes expressed remorse for the crime, but he recognized he had a drug addiction problem and had requested placement in a drug rehabilitation program. (36 RT 9612.)

Next, the state presented evidence showing that in 1993, someone called police to report that Mr. Grimes was struggling with his then girlfriend Marie McCosker in a nearby parking lot. (36 RT 9646.) According to McCosker, during a fight, Mr. Grimes forced her into his car and drove her to a parking lot in Modesto, California. (36 RT 9636.) When she tried to get out of the car, he held her down by the neck. (36 RT 9636.) After about twenty minutes, she escaped from the car and tried to run to a nearby payphone. (36 RT 9638.) Mr. Grimes ran after her. (36 RT 9638.) When police arrived, they were struggling in the parking lot. (36 RT 9639.) Mr. Grimes had a closed pocketknife in his hand. (36 RT 9639-9640.) Because McCosker did not want Mr. Grimes to get into trouble, she told police the knife was hers. (36 RT 9639.) Mr. Grimes was arrested but never charged with a crime. (36 RT 9648; 4 CT 739-740.)

The state also presented evidence of a 1985 possession of a dangerous weapon and a 1991 possession of a firearm by a felon. (36 RT 9624-9625, 9701.) Mr. Grimes was convicted in connection with both the 1985 and 1991weapons possessions. (4 CT 739-740.)

b. Victim impact.

In addition to evidence of prior misconduct, the state's case in aggravation also rested on victim impact evidence from family members Barbara Christensen, Leslie Skowbo and Carol Williamson. Barbara Christensen was the victim's daughter; she testified to three general areas, describing (1) her relationship with her mother and the role her mother played in her and her children's lives, (2) finding her mother on the day of the crime and the immediate emotional aftermath and (3) the devastating impact the crime had on her. (36 RT 9735-9751.) Leslie Skowbo and Carol Williamson were the victim's granddaughters; they testified in two general areas, describing (1) their relationship with their grandmother and (2) the impact of the crime on their lives. (36 RT 9753-9778.)

2. The defense case in mitigation.

There were two central themes defense counsel sought to convey in the penalty

phase mitigation case. First, counsel sought to convey a sense of the stark cognitive impairments Mr. Grimes suffered and his attempts to deal with those impairments as a young boy. Second, defense counsel sought to convey that remarkably enough, despite these impairments, Mr. Grimes had nevertheless contributed in positive ways to the lives of many around him. Thus, the defense presented numerous witnesses, including two experts, who testified to these impairments as well as family members and close friends who had known Mr. Grimes for many years.

a. Psychological testing and expert evaluation show Mr. Grimes is mentally retarded.

At the request of psychiatrist Albert Globus, clinical neuropsychologist John Wick gave Mr. Grimes a series of psychological tests. These tests included the Wide Range Achievement Test, the Weschler Memory Scale III, and the Raven's Colored Progressive Martrices test. (37 RT 9803-9821, 9858-9859.) These tests collectively evaluated Mr. Grimes's mental functioning in twelve different areas. (37 RT 9803-9821, 9858-9859.) Mr. Grimes tested mentally retarded in seven areas, low dull normal in two areas, and normal in only three areas. (37 RT 9818-9836, 9858-9859.) With respect to the Weschler Memory Scale III and Mr. Grime's ability "to hold information in his mind and work with it mentally," he scored a 60, which Dr. Wick explained was significantly beneath the cut-off for the mentally retarded:

> "That's the mentally retarded range, again. It's well below 70, which would be the mentally retarded range of functioning." (37 RT 9828-9829.)

Mr. Grimes's overall IQ was 73, his working memory score was 67, his Wide Range Achievement test score was 62, and he generally tested in the range of a third to fourth grader. (37 RT 9803-9836.)

Based on the testing, Wick found abnormalities or dysfunction in "most areas" of Mr. Grimes's brain. (37 RT 9865.) The testing showed Mr. Grimes should have been placed in special education classes when he was a child. (37 RT 9817.) Moreover, this type of very low intellect would impair a person's judgment, make difficult decision making, academic learning, and learning acceptable social behaviors. (37 RT 9866, 9930.) It would also cause impulsivity. (37 RT 9930.) The testing showed no evidence of malingering. (37 RT 9837-9839.)

Psychiatrist Albert Globus reviewed Mr. Grimes's family history, the results of John Wick's psychological testing, and interviewed Mr. Grimes. (39 RT 10231, 10236.) Based on this information, Dr. Globus agreed with the psychological testing which showed Mr. Grimes was mentally retarded. (39 RT 10269-10272). Indeed, according to Globus, "the intelligence test, his memory, his ability to perceive things, his visual functions . . . two-thirds of the tests were either in impaired or the mentally retarded

range." (39 RT 10269-10270.)

But Dr. Globus saw a number of telling signs suggesting brain damage prior to birth. For example, he noted the beatings Mr. Grimes's mother suffered when she was pregnant with Mr. Grimes. (39 RT 10240. *See* 39 RT 10426 [Mr. Grimes's mother testifies to these beatings].) Dr. Globus also noted that Mr. Grimes was born under weight, had trouble breast feeding, and dropped 40% of his weight in the first week of life -- all possible evidence of brain damage at time of birth. (39 RT 10241.) Finally, the fact that Mr. Grimes was incontinent until at least age eight was another indication that he was developmentally delayed from either psychological events or lack of mental development due to brain damage. (39 RT 10246.)

Dr. Globus explained some of Mr. Grimes's history as indicated in the medical records. (39 RT 10250.) At age nine, Mr. Grimes was referred to a psychiatrist because he was having difficulty at school both academically and behaviorally and was still incontinent. (39 RT 10250.) This doctor prescribed Ritalin. (39 RT 10253.) At age eleven, Mr. Grimes was placed in special education classes for emotionally disturbed children. (39 RT 10255.) His mother also reported that Mr. Grimes had a speech impediment as a child. (39 RT 10255.) Dr. Globus believed the speech impediment was another sign of organic brain disorder. (39 RT 10255.) When the 15 year old Gary

continued to have trouble at school, and began running away from home, he was placed in juvenile hall. (39 RT 10255.)

At age twelve, Mr. Grimes suffered a serious head injury when he was hit in the head with a baseball bat and knocked unconscious. (39 RT 10261.) The injury required 32 stitches to his head. (39 RT 10261.) This may have made Mr. Grime's existing brain disorder worse. (39 RT 10262.)

At age seventeen, Mr. Grimes was committed to the Napa State Mental Hospital. (39 RT 10256.) The psychological testing from this time showed he had latent schizophrenia and mental retardation. (39 RT 10256-10258.) His medical records from the state hospital noted he was mildly mentally retarded. (39 RT 10258.) He was released from the hospital when he turned 18 years old. (39 RT 10261.)

It was Dr. Globus's opinion that Mr. Grimes suffered from "organic brain damage" including "extensive brain damage particularly to the frontal and temporal areas . . . ." (39 RT 10262.) Although Mr. Grimes ultimately could determine right from wrong, he would have difficulty applying that knowledge to his decision making. (39 RT 10263.) Given his particular organic deficits, Mr. Grimes would also likely rely on others to make decisions for him. (39 RT 10264.)

After reviewing the results from Wick's testing, Dr. Globus agreed Mr. Grimes was "mentally retarded." (39 RT 10269-10270.) Moreover, Wick's findings were entirely consistent with everything Dr. Globus learned about Mr. Grimes from before birth to his commitment to the Napa State Mental Hospital at age 17. (39 RT 10271-10272.) Dr. Globus noted that people with a brain disorder like Mr. Grimes has will often function better in a structured setting like prison than they can on the outside. (39 RT 10274.) This is because in prison most decisions are made for them. (39 RT 10275.)

b. Mr. Grimes's special education teachers confirm the experts diagnosis.

As noted above, based on his testing neuropsychologist Wick believed Mr. Grimes should have been placed in special education classes when he was a child. (37 RT 9817.) Wick was correct.

Special education was new to Modesto in 1975; Mr. Grimes was eleven years old at the time. (37 RT 9962.) The school district selected 12 of its neediest children out of 3000 for a special education program designed to help "severely emotionally disturbed children." (37 RT 9991.) Mr. Grimes was one of these 12 students. (37 RT 9962-9964, 9991.)

J. Chris Gibson was Mr. Grimes's first special education teacher. (37 RT 9962.) He recalled that the only class in which 11 year-old Gary Grimes joined his non-special education counterparts was Physical Education. (37 RT 9966.) Otherwise, Gary was "unable to function" in the mainstream classroom. (37 RT 9966.) Gary was reading at the level of a seven or eight year old. (37 RT 9966.) Gibson described Gary as "passive," "timid," "quiet," but also someone who would "follow" some of the more aggressive children in the class. (37 RT 9967.) Gibson did not recall "ever needing to discipline [Gary] as a student." (37 RT 9972.)

Teacher's aid Robert Dougall remembered Gary Grimes as "not violent" and "never a bully." (37 RT 9982.) He was also "cooperative" and "one of the better behaved students" in the class. (37 RT 9981.) He considered Gary "desperately in need of nurturing." (37 RT 9973.) The resource specialist for the special education children, Elizabeth Dougall, described 11 year-old Gary Grimes as "a follower" and someone who was "never aggressive." (37 RT 9993.) She also considered Gary "needy" in the sense that he "wanted to be loved, nurtured, [and] given attention in a positive way." (37 RT 9993.)

c. Mr. Grimes's family and friends describe his difficult childhood and his ability to care for other people.

Mr. Grimes's younger sister, Darlene, was close to Mr. Grimes as they grew up. (38 RT 10025.) She described how their mother would humiliate him in public as a young boy because he was not potty trained, making him wear dresses and stand in the front yard if he went to the bathroom in his pants between the ages of four and eight years old. (38 RT 10028.) Darlene described the experience:

> "[M]y mom would make [Gary] wear a dress and go out in the front yard during the daytime and stay out there for an hour or two, just whatever, to punish . . .Gary [for] having a bowel movement." (38 RT 10028.)

This was particularly humiliating because their house was just blocks from the elementary school. (38 RT 10039.)

Not surprisingly, Darlene testified that her brother "never had much self-esteem" or "confidence." (38 RT 10029.) He also had trouble in school: Darlene described him as a follower who would do what others told him to do. (38 RT 10032.) Darlene made clear that she loved her brother. (38 RT 10037.)

Mr. Grimes's mother Patricia also loved her son. (39 RT 10458.) Patricia

described Mr. Grime's early childhood, starting when she was pregnant with him. (39 RT 10426.) When she was several months pregnant, Mr. Grimes's father James Hockenberry would beat her, including hitting her with a closed fist and pushing her down the stairs. (39 RT 10426.) James left her before her son was born. (39 RT 10428.) After Mr. Grimes's birth, Patricia suffered post-partum depression and was in the hospital for over three months. (39 RT 10433.) Mr. Grimes lived with Patricia's parents during this time. (39 RT 10433.)

From a very young age, Mr. Grimes told his mother that he heard voices, he also would wake in the night screaming, and had difficulty controlling his bowel movements. (39 RT 10434.) Patricia admitted that when he would soil his pants she would make him wear a dress and stand in the front yard. (39 RT 10462.) Ths was to "try and shame him into not soiling his pants" again. (39 RT 10462.)

With respect to school, Patricia confirmed Mr. Grimes's difficulties. He was hyperactive and had difficulty learning. (39 RT 10440.) He saw the school psychiatrist and was prescribed Ritalin and Librium. (39 RT 10443-10445.) In seventh grade the school placed Gary in special education classes. (39 RT 10446.) By ninth grade, he had dropped out of school. (39 RT 10447.)

Mr. Grimes also ran away from home. (39 RT 10447.) So much so that he was eventually placed in foster care and then juvenile hall. (39 RT 10447-10448.) When Mr. Grimes was only 17 years old, he was sent to Napa State Hospital for nine months. (39 RT 10450-10451.)

Patricia spoke with her son the day before he was arrested in this case. Her son was crying, remorseful and said he was "very sorry" that the victim had died. (39 RT 10454-10458.)

Cindy Grimes, who was married to Mr. Grimes in 1990 for a brief period of time, also loved him. (38 RT 10097.) When they were married, he treated her like a "princess." (38 RT 10097.) Mr. Grimes encouraged her then teenage son Michael to stay out of trouble and finish school. (38 RT 10099.) Mr. Grimes explained to Michael that he (Michael) did not want to spend time in prison. (38 RT 10099.) Mr. Grimes also took care of her disabled father Kenneth, helping him get dressed and shave. (38 RT 10100.) Cindy fondly described Mr. Grimes as the "best person" she had met in life. (38 RT 10111.)

Cindy's testimony was confirmed by other witness in all respects. Her son Michael recalled that Mr. Grimes treated him "very well," and "better than his own

father." (38 RT 10113.) In fact, Mr. Grimes was the main reason Michael got his high school diploma and never got in trouble with the law. (38 RT 10114.) Mr. Grimes would tell him to finish school and that prison was a place Michael never wanted to go. (38 RT 10115.) Michael also loved Mr. Grimes. (38 RT 10115.)

Cindy's mom Vergie Henshaw confirmed how helpful and kind Mr. Grimes was to her, her family and the others who lived in the same apartment complex. (38 RT 10122.) She also recalled how much he loved Cindy and how well he treated her. She, too, testified that Mr. Grimes was a father figure to her grandson Michael. (38 RT 10124.)

Sally Furman -- the apartment manager for the apartment complex where Mr. Grimes and Cindy lived -- confirmed Cindy's testimony about how Mr. Grimes would help Cindy's disabled father Kenneth, including dressing him and shaving him. (38 RT 10067.) She would often hear Mr. Grimes tell Kenneth "let me help you." (38 RT 10067.) But she went further, recalling how Mr. Grimes would also help other elderly

tenants in the building, including carrying their groceries inside their apartments for them. (38 RT 10068.)[10]

Finally, fellow prison inmate Michael Huntsman spoke of the help Mr. Grime's had given him in prison. When Huntsman was being assaulted by a group of inmates, Mr. Grimes was the only person to come to his aid; he told the other inmates to leave him alone and helped tend his wounds. (38 RT 10165-10166.) Huntsmen was "thankful" and unsure what would have happened if Mr. Grimes had not been there. (38 RT 10168.)

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[10] Shane Yarnell testified to a particularly difficult part of Mr. Grimes's life. In 1995, Mr. Grimes was engaged to Yarnell's sister Shannon. (38 RT 10134.) One night, Shane's mother Rebecca called Mr. Grimes from a bar needing help because she was being harassed by her husband Richard. (38 RT 10139.) Mr. Grimes, Shane, and Shannon drove to the bar where Rebecca had called from. (38 RT 10139.) When they got there, Rebecca and Richard were fighting outside. (38 RT 10140.) Shane and Shannon got into a car with Rebecca. (38 RT 10139.) Mr. Grimes told them to go ahead and he would try and stop Richard. (38 RT 10139.) Mr. Grimes drove behind them in his truck. (38 RT 10139.) Richard chased them in a Chevy truck. (38 RT 10140.) At a stop light, Mr. Grimes pulled up next to Rebecca's car and told them to run the light and he would stop Richard. (38 RT 10140.) Before Rebecca could go, Richard hit the back of Rebecca's car. (38 RT 10142.) Shannon was killed in the accident. (38 RT 10144.) Mr. Grimes took Shannon's death "very hard." (39 RT 10452.)

ARGUMENT

ISSUES ARISING DURING VOIR DIRE

I. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR JASSO, WHO REPEATEDLY AGREED HE WOULD PUT ASIDE HIS PERSONAL VIEWS AND FOLLOW THE LAW, REVERSAL OF THE GUILT PHASE IS REQUIRED.

A. The Relevant Facts.

Prospective juror Abel Jasso was called to jury service in this case. Mr. Jasso repeatedly stated he was a proponent of the death penalty. (18 RT 5201, 5211-5212.) During the initial phase of his voir dire, the trial court explored with Mr. Jasso whether -- in case of a conflict between his own views and the law -- he would follow the law. (18 RT 5199.)

Mr. Jasso said he could set aside his views and follow the law. (18 RT 5200.) When the court further pursued the matter of a conflict between his personal beliefs and the law, Mr. Jasso confirmed he would follow the law:

> "Q: [by the court] And I'm going to [be] asking you, sir, if it's a matter of

conscience to put your conscience aside. But if your state of mind is that should there be such conflict you felt bound to follow your conscience and not follow the law, I need to know that.

"A: [by Mr. Jasso] At this time, I don't know whether that situation would arise; therefore, I would say, having to answer your question, I would say that I would set it aside in order to follow my duty as a juror.

"Q: Okay. You feel that you could -- you could take a juror's oath and swear to that?

"A: Yes." (18 RT 5204.)

The subject came up again during defense counsel's questioning. Mr. Jasso stated he had difficulty with this area of questioning because he had never before been a juror. (18 RT 5204.) Yet he went on to confirm that if he took an oath, he would follow his oath and set aside whatever personal views he had:

"A: Thusly, I don't know if -- I'm a person who is directed by my conscience. Now, if I promise, through an oath, to set that aside, I will certainly do my duty --

"Q: [by defense counsel] Okay.

"A: -- as I have stated. Otherwise I would tell you I would never place myself in this situation or those who are going to be responsible for my actions. But, as I said before, never have been in this situation. I don't know if the situation -- the specific situation will be arise where I will be in conflict. But as I said, if I -- if I make an oath, say I will set that aside, that will be my primary responsibility." (18 RT 5206.)

Mr. Jasso added he could consider both life without parole and the death penalty, and would keep an open mind in the penalty phase. (18 RT 5208.)

Not surprisingly, these subjects came up once again during the prosecutor's questioning. After explaining the felony-murder rule, the prosecutor posed a hypothetical situation and asked whether Mr. Jasso could find someone guilty of murder under this rule if the person did not have the intent to kill. (18 RT 5220-5221.) Mr. Jasso said he did not agree with the law. (18 RT 5222.) He added twice, however, that if he was sworn as a juror, and took an oath to follow the law, he would set his personal views aside and apply the law as he was instructed:

> "Q: [by the prosecutor] So this is a situation where your conscience would differ with the law? We have been --
>
> "A: [by Mr. Jasso] If I was sworn in and said I would follow the law based -- regardless of what my conscience says, then I would do as I had sworn to do, that is, follow the law. But you're asking me a hypothetical situation, and I haven't been sworn to do anything other than give you my conscientious opinion, and I have given you my opinion.
>
> "Q: Okay. Let's assume you have been sworn in to follow the law.
>
> "A: As I said, I would do -- if I said I would follow the law, I would follow the law, I would follow the law, but if you're asking me if I agree with the law, I would say no, I do not agree with the law in the scenario that you prescribed." (18 RT 5221-5222.)

Moments later Mr. Jasso reiterated this same point -- that if he sworn in an a juror, he would set aside his own views and follow the court's instructions:

> "Q: [by the prosecutor] So what I am asking you is if you're sworn in as a juror, what are you going to do? You don't believe that should be the law.
>
> "A: As I mentioned to you, if I was sworn in as a juror, I have sworn to follow the law as it is explained to me by the court. That's what I would do. But I am not in that situation right now. At least I don't assume that I am. You're asking me if -- if I agree with that law, I think that's your question, if I agree with that law, that if you do not have the intent to kill somebody should you be liable for felony murder as you prescribed. My answer to you is, no, I don't agree with that.
>
> . . .
>
> "Q: Okay. So I need you to assume that you're a juror and that that is the law. Could you follow the law?
>
> "A: As I mentioned to you, if I was sworn to follow the law, I would follow the law. Yes." (18 RT 5222-5223.)

The trial court returned to this area of questioning. Mr. Jasso noted this would pose an "extreme conflict." (18 RT 5226.) But he once again assured the court that if sworn as a juror, he would set aside his views and apply the law. (18 RT 5226.)

The prosecutor challenged Mr. Jasso for cause. (18 RT 5227.) The trial court discharged the juror, over defense objection, despite noting Mr. Jasso's "expressed willingness [to apply the law] if he took the oath . . . ." (18 RT 5228.) The court thought

Mr. Jasso had "equivocated" and believed he would not be able to apply the law. (18 RT 5228.)

As more fully discussed below, the trial court's ruling was improper. It was the state's burden to prove Mr. Jasso unfit to serve as a juror. Given the voir dire of Mr. Jasso, and his repeated declarations that he was willing to set aside his views and follow his oath in connection with a finding of guilt, the state did not carry its burden. Reversal is required.

B. The State May Not Excuse A Prospective Juror For Cause Based On His Personal Views Unless It Affirmatively Establishes The Juror Will Not Follow The Law.

The Supreme Court has made clear that a prospective juror may be discharged for cause only where the record shows the juror is unable to follow the law as set forth by the court. (*Adams v. Texas* (1980) 448 U.S. 38, 48.) If the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

The facts of *Adams* provide a useful guide for this case. Ultimately, *Adams* held the state had *not* carried its burden of proving that the views of a number of jurors

"would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) In fact, the voir dire in *Adams* involved five jurors who were plainly equivocal about whether their views on the death penalty would impair their performance as jurors in the penalty phase.

For example, prospective juror Francis Mahon was unable to say her feelings about the death penalty would not impact her deliberations. Instead, she admitted these feelings "could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at p. 3, 8.)[11] Prospective juror Nelda Coyle expressed the same concern, admitting that she could not say her penalty phase deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.) Prospective juror Mrs. Lloyd White was not entirely sure, but believed her aversion to imposing death would "probably" affect her deliberations and she "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted his opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson stated his views on the death penalty would "probably" affect his deliberations. (Adams App. at p. 12, 17.)

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

In other words, *Adams* involved five jurors who expressed equivocal comments about whether they would put aside their personal views which might conflict with their ability to follow the law. In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Nevertheless, the Supreme Court held the state had *not* carried its burden of proving these jurors were properly stricken for cause "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, even when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

Here, read as a whole, Mr. Jasso's voir dire responses were not even equivocal. On at least nine different occasions he was asked whether, assuming he was seated as a juror and took an oath to follow the law, he would put aside his personal views and apply the law. He answered the question every time, both generally and specifically in the context of the felony-murder rule with which he did not agree: he would set aside his own views and apply the law. (18 RT 5204, 5206, 5221, 5222, 5223, 5226.) On this record, the state did not carry its burden of proving that Mr. Jasso views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*,

supra, 448 U.S. at p. 45.) The erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660.) Because the erroneous ruling here occurred in connection with Mr. Jasso's views in connection with guilt (as opposed to penalty), the conviction itself must be reversed.[12]

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[12] Even if Mr. Jasso's comments are construed, somehow, as equivocal, the facts of *Adams* establish even this was not enough for the state to carry its burden.

II. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR JOHN WOOLBERT, WHO AGREED TO FOLLOW THE LAW AND CONSIDER DEATH AS AN OPTION DESPITE HIS OPPOSITION TO CAPITAL PUNISHMENT, REVERSAL OF THE DEATH SENTENCE IS REQUIRED.

A. Introduction.

In a capital case, the state is permitted to challenge for cause any juror whose views about capital punishment would prevent or substantially impair that juror from following the law. Thus, the state may challenge for cause a juror who refuses to consider death as an option for a type of case (such as a felony murder) for which the law permits death as a sentence.

But the state may not strike a juror for cause because he refuses to consider death as an option for a type of case for which the law does *not* permit death as an option. As discussed below, that is exactly what happened here; reversal of the penalty phase is required.

B. The Relevant Facts.

1. In accord with current law, the prosecutor asks prospective jurors whether they could consider death for a defendant who was not the actual killer and did not intend to kill but nevertheless acted as a major participant with a reckless indifference to human life.

All parties agreed Mr. Grimes was not the actual killer. Accordingly, in order to render Mr. Grimes death eligible in this case under state and federal law, the prosecutor was required to prove that Mr. Grimes either (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivisions (c), (d); *Tison v. Arizona* (1987) 481 U.S. 137, 158.) In fact, in her closing argument the prosecutor relied on both theories in the alternative. (35 RT 9203-9211 [reckless indifference], 9212-9215 [intent to kill].)

Because she would be asking the jury to impose death on a defendant who was not the actual killer, the prosecutor addressed this issue in her voir dire of the prospective jurors. Taking the tougher case from the state's perspective -- where the defendant did not kill or intend to kill -- the prosecutor asked virtually all of the prospective jurors about their ability to impose death where the defendant (1) did not kill and (2) did not intend to kill, but (3) acted as a major participant and (4) exhibited a reckless indifference to human

life. On almost all these occasions, the prosecutor properly asked potential jurors whether they could vote for death in light of all these criteria. (*See, e.g.*, 10 RT 3415, 3457, 3490; 11 Rt 3629, 3650, 3741; 12 RT 3861, 3863, 3895, 3919, 3953, 4014, 4054-4055; 13 RT 4086, 4126, 4149-4150, 4175, 4243, 4286, 4309-4310, 4335-4336; 14 RT 4383-4384, 4421, 4442, 4468, 4501, 4525, 4556; 16 RT 4757-4758, 4806-4807, 4869-4870, 4897, 4918-4919; 17 RT 4973-4974, RT 5069, 5084-5085, 5105-5106, 5127-5128, 5154; 18 RT 5193, 5224-5225, 5294, 5320, 5346; 19 RT 5432-5433, 5455-5456, 5474, 5498, 5545, 5579-5580, 5601, 5621-5622; 20 RT 5680, 5709, 5724-5725, 5752, 5793-5794, 5836; 21 RT 5868, 5937, 5989-5990, 6064-6065; 22 RT 6206, 6265, 6291-6292, 6325-6326; 23 RT 6375, 6407-6408, 6440.)

On several occasions, however, the prosecutor left out the major participant and reckless indifference elements of the question. For example, in questioning prospective juror Gretchen Green, the prosecutor initially (and correctly) pointed out that to find the special circumstance true, the jury would have to find that defendant was a major participant who acted with a reckless indifference to human life. (13 RT 4202.) However, when later questioning Ms. Green about her ability to impose death in this situation, the prosecutor "short-formed" her question and simply asked potential juror Green if she would impose death on a defendant who was not the actual killer and who did not intend to kill. (13 RT 4204.)

Defense counsel immediately pointed out this question was legally incomplete because "she has to add in major participant and acting with reckless indifference to human life." (13 RT 4204.) The trial court recognized the problematic nature of the prosecutor's short-form question and *sustained* the objection, requiring the prosecutor to include these important parts of the question. (13 RT 4204.)

A similar problem occurred during the voir dire of prospective juror Judy Linegar. The prosecutor initially (and properly) explained that a defendant who did not actually kill, and did not intend to kill, was liable for a death sentence if he acted as a major participant and exhibited a reckless indifference to human life. (11 RT 3701.) Later on, however, in asking the juror a series of questions as to whether she could consider death, the prosecutor again short-formed her question (just as she did in connection with juror Green) and simply asked if the juror would consider death where defendant was not the actual killer and did not intend to kill. (11 RT 3702, 3705.) Defense counsel objected that the question was incomplete. (11 RT 3703, 3704, 3705.) The trial court again recognized the problem in the prosecutor's approach and sustained the objection, just as with juror Green. (11 RT 3704, 3705; *compare* 13 RT 4205.)

The identical situation occurred with prospective juror Linda Burke. Yet again the prosecutor explained the under California law, a defendant could be death eligible if he

did not kill or intend to kill as long as he acted as a major participant and with reckless indifference to human life. (17 RT 5012.) Later, however, the prosecutor asked Ms. Burke if she could consider death for "someone who had no intention to kill and was not the actual killer?" (17 RT 5013.) Defense counsel objected because "the question leaves out . . . the fact that the person would have had to have acted with reckless indifference to life . . . ." (17 RT 5013.) The court once again saw the problem, sustained the objection and required the prosecutor to add these facts into the question before soliciting an answer. (17 RT 5013.)

But a very different approach was taken in connection with the voir dire of John Woolbert. Here is what happened.

2. The voir dire of John Woolbert: the prosecutor simply asks Mr. Woolbert whether he would consider death for a defendant who was not the actual killer and did not intend to kill.

At the beginning of Mr. Woolbert's voir dire, the court explained the penalty phase process. (21 RT 6002-6003.) Under questioning by the court, Mr. Woolbert stated that although he did not like the death penalty, he was capable and willing to impose it if the law and facts justified it:

"Q: [by the court] So I take it from what you say here that although you don't like the fact that that kind of punishment might have to be imposed, if the law and the facts justified it, you'd be capable of voting for it?

"A: [by Mr. Woolbert] Yes.

"Q: Is that true?

"A: Yes I would." (21 RT 6003-6004.)

The court then turned to whether Mr. Woolbert would keep an open mind in the penalty phase. Mr. Woolbert agreed he would:

"Q: [by the court] When you enter into that second phase, if the defendant is convicted of a first degree murder with special circumstance making that decision the jury's decision, can you keep your mind open until you hear the evidence in the second phase?

A: [by Mr. Woolbert] Yes, yes." (21 RT 6004-6005.)

Under questioning by defense counsel, Mr. Woolbert explained he would set aside his views on the death penalty and apply the law as instructed by the court. (21 RT 6016-6017.) He was not equivocal about this in the least:

"Q: [by defense counsel] But do you accept the fact, Mr. Woolbert, that our state has decided to make the death penalty a part of the criminal justice system?

"A: [by Mr. Woolbert] Yes.

"Q: And you understand that for our system to function, jurors must follow the law as the court sets it out. Do you understand?

"A: Yes.

"Q: A jury is the judge of the facts and Judge Boeckman is the judge of the law. Do you understand that?

"A: (Nods head.)

"Q: Okay, and you understand that if you're selected as a juror in this particular case, the court will tell you what the law is as it applies to all aspects of this case, including punishment, if that's reached. Do you understand?

"A: Yeah.

"Q: And that's acceptable to you?

"A: Yeah.

"Q: Okay. The important thing is, you see, we all have -- all human beings have biases. Some of you of us like Coca Cola, some of us like Pepsi. You understand? So nobody can walk into this courtroom bias free. We all have certain biases. The important question is whether or not you can put your personal feelings aside and follow the court's instructions. Can you do that?

"A: I can follow the instructions.

"Q: Whatever feelings you have one way or another, can you set those feelings aside and follow the court's instructions?

"A: Yeah, I'm sure I can." (21 RT 6016-6017.)

The prosecutor also questioned Mr. Woolbert. The prosecutor's questions were roughly divided into two areas which corresponded to the two decisions the jury would be

asked to make: the underlying murder and special circumstance allegation and the penalty decision. As to the murder, Mr. Woolbert agreed he could find an aider and abettor guilty of murder even if he had no intent to kill. (21 RT 6026-6027.)

The prosecutor then focused on the penalty decision. The prosecutor first established that Mr. Woolbert would indeed consider death as an option, even if there was no intent to kill, so long as there was reckless indifference to human life. The prosecutor did so by asking a hypothetical question which accurately tracked state and federal law: she simply and directly asked Mr. Woolbert if he would consider death as an option where (1) the defendant was not the killer, (2) the defendant had no intent to kill but (3) the defendant was a major participant in the underlying felony who (4) acted with a reckless indifference to human life:

> "Q: by the prosecutor] Mr. Woolbert, the next question becomes, a person is responsible for special circumstances, okay? Special circumstances are found to be true if a person, even though they're not the actual killer and they had no intention to kill, act as a major participant in an underlying felony and they act with a reckless indifference to human life. Okay?
>
> "A: [by Mr. Woolbert] (Nods head)
>
> "Q: That person is eligible for the death penalty. Okay? Now you've indicated that you have some personal beliefs about the death penalty.
>
> "A: Right.
>
> "Q: Okay. Do you -- Are your personal beliefs such that you could not

seriously consider the death penalty in that situation?

"A: Yeah, I -- I'm sure I could follow the law." (21 RT 6028.)

Later Mr. Woolbert twice more confirmed that in this situation he would put aside his principles and apply the law as instructed by the court. (21 RT 6029.) As discussed above, the prosecutor's question here was nearly identical to the questions she had asked almost all prospective the jurors. (*See, e.g.*, 10 RT 3415, 3457, 3490; 11 Rt 3629, 3650, 3741; 12 RT 3861, 3863, 3895, 3919, 3953, 4014, 4054-4055; 13 RT 4086, 4126, 4149-4150, 4175, 4243, 4286, 4309-4310, 4335-4336; 14 RT 4383-4384, 4421, 4442, 4468, 4501, 4525, 4556; 16 RT 4757-4758, 4806-4807, 4869-4870, 4897, 4918-4919,; 17 RT 4973-4974, RT 5069, 5084-5085, 5105-5106, 5127-5128, 5154; 18 RT 5193, 5224-5225, 5294, 5320, 5346; 19 RT 5432-5433, 5455-5456, 5474, 5498, 5545, 5579-5580, 5601, 5621-5622; 20 RT 5680, 5709, 5724-5725, 5752, 5793-5794, 5836; 21 RT 5868, 5937, 5989-5990, 6064-6065, 22 RT 6206, 6265, 6291-6292, 6325-6326; 23 RT 6375, 6407-6408, 6440.)

The prosecutor then substantially modified her hypothetical question. The prosecutor deleted entirely any information that the defendant had been found to be a major participant who exhibited a reckless indifference to human life. Instead, the prosecutor asked Mr. Woolbert a second and much shorter hypothetical as to whether he

would consider death if a defendant simply had no intent to kill.

As noted above, this was the same short-form question the court had ruled improper in connection with jurors Linegar, Green and Burke. (11 RT 3704-3705, 13 RT 4204, 17 RT 5013.) In fact, Mr. Woolbert's responses to these questions (as well as the trial court's follow-up questions) show that Mr. Woolbert believed the prosecutor was no longer speaking of a defendant who was a major participant in a felony who acted with reckless disregard for human life, but of a death which was accidental:

> "Q: In the situation where someone doesn't have any intention to kill, do you feel that you could seriously consider the death penalty?
>
> "MR. MAXION [DEFENSE COUNSEL] I object, that's been asked and answered.
>
> "MR. WOOLBERT: Yeah. Yeah, I -- yeah, if a person flat had --
>
> "THE COURT: Go ahead, sir.
>
> "MR. WOOLBERT: If a person flat out had no intention to kill --
>
> "MS. DALY: Q: Uh-huh?
>
> "A: -- it would be hard to give them the death penalty.
>
> "Q: Okay. And when you say it would be hard to --
>
> "A: I don't know that I would, but I don't know that I wouldn't. I mean, I know, I -- I can -- I can come up and give you the right answer and when it comes right down to it if I had to do it, what can I say?

"Q: Right. And unfortunately, we need to ask you these questions before you really have a lot if information?

"A: I understand that.

"Q: You know?

"A: Yeah.

"Q: And we can't stop the trial in the middle.

"A: Right, I understand that. And the only thing I can say is, is like I said a little while ago, if someone was robbing a bank and they had a gun and a guard pulled his gun out and he shot the guard, that's intentionally killing him. If somebody was robbing a bank and somebody had a heart attack --

"Q: Uh-huh.

"A: -- and I believe under the law, he's in for murder there. No, that -- that wasn't an intentional killed. [sic]

"Q: Okay.

"A: That would be the life in prison instead of the death penalty." (21 RT 6029-6031.)

Mr. Woolbert then conceded he would have a difficult time imposing death on someone who did not intend to kill. (21 RT 6031.) But nowhere in this second series of questions was he asked if his hesitance also applied where the defendant who did not intend to kill acted as a major participant in the underlying felony and with reckless indifference to human life.

The court then stepped into the questioning. Unfortunately, the court did not

remedy the deficiency in the prosecutor's second hypothetical. Instead, the court simply told Mr. Woolbert that the law permitted a finding of special circumstances (and death eligibility) "even though that person did not personally kill the victim and even though that person did not have an intent to kill." (21 RT 6032.) The court reiterated that the law permitted a person to be sentenced to death "where the defendant did not have the intent to kill anybody." (21 RT 6032.) Like the prosecutor, the court said nothing about any requirement that the defendant also be found to have a reckless indifference to human life.

In this context, the court asked Mr. Woolbert if he would "have your mind already made up that if there's no intent the (sic) kill, you cannot vote for the death penalty." (21 RT 6033.) Mr. Woolbert replied that even in this situation, "my mind would not be made up that I would not vote for the death penalty" although he later recognized he would "have trouble voting for the death penalty" in this limited situation. (21 RT 6033-6034.) Mr. Woolbert's final comment confirms he was not considering a situation where the defendant was a major participant who had acted with reckless indifference to human life, but instead was considering at this point an "accidental" killing:

> "If he didn't deliberately kill someone or she, then I would have trouble giving the death sentence. If they killed somebody, breaking the law or whatever, you know, *and it was an accident* or what not, no, then they go to jail for the rest of their life or whatever." (21 RT 6034, emphasis added.)

The prosecutor moved to discharge Mr. Woolbert for cause because "Mr. Woolbert has indicated he could not follow the law and could not consider the death penalty for a person who has no intent to kill." (21 RT 6035.) Defense counsel objected, making the same argument he made in connection with jurors Linegar, Green and Burke and pointing out that the prosecutor's series of questions had deleted both the major participant and reckless indifference parts of the question. (21 RT 6035-6036; *compare* 11 RT 3704-3705, 13 RT 4205, 17 RT 5013.) This time, however, rather than sustaining defense counsel's objection (as it had in connection with jurors Linegar, Green and Burke), the trial court shifted gears completely and sustained the prosecutor's for-cause challenge. (21 RT 6036-6037.)

As discussed below, the trial court erred. Mr. Woolbert made clear he *would* consider death for a defendant who (1) was an aider and abettor and not an actual killer, (2) did not intend to kill but (3) acted as a major participant with (4) a reckless indifference to human life. That is all that was required.

Contrary to the trial court's finding, the further questioning of Mr. Woolbert -- which omitted any mention of reckless disregard of human life -- actually shows Mr. Woolbert was able to follow the law. As also discussed below, the United States Supreme Court itself has held an aider and abettor who does not intend to kill may *not* be

sentenced to death absent evidence that he acted as a major participant in the underlying felony and with reckless indifference to human life. Thus, Mr. Woolbert's expressed reluctance to impose death for someone who simply did not intend to kill -- without any information as to whether this person acted with reckless indifference to human life -- shows he was willing to follow the law, not disregard it. Reversal of the death sentence is required.

C. Because The Voir Dire Of Mr. Woolbert Established His Position On The Death Penalty Would Neither Prevent Nor Substantially Impair His Ability To Follow The Court's Instructions, Apply The Law To The Facts, Or Impose A Sentence Of Death, The Trial Court Committed Reversible Error Discharging Him For Cause.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) Instead, the state could properly excuse only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their

attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523, n. 21, emphasis omitted.)

The Court modified the *Witherspoon* standard in *Adams v. Texas*, *supra*, 448 U.S. 38, explaining that *Witherspoon* and its progeny "establish[] 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." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) Prospective jurors could *not* be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.* at p. 50.) Instead, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (448 U.S. at p. 48.) Moreover, as the Court later made plain in specifically reaffirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

This Court has repeatedly held that it is the *Adams/Witt* standard which reviewing courts should apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (*See, e.g., People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.) "Under *Witt*, therefore, our duty is to examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would substantially impair the performance of [the juror's] duties . . . was fairly supported by the record." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094. *See People v. Miranda* (1987) 44 Cal.3d 57, 94.)

In reviewing the trial court's ruling here, the Court must keep in mind that as the Supreme Court has emphasized, the *Adams/Witt* standard "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 the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas, supra*, 448 U.S. at pp. 47-48.) As the Court has concluded, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Here, application of the *Adams/Witt* standard to the voir dire of Mr. Woolbert shows the trial court erred in discharging him for cause. The voir dire record shows Mr. Woolbert specifically and repeatedly stated he could put aside his views and follow the law. Ultimately, the trial court discharged Mr. Woolbert not because he refused to impose a death sentence when the law required it, but because he was reluctant to impose death in a factual situation where neither state nor federal law even *permit* a death sentence. Accordingly, the state simply did not carry its burden of showing Mr. Woolbert's beliefs would have substantially impaired the performance of his duties as a capital case juror.

As noted above, although Mr. Woolbert plainly did not like the death penalty, he was willing to impose it if justified by the facts and law. (21 RT 6003-6004.) He agreed to keep an open mind in the penalty phase until he heard all the evidence. (21 RT 6004-6005.) Mr. Woolbert promised to set aside his views on the death penalty and apply the law as instructed by the court. (21 RT 6016-6017.) He was unequivocal:

> "Q: Whatever feelings you have one way or another, can you set those feelings aside and follow the court's instructions?
>
> "A: Yeah, I'm sure I can." (21 RT 6016-6017.)

Mr. Woolbert agreed he could find an aider and abettor guilty of murder even if he

had no intent to kill. (21 RT 6026-6027.) He agreed he would consider death as an option even where defendant was *not* the killer, and there was *no* intent to kill, so long as defendant acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (21 RT 6028.)

As discussed above, the prosecutor then asked Mr. Woolbert a number of questions focusing solely on whether he would consider death if a defendant simply had no intent to kill. (21 RT 6029-6031.) Significantly, this entire series of questions omitted any reference to whether the defendant in the hypothetical had been proven to act (1) as a major participant in the underlying felony and (2) with reckless indifference to human life. (21 RT 6029-6031.) Absent such information, Mr. Woolbert expressed reluctance to impose death. (21 RT 6029-6031.)

Mr. Woolbert's responses to these narrowly focused questions show his understanding of what was being asked. At one point, Mr. Woolbert rephrased the question to make clear that the person "flat out had no intention to kill . . . ." (21 RT 6030.) At another point, he made clear his understanding was that the prosecutor's hypothetical could involve a situation where a victim simply had a heart attack during a robbery -- a situation which on-its-face did not necessarily involve either a major participant or reckless indifference. (21 RT 6030-6031.) Plainly Mr. Woolbert did

not think -- at this point in the voir dire -- he was being asked about a defendant who had already unanimously been found to have acted as a major participant with a reckless indifference to human life.

This interpretation is confirmed by the court's subsequent questioning. As also noted above, the court stepped into the questioning, and explained to Mr. Woolbert the law permitted a finding of special circumstances (and death eligibility) "even though that person did not personally kill the victim and even though that person did not have an intent to kill." (21 RT 6032.) Like the prosecutor, the court's questions also omitted any reference to the fact that such a defendant was not death eligible unless the jury unanimously found he acted as a major participant with a reckless indifference to human life. Once again, without this information Mr. Woolbert stated he would have a difficult time imposing death on a defendant who did not intend to kill. (21 RT 6033-6034.) Mr. Woolbert made clear his view that a defendant who killed by accident would fall under the court's scenario. (21 RT 6034.) Plainly Mr. Woolbert did not believe he was being asked about a defendant who had already been found by a unanimous jury to have exhibited a reckless indifference to human life.

On this record, the trial court's discharge of Mr. Woolbert for cause was fundamentally improper. Where there has been a killing in the course of an enumerated

felony, California law permits the state to seek death for a defendant who has not actually killed, and who did not intend to kill, only where the state proves the defendant aided the felony "with reckless indifference to human life and as a major participant . . . ." (Penal Code § 190.3, subdivision (d).) In this regard, § 190.2, subdivision (d) was intended to embrace the minimum Eighth Amendment death eligibility standard set forth in *Tison v. Arizona*, *supra*, 481 U.S. 137, 158. (*People v. Estrada* (1995) 11 Cal.4th 568, 575; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298.)

Thus, under *Adams/Witt* it was entirely proper for the prosecutor and the court to probe whether Mr. Woolbert would set aside his opposition to the death penalty and consider death where defendant did not actually kill, and did not intend to kill, but aided a felony (as a major participant) with reckless indifference to human life. Had Mr. Woolbert expressed reluctance to impose death in such a situation, it would have been entirely proper to discharge him for cause.

But he expressed no such reluctance. And that is not why the court discharged him. To the contrary, when given this precise hypothetical by the prosecutor, Mr. Woolbert confirmed he would put his personal views aside, apply the law and consider death as an option. (21 RT 6028.) This is exactly what both state and federal law required. (*See* Penal Code § 190.3, subdivision (d); *Tison v. Arizona*, *supra*, 487 U.S. at

p. 158.) It was only when the major participant and reckless indifference components of the question were excised -- and Mr. Woolbert was solely asked if he could impose death absent an intent to kill -- that he expressed reluctance to impose death. (21 RT 6029-6034.)

Lest there be any confusion, Mr. Grimes stresses what he is *not* arguing here. This is not a claim that the prosecutor engaged in improper questioning of the prospective juror. Instead, the claim is simple: the state had the burden of proving Mr. Woolbert's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Thus, the prosecutor was fully entitled to explore whether Mr. Woolbert could consider death for a defendant who neither killed nor intended to kill but nevertheless was a major participant in a burglary and acted with a reckless indifference to life.

But read in context, and as the trial court itself recognized in connection with the identical questioning of prospective jurors Linegar, Burke and Green, the critical questions the prosecutor asked were simply not directed at this point. Indeed, when the prosecutor properly inquired into this area, he learned that Mr. Woolbert *would* consider death as an option. Mr. Woolbert's answers were direct and unequivocal on this point. It was only when the prosecutor excised critical parts of her questions -- excisions the trial

court precluded the prosecutor from making in connection with the other jurors -- that Mr. Woolbert expressed any hesitation at all. .

In short, under current law, the fact Mr. Woolbert said he would have trouble imposing death for a defendant who did not kill and did not intend to kill was legally irrelevant. Neither California law nor the Eighth Amendment even permit a defendant to be sentenced to death under such a scenario. To the contrary, both state and federal law require that the state prove such a defendant act as a major participant and with reckless indifference to human life. (*See* Penal Code § 190.3, subdivision (d); *Tison v. Arizona*, *supra*, 487 U.S. at p. 158.) And Mr. Woolbert made clear he would consider death for a defendant in this situation. On this record, allowing the state to discharge Mr. Woolbert for cause because he was reluctant to impose death absent the required *Tison* findings permitted the state to bar him from jury service on a "broader basis than inability to follow the law or abide by their oaths, [and], the death sentence cannot be carried out." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48.) Mr. Woolbert should not have been stricken for cause. Reversal of the penalty phase is required. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660 [improper exclusion of a single juror warrants reversal].)

III. THE TRIAL COURT ABUSED ITS DISCRETION, AND VIOLATED THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, IN REFUSING TO EMPANEL A SECOND JURY WHEN PRESENTED WITH UNREBUTTED SOCIAL SCIENCE DATA SHOWING DEATH QUALIFICATION RESULTS IN A CONVICTION-PRONE JURY AT GUILT PHASE.

In *Hovey v. Superior Court* (1980) 26 Cal.3d 1, this Court addressed the death qualification process used in capital trials and held there was insufficient data to support a conclusion that death qualification improperly impacted the guilt phase jury. Several years later, in *Lockhart v. McRee* (1986) 476 U.S. 162, the Supreme Court held death qualification of a capital jury did not violate the federal constitution.

Prior to the 1998 trial in this case, defense counsel filed a motion contending that since the decisions in *Hovey* and *Lockhart* "additional studies" showed death qualification resulted in a guilt prone jury at the guilt phase. (4 CT 691-692.) Defense counsel did not, however, object to death qualification. After all, death qualification is important to ensure the penalty phase jurors are not biased against the state's position. Instead, defense counsel urged a compromise: he asked the trial court to empanel separate juries for guilt and penalty. (4 CT 691.) Under this proposal, the guilt phase jury would not be death qualified. (4 CT 691.) In contrast, the penalty phase jury would be death qualified. (4 CT 691.)

When the motion was called for argument, defense counsel recognized that in order to prove the need for separate juries, he had to prove death qualification rendered the guilt phase jury more prone to convict. (3 RT 390.) He offered to submit the motion on the prior testimony of Professor Edward J. Bronson, an expert in the field, who had recently testified on the issue in another case, *People v. Brewster*. (3 RT 391.) Counsel lodged with the court a copy of Professor Bronson's testimony. (3 RT 391.)

The state argued the defense was not entitled to submit any evidence on the question. (3 RT 393.) The trial court overruled the state's objection, and considered Professor Bronson's testimony. (4 RT 2058-2059.)

Professor Bronson has been a professor since 1969; he received a doctorate in public law in 1972, a masters degree in law from New York University prior to that, and won a Fulbright Scholarship in 1982. (Bronson Testimony at 1768-1769.)[13] Since 1968 he had been doing research on the impact of death qualification on the composition of juries. (Bronson Testimony at 1770-1773.) He had designed, performed and published numerous studies in the area, kept current by reviewing other studies, testified as an

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[13] On January 21, 2009, this Court granted appellant's application to augment the record to include the Reporter's Transcript of Professor Bronson's testimony. (*People v. Grimes* S076339, Order of January 21, 2009.) A copy of Professor Bronson's testimony was attached to that application.

expert in both *Hovey* and *Lockhart*, and testified as an expert in this area in eight or ten different states. (Bronson Testimony at 1770-1774.) The trial court in *Brewster* accepted Professor Bronson as an expert on the question of whether *Hovey* voir dire resulted in a death prone jury. (Bronson Testimony at 1802.)

Professor Bronson explained his answer in some detail. (Bronson Testimony at 1811-1818.) His conclusion was stark: while *Hovey* (sequestered) voir dire was better than unsequestered voir dire, the studies showed it still resulted in a jury more likely to convict. (Bronson Testimony at 1808, 1811-1818.) According to Professor Bronson, however, there was a solution: seating two juries, and death qualifying the penalty phase jury but not the guilt phase jury. (Bronson Testimony at 1824.)

This was the only testimony the court considered in making its decision. The state did not present any contrary evidence.

Nevertheless, the trial court ultimately rejected the defense request for two juries. Of most importance, the trial court ruled "I think the studies and the evidence presented is insufficient to demonstrate" that death qualification results in a jury more prone to convict. (5 RT 2381.) As more fully discussed below, the trial court's ruling was

improper.[14]

The Fifth Amendment entitles defendants to a fair trial. (*Estes v. Texas* (1965) 381 U.S. 532.) The Sixth Amendment entitles defendants to an impartial jury. (*See Groppi v. Wisconsin* (1971) 400 U.S. 505, 508.) And, in the context of a capital trial, the Eighth Amendment entitles defendants to procedures designed to maximize the reliability of the jury's decision in the guilt phase. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625.)

Mr. Grimes recognizes, of course, this Court has on many occasions rejected the argument that a defendant is entitled to relief because the process of death qualification itself violates the federal or state constitutions. (*See, e.g., People v. Lenart* (2004) 32 Cal.4th 1107, 1120; *People v. Steele* (2002) 27 Cal.4th 1230, 1242-1243; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199; *People v. Davenport* (1995) 11 Cal.4th 1171, 1205; *People v. Stanley* (1995) 10 Cal.4th 764, 797-798; *People v. Breaux* (1991) 1

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[14] The court went on to rule that any prejudice which was caused could be addressed by sequestered voir dire. (5 RT 2381.) Of course, since the court had already found that prejudice had not been shown, the fact that it believed sequestered voir dire would cure the prejudice which had been shown was either beside the point or entirely contradictory.

More importantly, the court's observation misses the point entirely. As Professor Bronson made clear, sequestered voir dire was designed to address the problem of public voir dire where jurors were desensitized to the process by hearing about it again and again during voir dire. (Bronson Testimony at 1819-1821.) Sequestered voir dire simply does not address the problem that eliminating jurors who would not impose death as well as jurors who would not impose life results in a jury more prone to conviction.

Cal.4th 281, 306; *People v. Ashmus* (1991) 54 Cal.3d 932, 956-957; *People v. Webster* (1991) 54 Cal.3d 411, 449; *People v. Stankewitz* (1990) 51 Cal.3d 72, 104; *People v. Clark* (1990) 50 Cal.3d 583, 597; *People v. Bloom* (1989) 48 Cal.3d 1194, 1212-1213; *People v. Hamilton* (1988) 46 Cal.3d 123, 136; *People v. McLain* (1988) 46 Cal.3d 97, 106.)

Mr. Grimes has no quibble with these cases. If the state seeks the death penalty in a particular case, the state must be able through the death qualification process to determine if prospective jurors are able and willing to consider death as an option.

But that is not what this case involves. Here, Mr. Grimes did not seek to preclude death qualification. Nor does he now seek to overturn his conviction because the trial court engaged in death qualification. Instead, his argument at trial (and here) is much less far-reaching: on the facts of this case, where the undisputed evidence shows death qualification resulted in a jury more prone to guilt at the guilt phase, the trial court abused its discretion in refusing to empanel two juries as defense counsel requested.

The Court addressed this exact question in *People v. Miranda* (1987) 44 Cal.3d 57. There, defendant was charged with capital murder. At trial, defendant argued the death qualification process resulted in a jury more likely to convict at the guilt phase and he

asked the trial court to empanel two juries: one for guilt and one for penalty. The trial court refused. On appeal, defendant argued the trial court's ruling was error. This Court rejected the argument, noting that defendant had not presented any evidence to show death qualification resulted in a non-neutral jury at the guilt phase. (44 Cal.3d at p. 79, n.6.)

Here, defense counsel made exactly the showing that was absent in *Miranda*. Professor Bronson testified that according to the social science data the death qualification process even as modified by sequestered voir dire resulted in a jury more prone to convict. The state presented no contrary evidence.

With good reason. In fact, numerous scientific studies performed prior to the trial court's ruling here show that death qualification does indeed result in a jury more prone to convict in the guilt phase. (*See, e.g.*, Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544, 551 [hereafter Kadane I][concluding that excluding those who would automatically vote for death and those who would automatically vote for life results in a "distinct and substantial anti-defense bias" at the guilt phase]; Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115, 119 [hereafter Kadane II] [concluding "the procedure of death qualification biases the jury

pool against the defense."]; Seltzer, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 604 [hereafter Seltzer]; Haney, *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622, 631 [hereafter Haney].)

In light of all this, there should no longer be any genuine dispute about what the social science data shows. In a capital case, death qualification renders the jury more prone to convict in the guilt phase. And that was Professor Bronson's exact testimony here.

To be sure, as many of this Court's cases show, this social science data does *not* mean death qualification is improper. Regardless of the social science data on the impact of death qualification at the guilt phase, the fact remains that death qualification furthers the state's legitimate interest in a fair jury at the penalty phase.

But by the same token, none of the Court's cases require courts in this state to blind themselves to the social science data. There are fair ways for a trial court, when asked, to accommodate both (1) a defendant's interest in an impartial jury at the guilt phase as well as (2) the state's interest in an impartial jury at the penalty phase. Though there may be no one single way to accommodate these sometimes competing interests,

empaneling separate juries for guilt and penalty, and death qualifying only the penalty jury, is certainly one such way. That too was Professor Bronson's explicit testimony. (Bronson Testimony at 1824.)

Mr. Grimes recognizes that in determining whether a trial court has abused its discretion, many courts (including this one) have noted that "[d]iscretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Other courts have written that discretion is abused only when the trial court's ruling was "arbitrary, whimsical or capricious." (*See,* e.g., *People v. Linkenauger* (1995) 32 Cal.App.4d 1603, 1614.)

With respect, neither of these phrasings is particularly helpful or, indeed, even accurate. While "exceed[ing] the bounds of reason," or making an "arbitrary, whimsical or capricious" ruling will certainly be sufficient for a reviewing court to conclude a trial court has abused its discretion, these are certainly not the necessary requirements for a conclusion that discretion has been abused. Indeed, some courts have criticized these colorful descriptions of the abuse of discretion standard in search of principles that can actually be used in practice. (*See People v. Jacobs* (2007) 156 Cal.App.4th 728, 736; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [criticizing the "arbitrary, whimsical or capricious" test as "pejorative boilerplate"].) Putting aside colorful

descriptions and "pejorative boilerplate," the ultimate question is whether the trial court's decision was reasonable in light of the governing law and the facts presented. (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.) Thus, when the evidence presented at trial is insufficient to support the lower court's ruling, that ruling may constitute an abuse of discretion. (*See, e.g.*, *People v. Cleveland* (2001) 25 Cal.4th 466, 485-486; *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454.)

That is just the situation in this case. Here, Professor Bronson's unrebutted testimony was that *Hovey* voir dire resulted in a jury more prone to convict at the guilt phase of trial. A great deal of social science literature supports this conclusion. (*See, e.g.*, Kadane I, *supra*, 78 J. American Statistical Assn. at p. 551; Kadane II, *supra*, 8 Law & Human Behavior at p. 119; Seltzer, *supra*, 9 How. L.J. at p. 604; Haney, *supra*, 18 Law & Human Behavior at pp. 619-622, 631.) And the state offered *no* empirical evidence at all supporting a contrary conclusion. On this record, the trial court's ruling that "the studies and the evidence presented is insufficient to demonstrate" death qualification results in a jury more prone to convict was a clear abuse of discretion.

In short, the trial court relied on a factual predicate which was not only unsupported by the record, but which is no longer even subject to reasonable dispute, as the basis for rejecting trial counsel's proposal. Reversal is required. (5 RT 2381.)

ISSUES ARISING DURING THE GUILT/SPECIAL CIRCUMSTANCE PHASE

IV. THE TRIAL COURT'S EXCLUSION OF MORRIS'S ADMISSION THAT HE ALONE KILLED THE VICTIM, AND HE DID NOT ACT AT THE DIRECTION OF MR. GRIMES, VIOLATED DUE PROCESS AND REQUIRES REVERSAL OF THE SPECIAL CIRCUMSTANCE VERDICT AND THE DEATH SENTENCE.

A. Introduction.

In order to render Mr. Grimes death eligible, the state charged robbery and burglary felony-murder special circumstances. (2 CT 186-187) As both parties recognized below, it was Morris -- not Mr. Grimes -- who actually killed the victim here. In this situation, as discussed above, the state could not prove either of the special circumstance allegations true unless it proved that Mr. Grimes either (1) aided the felonies with a specific intent to kill or (2) was a major participant in the felonies who acted with a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.)

Here, the prosecutor argued both theories to the jury. (35 RT 9203-9215.) In urging the jury to find Mr. Grimes intended to kill, the prosecutor -- in her own words -- relied "primarily" on the testimony of Jonathan Howe. (35 RT 9212.) Howe, who was an

inmate at Shasta County Jail with Mr. Grimes, told police that Mr. Grimes confessed to ordering Morris and Wilson to kill the victim. (31 RT 8380, 8381; 5 CT 1020.) The prosecutor relied repeatedly on Howe's testimony in her closing argument at the guilt phase to support the special circumstance allegations. (35 RT 9212-9214, 9293-9294.) Similarly, at the penalty phase the prosecutor again heavily relied on this evidence, urging the jury to impose death because Howe's testimony could leave no "lingering doubt." (41 RT 10879-10880.) According to the prosecutor, "[t]hey've never given you a reason to doubt his [Howe's] testimony." (41 RT 10879-10880.)

Turns out, there was good reason to doubt Howe's testimony, as the prosecutor knew well: there *was* evidence that directly and fundamentally undercut Howe's testimony, but the jury never heard any of it. Here is what happened.

Prior to trial, the defense sought to introduce evidence that Morris forthrightly admitted that he killed the victim, both to his friend Misty Abbott and to his cellmate Albert Lawson. (24 RT 6747-6750.) Moreover, the defense also sought to introduce Morris's further admission to both witnesses that he acted *alone* in killing the victim, that Grimes was *not* involved in the decision to kill, and in fact, Mr. Grimes was shocked when the killing happened. (24 RT 6747-6750.)

The trial court properly admitted Morris's admissions that he killed the victim. Thus, the court admitted evidence that Morris told Lawson (1) "I killed that old lady" and (2) "I stabbed her . . . I grabbed her by the throat." (24 RT 6747, 6796.) The court also admitted evidence that Morris told Abbott (1) he "murdered the little old lady," (2) "it didn't work (strangling) and so he stabbed her," (3) "he killed her (the victim)" and (4) "she (the victim) wouldn't die choking her, so [he] had to get a knife from the kitchen." (24 RT 6749-6750, 6798.) The trial court properly recognized these statements were admissible under Evidence Code section 1230 ("section 1230") as declarations against Morris's interest. (24 RT 6796, 6798.)

Unfortunately, the trial court excluded the remainder of Morris's statements to both Lawson and Abbott showing that Morris *alone* decided to kill the victim and that Mr. Grimes was shocked when it unexpectedly happened. Thus, the court excluded Morris's statements to Lawson that Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." (24 RT 6747, 6797.) Likewise, the court excluded Morris's statements to Abbott that (1) Grimes "did not take part in the killing," (2) Mr. Grimes had not "participated in the killing" and (3) after he "did the lady" Mr. Grimes "looked at him as if they were saying, what in the hell are you doing, dude." (24 RT 6750, 6797.) According to the court, these statements were *not* admissible under section 1230 as declarations against interest. (24 RT 6797.)

As more fully discussed below, the trial court erred in excluding statements to Lawson and Abbott for two separate reasons. First, as discussed in Argument IV-B, *infra*, the trial court's conclusion that these statements were not against Morris's penal interest was wrong. These statements were indeed admissible under section 1230 as declarations against Morris's interest precisely because under clear state law these statements significantly increased Morris's own culpability and would have been plainly admissible against him as admissions had he gone to trial. In addition, as discussed in Argument IV-C, *infra*, the trial court's exclusion of this evidence not only violated state law, but federal law as well. Finally, as discussed in Argument IV-D, *infra*, under either the state or federal standard of prejudice, reversal of the special circumstance findings and death judgment are required.

B. Because Morris's Statements To Lawson And Abbott Maximized His Participation And Culpability In The Crime, They Were Admissible As Declarations Against Interest Under Evidence Code Section 1230.

Evidence Code section 1200 provides that "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 asserted" is inadmissible hearsay. Evidence Code section 1230 permits hearsay declarations against penal or pecuniary interest, however, when "the declarant is unavailable" and "the statement, when made, . . . so far subjected him to the risk of civil

or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."[15]

Here, Morris confessed to Lawson and Abbott that (1) he alone killed the victim, (2) Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house," (3) Mr. Grimes "did not take part in the killing," (4) Mr. Grimes had not "participated in the killing" and (5) after Morris killed the victim, Mr. Grimes "looked at him as if they were saying, what in the hell are you doing, dude." (24 RT 6747, 6749-6750, 6796-6798.) Taken together, these statements show that Morris not only acted alone in killing the victim, but in fact, alone made the decision to kill. Indeed, there is no other reasonable explanation for the expression of surprise from Mr. Grimes after Morris's unexpected actions.

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[15] In full, Evidence Code section 1230 reads:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Plainly, Morris's statements that he killed the victim subjected him to the risk of prosecution, and were admissions against his penal interest. And the trial court here reached precisely this result in admitting these statements. (24 RT 6796, 6798.)

The question then becomes whether Morris's further statements that Mr. Grimes did not take part in the killing, and that he was surprised when Morris killed the victim, were also against Morris's penal interest. The trial court here ruled that these statements were *not* against Morris's penal interest, and so ruled them inadmissible. (24 RT 6797.)

The trial court was wrong. Under state law these statements -- in which Morris took total blame for the killing, and refused to place any responsibility at all on Grimes or Wilson -- were unquestionably disserving to Morris's penal interests.

Under California law, when a capital jury is faced with deciding whether to impose a death sentence, or give life, it must weigh aggravating and mitigating factors. (Pen. Code § 190.3) Among the designated aggravating factors under California's death penalty scheme is Penal Code section 190.3(a), which permits the jury to impose death by relying on the "circumstances of the crime." As this Court has explained, a "circumstance of the crime" under section 190.3(a) "is concerned with those circumstances that make a murder especially aggravated, and therefore more culpable and

deserving of the ultimate penalty." (*People v. Bunyard* (2009) 45 Cal.4th 836, 897, *citing People v. Jenkins* (2000) 22 Cal.4th 900, 1052-1053.) Significantly, in applying the "circumstances of the crime" aggravating factor under section 190.3(a), it is well established that where a defendant has acted alone in deciding to kill, that fact is aggravating within the meaning of section 190.3(a), and makes the defendant both more culpable and deserving of death. (*See e.g.*, *People v. Carpenter* (1997) 15 Cal.4th 312, 415. *See also People v. Howard* (1992) 1 Cal.4th 1132, 1195 [reiterating aggravating nature of the fact that a defendant acted alone in killing the victim].)

Here, Morris told both Lawson and Abbott that Mr. Grimes did not participate in the killing and, in fact, was shocked when Morris actually killed the victim. This was compelling evidence not only that Morris acted alone, but that he alone had made the decision to kill the victim. Pursuant to cases like *Carpenter* and *Howard*, as to Morris this evidence was aggravating under Penal Code section 190.3(a) and made Morris "more culpable and deserving of the ultimate penalty." (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 897.)

It is difficult to imagine how a statement can make a defendant "more culpable and deserving of the death penalty" and yet not be against the defendant's interest within the meaning of Evidence Code section 1230. But even if this were theoretically possible, it is

not possible here; these statements directly enhanced Morris's culpability and were therefore just as directly contrary to his penal interest and admissible under section 1230. The trial court erred in concluding otherwise.

In reaching a contrary conclusion, the trial court relied on *People v. Gatlin* (1989) 209 Cal.App.3d 31. (24 RT 6797, 6798.) But *Gatlin* does not support the exclusion of evidence here.

In *Gatlin*, defendant was charged with crimes in connection with a burglary. At trial, defendant moved to admit evidence that three codefendants denied involvement in the burglary and claimed defendant too had nothing to do with the burglary. The trial court excluded the evidence as hearsay. On appeal, defendant claimed this was improper. The appellate court properly rejected the argument, ruling that in the context of the codefendants' "self-serving" denials of culpability, "any statement that defendant had nothing to do with the burglary is not specifically disserving to the interests of any of the three codefendant declarants." (*People v. Gatlin*, *supra*, 209 Cal.App.3d at p. 43.)

Gatlin is entirely distinguishable from this case. First, in contrast to *Gatlin*, Morris's statement here was not a "self-serving" denial of culpability; it was a confession to first degree capital murder. Second, and again in contrast to *Gatlin* (and as discussed

above), the specific statements sought to be introduced here -- which minimized Grimes's role in the crime and decision to kill -- actually made Morris *more* culpable for the murder he alone committed. Indeed, contrary to the "self-serving" statements of the codefendants in *Gatlin*, the proffered statements from Morris here were *entirely* disserving. In other words, they were admissible as declarations against interest. The trial court's reliance on *Gatlin*, and its exclusion of the evidence, were both improper.

C. The Trial Court's Exclusion Of These Statements Violated Due Process And The Eighth Amendment.

There is a federal constitutional dimension to the error here. The Fifth Amendment provides that no person may be deprived of liberty without "due process of law." Under this constitutional guarantee, while a defendant is not entitled to a perfect trial, he is entitled to a fair one. (*Estes v. Texas* (1965) 381 U.S. 532.) In gauging the fairness of a trial, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Thus, the right to present evidence "has long been recognized as essential to due process." (*Id.* at p. 294.)

The Sixth Amendment provides that defendants in criminal cases shall "have compulsory process for obtaining witnesses in his favor . . . ." The Sixth Amendment

requires "at a minimum that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

Applying this well established authority, the Supreme Court has made clear that the erroneous exclusion of a defendant's evidence may violate the defendant's Fifth Amendment right to a fair trial as well as his Sixth Amendment right to present a defense. (*See, e.g., Davis v. Alaska* (1974) 415 U.S. 308, 319-320; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers v. Mississippi, supra*, 410 U.S. at p. 302.) The Supreme Court's case law in this area stands squarely for the proposition that where a trial court excludes critical, reliable defense evidence which fully corroborates a defense presented to the jury, the defendant's Fifth and Sixth Amendment rights are violated. (*See, e.g., Chambers v. Mississippi, supra*, 410 U.S. at p. 302; *Washington v. Texas, supra*, 388 U.S. at pp. 19, 23.) Thus, when certain evidence is critical to the theory of defense presented to the jury, the Constitution does not permit the state to exclude that evidence *even where that exclusion is in full conformity with state rules of evidence.* (*See, e.g., Davis v. Alaska, supra*, 415 U.S. at pp. 319-320; *Chambers v. Mississippi, supra*, 410 U.S. at p. 302; *Washington v. Texas, supra*, 388 U.S. at pp. 19, 23.)

The Supreme Court has applied these very principles to a trial court's exclusion of

evidence which places a defendant's purported confession in context. (*See Crane v. Kentucky* (1986) 476 U.S. 683.) There, after defendant was arrested for murder, he was interrogated by police. Ultimately defendant confessed to the murder. Prior to trial, the defendant moved to suppress this confession. The trial court determined that the confession was voluntary and denied the motion.

At trial, defendant denied complicity in the murder. Central to this defense was his claim that the confession he gave to police was unreliable and should not be believed. Defendant offered evidence about the circumstances of the interrogation which called into question the credibility of some of the incriminating statements defendant had made during the interrogation. As the Supreme Court recognized, defendant's objective was to give context to the confession and thus challenge the confession's credibility. (476 U.S. at p. 684.) The trial court excluded the testimony under state law.

On appeal, the Court first observed that the Constitution, whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Id.* at p. 690, *quoting California v. Trombetta* (1984) 467 U.S. 479, 485.) "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of

a confession when such evidence is central to the defendant's claim of innocence." (*Ibid.*) Unless there is a valid state justification, the exclusion of this exculpatory evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." (*Id.* at pp. 690-691 [citations omitted].)

Applying these principles to the case before it, the Court held that the evidence which gave context to defendant's confession could not be excluded consistent with Due Process. (*Id.* at p. 691.) This was especially true where a central theme of the defense case was that defendant's earlier admissions of guilt should not be believed. (*Id.*)

The Court reached a similar result in *Chambers*. There, defendant was charged with murder. He sought to introduce hearsay evidence showing that a third person had confessed to the murder to three individuals. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 292-293.) The state trial court excluded the evidence under the state's hearsay rules, which did not include an exception for statements against penal interest. (*Id.* at pp. 292-293, 299.) The Supreme Court noted that although the evidence was hearsay, it was nonetheless reliable. (*Id.* at pp. 300-301.) In light of its reliability, and although the evidence violated state law, the Court held that exclusion of the evidence violated defendant's constitutional rights. (*Id.* at p. 302-303.)

Not surprisingly, courts throughout the country have followed the principles expressed and applied in *Chambers* and *Crane*, holding that a trial court's exclusion of critical evidence which fully corroborates a defense presented to the jury is unconstitutional. (*See, e.g., Depetris v. Kuykendall* (9th Cir. 2001) 239 F.2d 1057, 1062 [exclusion of evidence violated Due Process where it went to "the heart of the defense"]; *Lyons v. Johnson* (2d Cir. 1996) 99 F.3d 499 [exclusion of evidence violated Due Process where it would have corroborated a theory of defense presented to the jury through the testimony of other witnesses]; *Dey v. Scully* (E.D.N.Y. 1997) 952 F.Supp. 957 (same). *Cf. Franklin v. Henry* (9th Cir. 1997) 122 F.2d 1270, 1273 [where a defendant's culpability hinges largely on the testimony of a prosecution witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution]; *Justice v. Hoke* (2d Cir. 1996) 90 F.3d 43, 47-49 [same]; *Franklin v. Duncan* (N.D.Cal. 1995) 884 F.Supp. 1435, 1455.)

The constitutional principle applied in *Crane* and *Chambers*, and followed throughout the country since, controls this case. The prosecutor introduced Howe's testimony that Mr. Grimes confessed to him that he ordered Morris and Wilson to kill the victim. (31 RT 8381; 5 CT 1020.) The prosecutor then told the jury that in finding the special circumstances, the jury should rely "primarily" on Howe's testimony. (35 RT 9212.) The prosecutor again relied on Howe's testimony in penalty phase, telling the jury

that there could be no "lingering doubt" in light of Howe's testimony. (41 RT 10879-10880.) According to the prosecutor, "[t]hey've never given you a reason to doubt his [Howe's] testimony." (41 RT 10879-10880.)

Yet the trial court here prevented Mr. Grimes from introducing this very evidence. Morris's statements to Lawson and Abbott -- that he acted alone, Mr. Grimes did not participate in the killing and in fact, Mr. Grimes was shocked when Morris unexpectedly killed -- directly contradicted Howe's testimony that Mr. Grimes ordered the kill and thus, entirely supported the defense that Howe was a liar. Exclusion of this important defense evidence violated Due Process.

There is another federal constitutional dimension here. The Supreme Court has repeatedly recognized death is a unique punishment, qualitatively different from all others. (*See, e.g., Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court has held there is a corresponding Eighth Amendment need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625 [guilt phase]; *Gardner v. Florida, supra*, 430 U.S. at p. 357 [penalty phase].)

Here, there was no real question that Morris's statements to Lawson and Abbott were reliable evidence. Indeed, before it could admit any portion of these statements as declarations against interest, the trial court was required to determine whether each statement was made under circumstances which showed it was "sufficiently reliable to warrant admission despite its hearsay character." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) The trial court here took no issue with the circumstances surrounding Morris's statements to Lawson and Abbot nor their reliability. Indeed, the court found the statements reliable and admitted those portions which it found were also declarations against interest. (24 RT 6796-6797, 6798-6799.) Whatever the rule in connection with a non-capital case, excluding the remaining portions of this reliable evidence violated the Eighth Amendment's requirement of enhanced reliability at both the special circumstance and penalty phases.

D. Because The State Will Be Unable To Prove The Exclusion Of Morris's Statements Harmless, Reversal Is Required.

To the extent the exclusion of Morris's statements violated Mr. Grimes's rights under state law, reversal is required if there is a reasonable probability that the error impacted the outcome of the guilt and penalty phase. (*See People v. Watson* (1956) 46 Cal.2d 818, 836.) But because this error also violated Mr. Grimes's Due Process and Eight Amendment rights, the error is subject to the *Chapman* standard of prejudice,

requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) Ultimately, there is no need for the Court to decide which standard should apply; under either standard, reversal is required here.

As to the special circumstances allegation on an intent to kill theory, Mr. Grimes's entire defense was that Howe was a liar. Mr. Grimes denied he ordered the killing. Instead, Morris acted alone while Mr. Grimes and Wilson rummaged elsewhere through the victim's home. Obviously, this defense could not be successful unless Mr. Grimes was able to challenge the reliability and credibility of Howe's testimony. Morris's statements to Lawson and Abbott -- which the trial court kept from the jury -- would have allowed Mr. Grimes to do just that.

Indeed, the exclusion of Morris's statements left the jury with a fundamentally distorted impression of Mr. Grimes's involvement in the actual killing. The jury did not know that Howe's credibility was undermined by statements from Morris, the actual killer. The jury did hear that Morris explicitly took *all* responsibility for the actual killing. The jury did not know that Morris placed no responsibility for the killing on Mr. Grimes. The jury did not know that, in fact, Mr. Grimes was shocked and surprised when Morris unexpectedly killed the victim.

Moreover, the case against Mr. Grimes on this critical issue was hardly overwhelming. In fact, as the prosecutor recognized in closing argument, the evidence that Mr. Grimes intended the victim killed rested "primarily" on Howe's testimony. (35 RT 9212.) On this record, the exclusion of Morris's statements to Lawson and Abbott precluded Mr. Grimes from attacking the critical evidence against him and cannot be found harmless under either the state or federal standard. This is especially true here, where the prosecutor explicitly lambasted the defense for failing to attack this very evidence, telling the jury, "[t]hey've never given you a reason to doubt [Howe's] testimony." (41 RT 10879-10880.)

Indeed, the prosecutor took full advantage of Howe's uncontradicted testimony in closing argument to urge the jury to find the special circumstances true on an intent to kill theory. (35 RT 9212-9214, 9293-9294.) Likewise, the prosecutor explicitly urged the jury to return a verdict of death because Howe's uncontradicted testimony left no "lingering doubt." (41 RT 10879-10880.) "The prosecutor's heavy reliance on this evidence shows just how important it was to the state's special circumstance and penalty phase cases. (*See People v. Powell*, *supra*, 67 Cal.2d at pp. 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz*, *supra*, 61 Cal.2d at p. 868 [same]. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument

matters; statements from the prosecutor matter a great deal"].) Reversal of the special circumstance findings and verdict of death is required.

V. THE TRIAL COURT VIOLATED DUE PROCESS AND THE SIXTH AMENDMENT BY EFFECTIVELY TELLING THE JURY THAT DIRECT EVIDENCE DID NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT.

A. The Relevant Facts.

Mr. Grimes was an aider and abettor who did not kill. Thus, as discussed above, in order to prove the truth of the special circumstance allegations (and thereby render Mr. Grimes eligible for death), the state had to prove either that he (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) As also discussed above, in her closing argument the prosecutor relied in the alternative on each of these factual theories. (35 RT 9203-9211 [reckless indifference], 9212-9215 [intent to kill].) The jury found the special circumstance allegations true under a general verdict which did not specify on which of these factual theories it relied. (6 CT 1296-1297.)

In connection with the first of these theories -- the intent to kill scenario -- the state presented the jury with two distinct categories of evidence. First, the state presented direct evidence consisting entirely of the testimony of jailhouse snitch Jonathan Howe. Howe testified that in May or June of 1998, Mr. Grimes confessed to ordering Wilson and

Morris to tie up the victim and kill her. (31 RT 8381.)

But Howe's testimony had significant problems. Howe only recalled this May or June conversation in July, after he and Grimes had been in a fight at the county jail and they each threatened the other. (5 CT 1022-1023; 31 RT 8500-8501.) Howe failed a voice stress test -- in which three different examiners concluded he was lying -- and a separate lie detector test. (5 CT 1026; 30 RT 8228-8229.) Howe said he was not receiving any benefits for his testimony; yet the district attorney who prosecuted Howe testified in no uncertain terms that Howe could indeed get a shorter prison term depending on his testimony. (31 RT 8385-85, 8405, 8445-0446.) Moreover, as defense counsel noted in closing argument, not only did the record show Howe had nine felony convictions with five aliases, but the testimony he provided was completely uncorroborated. (35 RT 9244-9245.) Thus, there were no eyewitnesses to Howe's alleged jailhouse conversation with Mr. Grimes and there was no other testimony or physical evidence corroborating Howe's claim that Mr. Grimes ordered Morris and Wilson to kill.

Separate and apart from this direct evidence, the prosecutor presented the jury with circumstantial evidence supporting its intent to kill theory. According to the prosecutor, this circumstantial evidence included the facts that Mr. Grimes (1) entered the home with

a gun and Morris or Wilson entered with a knife, (2) was older than the other two defendants and (3) wore gloves and a bandana and later disposed of his shirt. (35 RT 9214-9215.)

In short, there were two categories of evidence presented here: (1) direct evidence that Mr. Grimes aided the murder with an intent to kill (Howe's testimony) and (2) circumstantial evidence that Mr. Grimes aided the murder with an intent to kill (the circumstances of the weapons, his age and his clothing). At the close of evidence, the court instructed the jury how to view this evidence.

The court provided CALJIC 8.83, specifically identifying the *second* of these categories (circumstantial evidence) and telling the jurors that as to this category of evidence, two important limitations applied: (1) the evidence had to be proved beyond a reasonable doubt and (2) if there were two reasonable constructions of the evidence, the jurors had to adopt the construction favoring Mr. Grimes. (4 Supp.CT 138-139.) As more fully discussed below, in a case like this -- where the record contains sharply conflicting evidence in response to the state's direct evidence -- it was fundamentally improper to limit these cautionary principles to the jury's evaluation of circumstantial evidence. Reversal of the special circumstance finding is required.

B. Under The Unique Circumstances Of This Case, The Trial Court's Provision Of CALJIC 8.83 Was Unconstitutional And Requires Reversal Of The Special Circumstance Finding.

In criminal cases, the Due Process Clause of the Fifth Amendment requires the state to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury, not the trial court, make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

Jury instructions violate these constitutional principles if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, 22.) In assessing whether "there is a reasonable likelihood that the jury has applied the challenged instructions" in an improper manner, a reviewing court must consider the entire context in which the instruction is given. (*Boyde v. California* (1990) 494 U.S. 370, 380, 383-384.) Where there is a "reasonable likelihood" that the jury has applied a reasonable doubt instruction incorrectly, the error is deemed structural and reversal is required without a showing of prejudice. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p.

280.)

In this case, recognizing the state had presented circumstantial evidence against Mr. Grimes, the trial court advised the jury of two cautionary principles which implement the presumption of innocence. First, the jury was instructed that before it could rely on circumstantial evidence, it had to be proved beyond a reasonable doubt:

> "[E]ach fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt. In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt." (4 Supp.CT 139.)

Second, the trial court explained that as to circumstantial evidence, the jury was required to give Mr. Grimes the benefit of the doubt if there were two reasonable views of the evidence:

> "[I]f the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth." (4 Supp.CT 139.)

Of course, it is true these two cautionary principles -- that evidence be proved beyond a reasonable doubt and that the jury must acquit if there is a reasonable interpretation of the evidence that points to untruth -- apply to circumstantial evidence. And as this Court has already concluded, it is both obvious, and logical, that by explicitly limiting the quoted principles to *circumstantial* evidence, the instructions logically told the jurors that these principles did *not* apply to *direct* evidence. (*See, e.g., People v. Vann* (1974) 12 Cal.3d 220, 226-227, rejected on another point by *People v. Brigham* (1979) 25 Cal.3d 283 ["An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality."] *Accord People v. Crawford* (1997) 58 Cal.App.4th 815, 824-825. *See generally People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App.3d 460, 474. *See also People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.].)

Significantly, however, California courts have long recognized the principle that these two cautionary principles apply to all types of evidence, not just circumstantial evidence. Thus, while it is true that a determination of guilt resting upon circumstantial evidence requires proof beyond a reasonable doubt, so too does a determination of guilt

based on direct evidence. (*People v. Vann*, *supra*, 12 Cal.3d at p. 226.) Similarly, the principle that where two reasonable interpretations of the evidence exist the one favorable to the defendant must be adopted by the jury is *not* limited to circumstantial evidence, but applies to *all* evidence, including *both* direct and circumstantial evidence. (*See People v. Naumcheff* (1952) 114 Cal.App.2d 278, 281-82 [in case consisting primarily of direct evidence, jury instructed that "[i]f from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty."]; *People v. Foster* (1926) 198 Cal. 112, 127 [defendant charged with robbery; state presents direct evidence of his guilt in the form of eyewitness testimony, jury properly instructed "that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant.'"].)

In this case, as noted above, jurors were given a specific instruction advising them of the requirement of proof beyond a reasonable doubt for circumstantial evidence. Further, the instructions which explained how this concept was to be applied specifically told the jurors that where circumstantial evidence was involved, they could *not* convict of the special circumstance allegation "if the circumstantial evidence is susceptible of two

reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth . . . ." (4 Supp.CT 139.) As the cases above suggest, there is a reasonable likelihood this instruction told the jury these important cautionary principles did not apply to direct evidence. (*People v. Vann*, *supra*, 12 Cal.3d at pp. 226-227; *People v. Crawford*, *supra*, 58 Cal.App.4th at pp. 824-825.)

This was especially harmful in this case. The state relied on direct evidence from jailhouse informant Howe. As noted above, however, Howe's testimony was riddled with problems. He was a jailhouse informant with an extensive criminal history. He recalled the conversation with Mr. Grimes only after the two had a fight in the jail. Despite his testimony, the district attorney who was prosecuting him made clear Howe could get a shortened term depending on his testimony. And there were no eyewitnesses to Howe's purported conversation with Mr. Grimes nor any other testimony which corroborated his claim that Mr. Grimes ordered Morris and Wilson to kill. In fact, there was substantial evidence that Morris surprised both Mr. Grimes and Wilson when he killed the victim on his own accord. (24 RT 6747-6750, 6796-6798; 26 RT 7350.)

Given the problems with Howe's credibility, and the lack of corroboration to support his story, a properly instructed jury could easily have disbelieved Howe's testimony that Mr. Grimes ordered Morris and Wilson to tie up and kill the victim. Thus,

it was especially important for this jury to have been correctly told that the reasonable doubt rule and the rule about two reasonable interpretations of evidence applied not only to circumstantial evidence, but to direct evidence as well.

But the jury was not given any such instructions. To the contrary, the jury here was told these cautionary rules applied only to circumstantial evidence. And as this Court recognized in *Vann*, the logical import of limiting these cautionary principles to circumstantial evidence was to tell the jury these principles did not equally apply to direct evidence. Otherwise, of course, there would have been no reason to single out circumstantial evidence in describing the scope of these principles at all. Thus, there is a reasonable likelihood the jury applied the instructions it did receive so as to permit it to return a true finding of the special circumstance allegation based on this direct evidence even if it found the evidence was reconcilable with innocence. Under these circumstances, the burden of proof beyond a reasonable doubt was undercut in violation of Mr. Grimes's Fifth and Sixth Amendment right to a fair jury trial. Reversal of the special circumstance allegation is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

VI. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE ON THE OVERT ACT COMMITTED IN FURTHERANCE OF THE CONSPIRACY TO COMMIT ROBBERY VIOLATED APPELLANT'S DUE PROCESS AND SIXTH AMENDMENT JURY TRIAL RIGHTS.

Count four charged Mr. Grimes with conspiracy to commit robbery in violation of section 211. (2 CT 184.) Under California law, of course, in order to prove a conspiracy, the state must also prove the commission of at least one overt act in the furtherance of the conspiracy. (Penal Code section 184.)

Here, the state alleged five separate overt acts in support of the conspiracy to commit robbery. (2 CT 184.) Although the trial court defined conspiracy for the jury, it never instructed the jury that it had to unanimously agree as to which overt acts were committed in the course of the conspiracy. As more fully discussed below, the trial court's failure to instruct on unanimity was prejudicial error and requires that the conspiracy conviction be reversed.

A. The Trial Court Erred In Failing To Instruct The Jury It Must Unanimously Agree On The Overt Act Essential To The Conspiracy Conviction.

As noted above, the Fifth Amendment requires that in criminal cases, the state must prove every fact necessary to establish its case beyond a reasonable doubt. (*In re*

Winship, *supra*, 397 U.S. at p. 364.) In turn, the Sixth Amendment requires that criminal defendants are entitled to a jury determination of the elements of the offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-698; *Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *Morrissette v. United States* (1952) 342 U.S. 246, 274-275. Together, these rights require a jury determination, based upon proof by the State beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Where proof of a particular fact exposes a defendant to greater punishment than that available in the absence of such proof, the Fifth and Sixth Amendments require that the factual issue must be proven beyond a reasonable doubt to a jury. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 698; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 88.) "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*United States v. Jones* (1999) 526 U.S. 227, 243, n.6. *Accord Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [citing *Jones* and noting the "historic practice" that under the federal constitution "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."].)

Here, Penal Code section 182 provides that an agreement to "commit any crime" is a felony. But Penal Code section 184 goes on to provide that no agreement is criminal "unless some act, beside such agreement, be done within this state to effect the object thereof . . . ." In light of section 184, California cases have long held that an overt act is an element of conspiracy. "Penal Code section 184 specifies that there can be no crime of conspiracy unless there is an overt act, which, *reduced to simplest terms, means that an overt act is an essential element in the crime of conspiracy . . . .*" (*People v. Feagles* (1970) 11 Cal.App.3d 735, 739 [emphasis added]; *accord People v. Zamora* (1976) 18 Cal.3d 538, 549, n.8; *People v. Cockrell* (1966) 63 Cal.2d 659, 667; *People v. Van Eyk* (1961) 56 Cal.2d 471, 478.)

Thus, under California law, a defendant may not be exposed to punishment for conspiracy in the absence of an overt act. Pursuant to *Mullaney*, then, an overt act is necessarily an element of the offense on which defendants have a Sixth Amendment right to a jury trial. Under the federal constitution, although a state criminal defendant does not have the right to a fully unanimous jury, he does have a Sixth Amendment right to at least a super-majority of jurors agreeing on his guilt. (*Compare Johnson v. Louisiana* (1972) 406 U.S. 356 [permitting conviction in non-capital criminal case based on vote of 9 out of 12 jurors] *with Brown v. Louisiana* (1980) 447 U.S. 323, 333 [precluding conviction on the vote of five out of six jurors].)

Here, the state charged Mr. Grimes with five different overt acts on which the jury could rely to convict him of conspiracy. The trial court's failure to give a unanimity instruction violated defendant's federal constitutional right to at least a super-majority of jurors agreeing on his guilt.

Appellant recognizes that this Court has rejected the argument that jury unanimity is required on the overt act for conspiracy under state law. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.) In *Russo*, the defendant argued that "the trial court erred prejudicially in not requiring the jury to agree unanimously on at least one specific overt act." (25 Cal.4th at p. 1131.) The Court rejected this argument. (*Id.* at p. 1135.)

But it is clear from the opinion in *Russo* that the federal constitutional issue raised here -- based on *Mullaney* and its progeny -- was never presented, considered or decided. (*Id.* at pp. 1131-1136.) In fact, the briefing in *Russo* does not even raise this issue or cite *Mullaney*, *Jones* or *Apprendi*. (*People v. Russo*, S088368, Appellant's Opening Brief on the Merits, at 16-47; *People v. Russo*, S088368, Respondent's Brief, at 16-48; *People v. Russo*, S088368, Appellant's Reply Brief on the Merits, at 1-14.) As a result, the Court resolved the issue by relying on state constitutional and decisional law. (*Id.* at pp. 1131-1136.)

In light of the briefing, it is not surprising that the Court's decision in *Russo* does not cite either the Fifth or Sixth Amendments. (*Id.* at pp. 1131-1136.) Nor does the Court discuss or cite *Mullaney*, *Jones* or *Apprendi*. (*Id.* at pp. 1131-1136.) Because cases are not authority for propositions not raised or considered, *Russo* does not control here. (*See People v. Williams* (2004) 34 Cal.4th 397, 405; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 581; *General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 114.)[16]

B. The Error Requires Reversal Because The State Will Be Unable To Prove Beyond A Reasonable Doubt That The Jurors Did Not Disagree About Which Acts Were Committed.

Generally, the failure to give a jury unanimity instruction requires reversal unless the beneficiary of the error can prove it harmless beyond a reasonable doubt. (*See, e.g.*, *People v. Gordon* (1985) 165 Cal.App.3d 839, 855; *People v. Metheney* (1984) 154 Cal.App.3d 555, 563-564; *People v. Dunahoo* (1984) 152 Cal.App.3d 561, 574.) When the record shows that the jurors could reasonably disagree about which act was committed, yet still convict defendant of the offense, reversal is required under this standard. (*See, e.g.*, *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 792; *People v.*

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[16] To the extent *Russo* does control resolution of this issue, Mr. Grimes nevertheless raises the issue here to preserve his rights to further review. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].)

Delleto (1983) 147 Cal.App.3d 458, 473.) Thus, when a juror believing one of the acts took place would not necessarily believe the other took place as well, reversal is required. (*See, e.g., People v. Diedrich* (1982) 31 Cal.3d 263, 283; *People v. Gordon, supra*, 165 Cal.App.3d at p. 856; *People v. Crawford, supra*, 131 Cal.App.3d at pp. 598-600.) Similarly, where jurors agree that certain acts occurred, but where it is reasonably possible that the jurors could disagree about the characterization of those facts, the failure to give a unanimity instruction is prejudicial. (*People v. Espinoza* (1983) 140 Cal.App.3d 564, 569.)

Pursuant to *Gordon*, *Delleto*, *Gonzales* and *Crawford*, if the jurors in this case could reasonably disagree about whether all of the five overt acts were committed, the failure to give the unanimity instruction requires reversal of the conspiracy count. And pursuant to *Espinoza*, reversal would also be required even if the jurors all agreed that the overt acts took place, but reasonably disagreed whether the act or acts were committed "in the furtherance of the accomplishment of the object of the conspiracy."

Here, jurors could reasonably disagree about whether all five overt acts were in the furtherance of the conspiracy. The prosecutor's theory was that conspiracy to commit robbery began when Mr. Grimes, Morris and Wilson agreed to do "a caper" and drove around looking for a house to burglarize. (35 CT 9216.) For his part, Mr. Grimes

confessed to police that he only had a burglary in mind and did not know anyone was inside the home until the victim answered the door. (26 RT 7350.)

Jurors were, of course, free to accept either of these theories. In other words, the jurors could reasonably disagree about when the conspiracy began. Significantly, however, overt acts 1 through 4 -- possession of the latex gloves, possession of a knife, driving to the victim's home and knocking on the victim's door -- all occurred *before* Mr. Grimes was aware anyone was home. While these overt acts certainly support the charge of conspiracy to commit burglary, jurors crediting Mr. Grimes's confession could reasonably find Mr. Grimes did not contemplate a robbery until the front door was opened and Mr. Grimes entered along with Morris and Wilson. Other jurors could have disagreed and believed Mr. Grimes contemplated a robbery before getting in the car.

Because reasonable jurors could find that several of the overt acts, even if they occurred, were not in the furtherance of the conspiracy, the failure to give a unanimity instruction cannot be deemed harmless. Count four must be reversed.

VII. BECAUSE THE TRIAL COURT'S DISCOVERY ORDER VIOLATED MR. GRIMES'S PRIVILEGE AGAINST SELF INCRIMINATION, AS WELL AS HIS RIGHTS TO DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL, REVERSAL OF BOTH THE GUILT AND PENALTY VERDICTS IS REQUIRED.

Proposition 115, passed in June of 1990, added both constitutional and statutory language permitting reciprocal discovery in criminal cases. Section 30, subdivision (c), added to article I of the California Constitution by Proposition 115, declares discovery to be "reciprocal" in criminal cases: "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the People through the initiative process."

Proposition 115 also added a new Penal Code chapter on discovery. (Pen.Code, § 1054 et seq.) The proposition added a number of new sections, including section 1054 (providing for interpretation of the chapter to give effect to certain specified purposes), section 1054.1 (providing for defense discovery), section 1054.3 (providing for prosecutorial discovery), section 1054.5 (providing mechanism for compelled discovery), section 1054.6 (providing that discovery shall not be required of work product or otherwise privileged information and material), and section 1054.7 (requiring disclosure at least 30 days prior to trial, placing a continuing duty to disclose on both prosecution and defense, and providing for denial of disclosure on a showing of "good cause".)

This Court addressed these provisions in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356. In *Izazaga*, the Court rejected an argument that the discovery provisions of Proposition 115 violated the federal or state privilege against self-incrimination. (54 Cal.3d at pp. 365-372.) The Court rejected an argument that Proposition 115 violated the federal or state due process clauses. (54 Cal.3d at pp. 372-376.) And finally the court rejected an argument that Proposition 115 violated the federal or state right to effective assistance of counsel. (54 Cal.3d at pp. 379-382.) Justices Mosk and Broussard dissented, concluding that Proposition 115 was indeed unconstitutional. (54 Cal.3d at pp. 387-410.)

Here, prior to trial, the state sought discovery under the provisions of section 1054.3. Defense counsel filed a written opposition, arguing that such discovery would violate defendant's privilege against self-incrimination as well as his federal and state constitutional rights to due process and the effective assistance of counsel. (4 CT 844-845.) The trial court rejected defense counsel's attacks on the discovery statute and required counsel to comply with section 1054.3. (7 RT 2734-2735.)

Mr. Grimes has no wish to unnecessarily lengthen this brief. As noted, this Court has already rejected these detailed constitutional challenges to Proposition 115. (*Izazaga*, *supra*, 54 Cal.3d at pp. 365-382.) For all the reasons argued in that case, and the reasons

set forth in the dissenting and concurring opinions in that case, *Izazaga* was wrongly decided and should be reconsidered. The entire discovery process here violated Mr. Grimes's privilege against self incrimination, and his state and federal rights to due process and the effective assistance of counsel. Reversal is required.[17]

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[17] In light of this Court's ruling in *Izazaga*, the claim here is made in order to preserve the issue for further review. (*See Smith v. Murray* (1986) 477 U.S. 527 [even issues settled under state law must be raised in state court to preserve the issue for subsequent federal review].) In *People v. Schmeck* (2005) 37 Cal.3d 240, this Court noted that with respect to preserving issues which arise frequently, a defendant could properly preserve these claims by "(i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.) Although *Schmeck* dealt specifically with claims regarding the death penalty statute itself, Mr. Grimes is attempting here to comply with the spirit of the *Schmeck* decision in raising his attack on the discovery statute to avoid unnecessary and detailed briefing on claims the Court has already rejected. To the extent respondent argues this claim is not properly preserved because Mr. Grimes has not presented it in sufficient detail, Mr. Grimes will seek leave to file a detailed supplemental brief more fully discussing each of these issues.

VIII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY IT MUST UNANIMOUSLY AGREE ON THE SPECIAL CIRCUMSTANCE VERDICTS.

A. Introduction.

As discussed above, the state recognized Mr. Grimes was not the actual killer in this case. Thus, under both federal and state law, in order to prove the truth of the special circumstance allegations (and thereby render Mr. Grimes eligible for death), the state had to prove Mr. Grimes liable under an aiding and abetting theory proving either that he (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) In her closing argument the prosecutor relied, in the alternative, on each of these factual theories. (35 RT 9203-9211 [reckless indifference], 9212-9215 [intent to kill].)

Despite defense counsel's request, however, the trial court refused to instruct the jury it had to unanimously agree on the facts required for application of the special circumstance verdict. As more fully discussed below, pursuant to United States Supreme Court precedent, the trial court's refusal to provide such instructions violated both the Sixth and Eighth Amendments. The special circumstance findings must be reversed.

B. The Relevant Facts.

The state charged Mr. Grimes with both robbery and burglary special circumstance allegations. (2 CT 186.) As noted above, because Mr. Grimes was not the actual killer, the state's theory was that he was liable as an aider and abettor. Under state and federal law, Mr. Grimes could only be found liable for the special circumstance allegations as an aider and abettor if the state proved he either (1) aided the murder with the intent to kill or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life. (*See* Penal Code § 190.2, subdivision (c), (d); *Tison v. Arizona*, *supra*, 481 U.S. at p. 158.)

During various instructional conferences, the court and parties recognized there was a question as to whether the jurors had to unanimously agree on this aspect of the special circumstance allegations. (33 RT 8894-8895, 34 RT 9033-9034.) Defense counsel asked the court to instruct the jury that unanimity was required. (34 RT 9047-9048.) The prosecutor opposed these instructions. (34 RT 9049.) Apparently believing the Sixth Amendment right to a jury trial did not apply to this aspect of the special circumstance allegation, the trial court refused to give a unanimity instruction. (34 RT 9063.) Instead, the court broadly instructed the jurors they could find the special circumstance allegation true if they found defendant aided the murder with an intent to

kill *or* acted as a major participant in the robbery with a reckless indifference to human life. (CT Supp. (Fourth) 136.)

In her closing argument, the prosecutor relied on each of these theories in the alternative. (35 RT 9203-9211 [reckless indifference], 9212-9215 [intent to kill].) The jurors found both special circumstance allegations true, though they did not specify whether they agreed on any one theory. (6 CT 1296-1297.)

C. Because The Sixth Amendment Right To A Jury Trial Applied To The Special Circumstance Allegations, Mr. Grimes Was Entitled To Have The Jury Unanimously Agree On The Facts Required For Conviction Of The Special Circumstance.

There are two basic questions which must be resolved in deciding whether the trial court's refusal to instruct on unanimity violated the Sixth Amendment. The first question is whether the Sixth Amendment right to a jury trial even applies to special circumstance allegations. If it does not, then the question of whether the Sixth Amendment also requires some form of unanimity is moot. If the Sixth Amendment does apply to special circumstance allegations, the second question is whether the Sixth Amendment requirement of unanimity applied to the specific factual question at issue here.

The first question is easily answered. Prior to 2002, the United States Supreme

Court held the Sixth Amendment right to jury trial simply did *not* apply to factual allegations, like special circumstance allegations, which rendered a defendant eligible for death. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In accord with *Walton*, this Court also held "there is no right under the Sixth or Eighth Amendment to have a jury determine the existence of all of the elements of a special circumstance." (*People v. Odle* (1988) 45 Cal.3d 386, 411. *Accord People v. Edwards* (1991) 54 Cal.3d 787, 824 [upholding a trial court's refusal to instruct the jury that it must unanimously agree on the facts comprising a charged lying-in-wait special circumstance.].)

But as this Court has since recognized, both *Odle* and *Walton* were overruled by *Ring v. Arizona* (2002) 536 U.S. 584. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.) *Prieto* was entirely correct; in fact, *Ring* overruled *Walton* and held the Sixth Amendment right to a jury trial *did* apply to "aggravating circumstance[s] necessary for imposition of the death penalty." (536 U.S. at p. 609.) And as *Prieto* properly went on to conclude, under *Ring* the Sixth Amendment right to a jury trial does indeed apply to the elements of California's special circumstance allegations. (30 Cal.4th at p. 256.) Thus, Mr. Grimes clearly had a Sixth Amendment right to a jury trial on the special circumstance allegations here. As such, the remaining question to be resolved in deciding whether the Sixth Amendment was violated here is whether the specific jury determination at issue in this case -- involving the acts on which the jury could rely to find the special circumstance

true -- was one on which Mr. Grimes had a right to unanimity.

It was. When a defendant is prosecuted for a charge under several different *legal* theories, the trial court need *not* instruct the jury it must unanimously agree on the legal theory upon which it convicts the defendant. (See, *e.g. People v. Jenkins* (2000) 22 Cal.4th 900, 1024 [defendant charged with murder, state had two different legal theories including an accomplice liability theory and an actual killer theory; held, no requirement that jury be told it had to agree on the legal theory]; *People v. Davis* (1992) 8 Cal.App.4th 28, 45 [same]; *People v. Failla* (1966) 64 Cal.2d 560, 567.) However, when a defendant is prosecuted for a charge under a single legal theory, but the state presents alternative *factual* theories -- each of which is alone sufficient to constitute the charge -- the trial court is required to instruct the jury it must unanimously agree on the acts constituting the offense. (*See, e.g., People v. Diedrich* (1982) 31 Cal.3d 263, 281; *People v. Failla, supra*, 64 Cal.2d at p. 567; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 300-302; *People v. Crawford* (1982) 131 Cal.App.3d 591. *See also Richardson v. United States* (1999) 526 U.S. 813.)

Dellinger provides a useful example of when a unanimity instruction is required. There, defendant was charged with murder. The state proceeded on a single legal theory, arguing that defendant was the actual killer. But the state had two distinct factual theories

on which the jury could rely: defendant poisoned the victim with cocaine or defendant inflicted a fatal head wound. (163 Cal.App.3d at p. 300.) The jury was not instructed it had to agree on which of these acts rendered defendant culpable for murder under the state's actual killer theory. (163 Cal.App.3d at p. 300.)

On appeal, defendant contended the trial court had a *sua sponte* duty to instruct the jurors they had to unanimously agree on the facts which comprised the crime. (163 Cal.App.3d at p. 300.) The Court of Appeal agreed, ruling "[h]ere there was only one offense and one victim but there were several hypotheses as to which act or acts caused [the victim's] death. As long as there are multiple acts presented to the jury which could constitute the charged offense, a defendant is entitled to an instruction on unanimity." (*Id.* at p. 301.)

This case is just like *Dellinger*. Here too the prosecution had only one legal theory in connection with the special circumstance allegation: Mr. Grimes did not inflict the fatal wound and so could be guilty of the special circumstance only as an aider and abettor. (*See People v. Beardslee* (1994) 53 Cal.3d 68, 93-94 [recognizing "the jury had to agree unanimously at least on the facts required for conviction as an aider and abettor, and for application of the special circumstance findings to a person who was not the actual killer . . ."]. Here too the state had two distinct sets of acts upon which the jury could rely in

finding Mr. Grimes culpable on this single theory.

First, the state theorized Mr. Grimes was guilty of the special circumstance allegations because he aided the actual murder/robbery with an intent to kill. According to the prosecutor herself, the following acts established guilt: (1) jailhouse snitch Howe said that Mr. Grimes ordered Wilson and Morris to tie up the victim and kill her, (2) Mr. Grimes entered the home with a gun and Morris or Wilson entered with a knife, (3) Mr. Grimes was older than the other two defendants and (4) Mr. Grimes wore gloves and a bandana and later disposed of his shirt. (35 RT 9212-9215.)

Second, the state theorized Mr. Grimes was guilty of the special circumstance allegations because he aided the murder/robbery as a major participant with a reckless indifference to human life. There was no dispute that Mr. Grimes was a major participant; defense counsel conceded "it's clear that he was." (35 RT 9247.) The entire dispute was whether Mr. Grimes acted with reckless indifference to human life. Once again, according to the prosecutor herself, the following acts established Mr. Grimes acted with reckless indifference to human life: (1) he entered the house in broad daylight, (2) he committed the crime with two other people, (3) he wore gloves into the home, (4) he committed the crime in a rural area, (5) he knew Morris expressed no problem with killing someone, (6) he handed Morris a weapon, (7) he was aware an elderly woman was

home before the entry, (8) the victim was knocked unconscious before he entered the house and (9) he thought the victim could identify him. (35 RT 9208-9211.)

Although there is some overlap between the two sets of facts supporting each of the prosecutor's theories, the bottom line is that each of the two scenarios asked the jury to rely on different witnesses and make different conclusions as to credibility. The prosecutor's intent-to-kill theory relied primarily on the testimony of jailhouse snitch Howe. As defense counsel noted, Howe was impeached by his criminal history, the benefits he would receive and the uncorroborated nature of his testimony. (35 RT 9244-9245.) In contrast, the prosecutor's reckless-indifference theory required the jury to reject a great deal of defense testimony showing Mr. Grimes was unaware the victim was home prior to arriving at the house, was surprised when the victim answered the door, stayed by the car assuming Wilson and Morris would retreat from the plan and entered the home only after Wilson knocked the victim unconscious. (26 RT 7350, 7360, 7365.) Significantly, however, both of these different factual scenarios were argued in connection with the identical legal theory: Mr. Grimes was liable as an aider and abettor for the felony murder. Pursuant to the above authority, the trial court should have

instructed the jury it had to unanimously agree on the special circumstance allegations. Error has occurred.[18]

D. The Trial Court's Refusal To Require Unanimity In Connection With The Special Circumstance Violated The Eighth Amendment Requirement Of Heightened Reliability Applicable To Capital Cases.

The Supreme Court has repeatedly recognized that death is a unique punishment, qualitatively different from all others. (*See, e.g., Gregg v. Georgia* (1976) 428 U.S. 153,

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[18] To be sure, the Sixth Amendment may not actually require true unanimity. At least in non-capital cases, the Supreme Court has held that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does *not* require that the jury be unanimous. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Yet even in non-capital cases, when the Sixth Amendment does apply there are limits below which the states may not go.

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

Although this case involves a capital case, there is no reason to reach the question of whether the special reliability requirements of the Eighth Amendment require complete unanimity in capital (as opposed to non-capital) cases. This is because even if the same rules applied to this case as in non-capital cases, and complete unanimity was not required, at a minimum a super-majority would be required. And here, not even that lesser standard was met.

181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court has held there is a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See*, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) For this reason, the Court has not hesitated to strike down penalty phase procedures which increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.)

Here, as discussed above, the trial court's refusal to require unanimity (or at least a super-majority) in connection with the special circumstance allegations violated the Sixth Amendment. But even putting this aside, the trial court's refusal also violated the Eighth Amendment requirement of reliability applicable to capital cases. Here is why.

The Supreme Court has long recognized the dynamic relationship between a requirement of unanimity and a robust deliberative process. The starting point for this recognition is *Johnson v. Louisiana*, *supra*, 406 U.S. 356, where the Court addressed a Louisiana statute which permitted convictions in non-capital cases when nine of twelve

jurors favored conviction. A plurality of the Court held the Sixth Amendment did not require jury unanimity. (406 U.S. at pp. 362, 364.) In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision:

> "The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority. . . . [B]ecause [jurors] have imperfect memories, the forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked. This collective effort to piece together the puzzle of historical truth, however, is cut short as soon as the requisite majority is reached . . . . Indeed, if a necessary majority is immediately obtained, then no deliberation at all is required . . . . The Court now extracts from the jury room this automatic check against hasty factfinding by relieving jurors of the duty to hear out fully the dissenters.
>
> ¶] It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity." (406 U.S. at pp. 388-89.)

The Supreme Court subsequently adopted Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In *Ballew v. Georgia* (1978) 435 U.S. 223, for example, the Court struck down a Georgia law allowing criminal

convictions with a five person jury. The Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding . . . ." (435 U.S. at p. 232.) The Court held that a conviction by such a jury was improper because there was "substantial doubt about the reliability . . . of panels smaller than six." (*Id.* at p. 239.)

Similarly, the Court has also adopted Justice Douglas's observations about the relationship between a unanimity requirement and the presence of "earnest and robust argument" in the jury room. In *Brown v. Louisiana* (1979) 447 U.S. 323 the Court held retroactive the rule of *Burch v. Louisiana* (1978) 441 U.S. 130 precluding a criminal conviction on the vote of five out of six jurors. In so holding the Court observed that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (447 U.S. at p. 333. *See also Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

Of course, these observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more important here for two reasons. First, as noted above, since this is a capital case, the need for reliable factfinding is substantially greater. Second, and unlike the Louisiana schemes involved in *Johnson*,

Ballew and *Brown*, the California scheme does not require even a majority of jurors to agree on what acts formed the basis for the special circumstance allegations. As such, once deliberations begin, "no deliberation at all is required" on this critical factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, Douglas, J., dissenting.) Given the constitutionally indispensable purpose served by jury deliberation on factual issues in capital cases under the Eighth Amendment, exposing Mr. Grimes to a true finding on the special circumstance allegation -- and a potential death sentence -- on the basis of factual findings which were neither debated, deliberated on or even discussed is impermissible.

E. Because The State Cannot Prove The Error Harmless Beyond A Reasonable Doubt, Reversal Is Required.

It does not matter whether the Court's error is analyzed under the Sixth or the Eighth Amendment. In either event, the error is of constitutional magnitude and requires reversal of the special circumstance verdict unless the beneficiary of the error can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) California courts have long applied this standard to a trial court's failure to instruct on unanimity. (*See*, *e.g.*, *People v. Gordon* (1985) 165 Cal.App.3d 839, 855; *People v. Metheney* (1984) 154 Cal.App.3d 555, 563-564; *People v. Dunahoo* (1984) 152 Cal.App.3d 561, 574.) Thus, where the evidence shows two distinct factual scenarios on which a particular charge

could be based, and the reviewing court cannot be sure which scenario the jury relied on, reversal is required. (*See, e.g., People v. Davis* (2005) 36 Cal.4th 510, 561.) Where a jury could not reasonably find one act or series of acts to constitute the charge without also finding the second act or series of acts to constitute the charge, there is no prejudice from the failure to provide a unanimity instruction. (*Ibid.*) But where a defendant presents different evidence as to each of two acts or series of acts which could form the basis for a conviction, the jury has a basis for distinguishing between the two acts and the failure to give a unanimity instruction requires reversal. (*See, e.g., People v. Diedrich, supra*, 31 Cal.3d at p. 283; *People v. Moore* (1989) 211 Cal.App.3d 1400, 1416; *People v. Winkle* (1988) 206 Cal.App.3d 822, 828-829; *People v. Dellinger, supra*, 163 Cal.App.3d at p. 301-302.)

Again *Dellinger* presents a useful example. As discussed above, the state there prosecuted defendant for murder as the actual killer. But there were two distinct factual scenarios on which this legal theory was based: defendant killed the victim by (1) administering a lethal amount of cocaine or (2) inflicting a fatal head wound. The Court of Appeal found the failure to instruct on unanimity prejudicial precisely because the two acts were supported by different evidentiary presentations:

> "The evidence suggesting [defendant] was responsible for [the victim's] ingestion of cocaine was entirely different from the evidence suggesting he

> had physically assaulted her. It is very plausible the jurors could have distinguished between the two acts by way of argument and evidence. . . . Some jurors may have believed [defendant] administered a death blow to the child; others may have been convinced he poisoned her. 'It is this unacceptable possibility which taints the verdict in this case.'" (163 Cal.App.3d at pp. 301-302.)

Again this case is just like *Dellinger*. As explained above, the prosecutor relied on very different evidence to argue Mr. Grimes aided the murder with an intent to kill than she relied upon to argue Mr. Grimes acted with reckless indifference to human life. (*Compare* 35 RT 9212-9215 [relying on testimony from jailhouse snitch Howe to support finding of intent to kill] *with* 35 RT 9208-9211 [relying on circumstantial evidence to support finding of reckless indifference].) And as the arguments of defense counsel made clear, Mr. Grimes had very different defenses to these two factual theories.

Because the intent to kill theory was based on testimony from Howe regarding an alleged May or June conversation with Mr. Grimes, the defense emphatically targeted Howe's credibility. As counsel explained, there were numerous reasons for one or more jurors to reject Howe's testimony. Howe only recalled this May or June conversation in July, after he and Grimes had been in a fight at the county jail and they each threatened the other. (5 CT 1022-1023; 31 RT 8500-8501.) Howe said he was not receiving any benefits for his testimony; yet the district attorney who prosecuted Howe testified Howe could indeed get a shorter term depending on his testimony. (31 RT 8385-85, 8405,

8445-8446.) Moreover, as defense counsel noted in closing argument, not only did the record show Howe had nine felony convictions with five aliases, but the testimony he provided was completely uncorroborated. (35 RT 9244-9245.) Thus, there were no eyewitnesses to Howe's alleged jailhouse conversation with Mr. Grimes and there was no other testimony which corroborated Howe's claim that Mr. Grimes ordered Morris and Wilson to kill. Plainly one or more jurors could reasonably have agreed with the defense that Howe was not worthy of belief and reject the state's theory that Mr. Grimes aided the murder with an intent to kill.[19]

The reckless indifference to human life theory was not based on Howe's testimony at all; accordingly, Mr. Grimes's defense was entirely different. The state was required to prove beyond a reasonable doubt that Mr. Grimes "kn[ew] or [was] aware that his acts involve[d] a grave risk of death to an innocent human being." (6 CT 1259.) The defense presented significant evidence, however, that Mr. Grimes was entirely unaware that the victim was home prior to arriving at the house, was surprised when the victim answered the door, stayed by the car on the assumption that Wilson and Morris would retreat from the plan, then entered the home only after Wilson knocked the victim unconscious, unlikely to cause trouble or identify him. (26 RT 7350, 7360, 7365.) Indeed, there was

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[19] It is also worth noting that although Howe eventually passed a lie detector test, he first failed a voice stress test, in which three different examiners concluded he was lying, and then failed an initial lie detector test. (5 CT 1026; 30 RT 8228-8229.)

overwhelming evidence that the victim was only in danger of death once Morris suddenly and without warning decided to kill her himself. (26 RT 7329-7330, 7372, 7400.) One or more jurors could reasonably have relied on this evidence to find that the state did not prove beyond a reasonable doubt that Mr. Grimes knew his acts of entering the home of the unconscious victim and taking her property involved a grave risk of death to support the state's theory of reckless indifference.

In short, one or more jurors could have found Howe not worthy of belief, but accepted the state's reckless disregard theory, based as it was on different facts and a different defense. Similarly, one or more jurors could have rejected the state's reckless disregard theory, but found Howe believable. Since the two factual theories relied on different evidence and different defenses, jurors were free to accept one or the other. In this situation, because the prosecutor relied on different acts to support its two theories, and because jurors would not necessarily have to agree that all the acts supported the special circumstance allegations, the failure to give a unanimity instruction in this case was plainly prejudicial. Accordingly, the special circumstance allegations must be reversed.

IX. THE TRIAL COURT VIOLATED MR. GRIMES'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL BY FAILING TO PROPERLY INSTRUCT ON THE MENTAL STATE ELEMENT OF THE FELONY MURDER SPECIAL CIRCUMSTANCE ALLEGATION.

A. Introduction.

Count one of the information charged Mr. Grimes with first degree murder in the October 18, 1995 stabbing death of Betty Bone. (2 CT 183.) This count included separate robbery and burglary special circumstance allegations making Mr. Grimes eligible for the death penalty. (2 CT 183.) At all points, the state recognized that Mr. Grimes was not the actual killer. (5 RT 876.) Indeed, Mr. Grimes passed a polygraph examination on this point and the prosecutor herself noted this in her guilt phase closing argument. (4 CT 673, 679, 686; 35 RT 9198.)

Under the law of aiding and abetting as applied to the felony-murder rule, of course, Mr. Grimes did not have to be the actual killer to be liable for felony murder. But to prove the special circumstances true and render Mr. Grimes death eligible under state and federal law, the state would have to prove either that Mr. Grimes (1) aided the murder with the intent to kill (intent to kill theory) or (2) acted as a major participant in the underlying felony and exhibited a reckless indifference to human life (reckless

indifference theory). (*See* Penal Code § 190.2, subdivisions (c), (d); *Tison v. Arizona* (1987) 481 U.S. 137, 158.) Pursuant to this Court's decision in *People v. Estrada* (1995) 11 Cal.4th 568, a defendant exhibits reckless indifference when he knows or is aware that his acts involve a grave risk of death to an innocent human being. (*Id.* at pp. 579-580. *See* CALJIC 8.80.1.) The jury here found the special circumstance allegations true under a general verdict which did not specify whether it relied on the intent to kill theory or the reckless indifference theory. (6 CT 1296-1297.)

But as discussed more fully below, the trial court's oral instructions to the jury omitted two critical elements of the reckless indifference theory. Instead of telling jurors that reckless indifference exists "*when* [the] defendant knows or is aware that his acts involve a *grave* risk of death to an innocent human being" as *Estrada* requires, the court here told jurors that reckless indifference exists "*whether* [he] knows or is aware that his acts involve a *great* risk of death to an innocent human being." (35 RT 9178, emphasis added.) Because this permitted the jury to find the special circumstance true without necessarily finding that Mr. Grimes "kn[ew] or [was] aware that his acts involve[d] a grave risk of death to an innocent human being," and because the state will be unable to prove this error harmless, reversal of the special circumstance finding and the death judgment is required.

B. Because State Law Imposes A Significantly Enhanced Punishment Where A Special Circumstance Allegation Is Found True, The Elements Of Special Circumstance Allegations Must Be Proven Beyond A Reasonable Doubt To A Jury.

As discussed above, the Fifth and Sixth Amendments require that in criminal cases, the state must prove every fact necessary to establish its case to a jury beyond a reasonable doubt. ((*Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 697-698; *In re Winship*, *supra*, 397 U.S. at p. 364.) Under the federal constitution "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; *United States v. Jones*, *supra*, 526 U.S. at p. 243, n.6.)

Under California law, where there has been a killing in the course of an enumerated felony, the state may seek death for a defendant who has not actually killed, and who did not intend to kill, only where the state proves the defendant aided the felony "with reckless indifference to human life and as a major participant . . . ." (Penal Code § 190.3, subdivision (d).) In order to prove reckless indifference, the state must show defendant knew or was aware that his acts involved a grave risk of death to an innocent human being. (*People v. Estrada, supra,* 11 Cal.4th at pp. 579-580.) Because a finding of reckless indifference exposes defendants to an enhanced sentence -- a potential death sentence -- the reckless indifference finding is an element of the offense which must be

proven to a jury beyond a reasonable doubt. (*See People v. Prieto*, *supra*, 30 Cal.4th at p. 256 [concluding that the Sixth Amendment right to a jury trial applies to elements of special circumstance allegations which render a defendant eligible for death].)

C. The Trial Court's Instructions Permitted The Jury To Find The Special Circumstance Allegation True Without Ever Finding That Mr. Grimes Knew Or Was Aware His Acts Involved A Grave Risk Of Death To An Innocent Person.

Here, there was no dispute that Mr. Grimes was a major participant in the underlying robbery and burglary. Thus, the only real question for the jury in deciding whether the special circumstance allegation was true was whether Mr. Grimes either (1) intended to kill the victim or (2) aided the felony with reckless indifference to human life. The prosecutor relied on both theories in her closing argument. (35 RT 9203-9211 [reckless indifference] 9212-9215 [intent to kill].)

As noted, this Court has made clear that a defendant exhibits reckless indifference when he knows or is aware that his acts involve a grave risk of death to an innocent human being. (*People v. Estrada*, *supra*, 11 Cal.4th at pp. 579-580.) This principle has been codified in the standard jury instruction which correctly advises jurors that "[a] defendant acts with reckless indifference to human life *when* that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (CALJIC

8.80.1, emphasis added.)

But in providing its oral instructions to the jury, the trial court here departed from this standard instruction in two important ways. First, instead of telling jurors they could find the special circumstance allegation true "*when* [the] defendant knows or is aware that his acts involve a grave risk of death to an innocent human being" the trial court told the jury it could find the special circumstance allegation true "*whether* [he] knows or is aware that his acts involve a great risk of death to an innocent human being." (35 RT 9178, emphasis added.) Given the plain meaning of the word "whether," the court's oral instruction told the jury it could find the special circumstance true *without* finding that Mr. Grimes "kn[ew] or [was] aware that his acts involve[d] a great risk of death." (*See* www.webster-dictionary.net/definition/Whether [whether; "used to introduce the first or two or more alternative clauses, the other or others being connected by, or by or whether. *When the second of two alternatives is the simple negative of the first it is sometimes only indicated by the particle not or no after the correlative, and sometimes it is omitted as*

being distinctly implied by the whether of the first."].)[20]

In effect, the jury was told it could convict if it found Mr. Grimes was a major participant in the robbery and/or burglary whether or not he knew his acts involved a grave risk of death. Given that Mr. Grimes's status as a major participant in the felony was never genuinely disputed, this instruction undercut the only part of the reckless indifference inquiry that really mattered in the case. The trial court's instructions improperly removed a genuinely disputed element from the jury's consideration. Error has occurred.

Mr. Grimes recognizes that in addition to the inaccurate oral instruction, the trial court also provided the jury with an accurate written instruction which advised the jury that "[a] defendant acts with reckless indifference to human life *when* that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (6 CT 1259, emphasis added.) In this situation, although the existence of a proper written

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[20] Second, the trial court's oral instruction departed from the standard instruction in another way. As noted above, this Court has made clear that a defendant exhibits reckless indifference when he knows or is aware that his acts involve a *grave* risk of death to an innocent human being. (*People v. Estrada*, *supra*, 11 Cal.4th at pp. 579-580.) But the oral instruction here imposed a lesser burden on the state; the jurors were told they only had to find that the Mr. Grimes's "acts involve[d] a *great* risk of death to an innocent person." (35 RT 9178, emphasis added.) Understating the requisite finding required for a true finding on the reckless indifference strand of the special circumstance instruction was also fundamentally improper.

instruction is considered in the prejudice calculus, it does not impact the straightforward conclusion that provision of an inaccurate oral instruction is error. (*See, e.g., People v. Garceau* (1993) 6 Cal.4th 140, 189-190; *People v. Andrews* (1989) 49 Cal.3d 200, 215-216; *People v. Heishman* (1988) 45 Cal.3d 147, 163-164.) The trial court's oral instruction was plain error.

D. Permitting The Jury To Find The Special Circumstance True Without A Finding That Mr. Grimes Knew Or Was Aware That His Acts Involved A Grave Risk Of Death To An Innocent Human Being Requires Reversal Of The Death Sentence.

To the extent it was relying on a reckless indifference theory, the state was required to prove to a jury beyond a reasonable doubt that Mr. Grimes knew or was aware that his acts involved a grave risk of death to an innocent human being. The court's instructions here permitted the jury to find the special circumstance true without making this finding. This violated both the Fifth and Sixth Amendments. As such, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California, supra*, 386 U.S. at p. 24.) Ultimately, however, even if the Court were to apply the more-lenient *Watson* standard of prejudice applicable to state-law errors, reversal would still be required here because there is a reasonable probability that the error impacted the outcome of the special circumstance finding and penalty phase. (*See People v. Watson* (1956) 46 Cal.2d

818, 836.)

Here is why. In applying the *Watson* test to state-law instructional errors, factors relevant to the prejudice inquiry include whether (1) the factual issue removed from the jury was contested at trial, (2) the issue was peripheral to the main issues and (3) the evidence introduced on the issue was conflicting. (*People v. Flood* (1999) 18 Cal.4th 470, 489-490 [where issue not genuinely disputed at trial, peripheral to main issues in case and the evidence was not conflicting, the removal of that element from the jury will be deemed harmless under state law].)

Pursuant to this test, the error cannot be deemed harmless. First, this issue was plainly contested at trial. There was no dispute that Morris was the actual killer. There was also no dispute that Mr. Grimes participated in the underlying robbery and burglary. Instead, the critical issue at trial insofar as the special circumstance allegation was concerned was whether Mr. Grimes was aware that participation in the robbery/burglary involved a grave risk of death to the victim.

Second, the issue was not peripheral to the main issues. As discussed at length above, the question of Mr. Grimes's mental state was critical to whether the jury could find the special circumstance allegation true under Penal Code § 190.3, subdivision (d).

And third, the evidence introduced on this issue was plainly conflicting. As explained in the above statement of facts, the state's theory was that although Mr. Grimes was not the actual killer, he was integral in planning and carrying out the robbery and burglary and aware of the possible risk of death to the victim. (35 RT 9203-9212.) In stark contrast, Mr. Grimes's defense presented significant evidence showing that he did not know his actions involved a risk of death to the victim. This evidence included that he was entirely unaware the victim was home prior to arriving at the house, was surprised when the victim answered the door, stayed by the car on the assumption that Wilson and Morris would retreat from the plan, and only entered the home after Wilson knocked the victim unconscious making it unlikely she would cause trouble or identify him. (26 RT 7350, 7360, 7365.) Indeed, there was overwhelming evidence that the victim was only in danger of death once Morris suddenly and without warning decided to kill her himself. (26 RT 7329-7330, 7372, 7400.)

Based on this evidence, one or more jurors could reasonably have found that the state did not prove beyond a reasonable doubt that Mr. Grimes knew his acts of entering the home of the unconscious victim and taking her property involved a grave risk of death. But under the oral instruction as given, even in this situation the jury could find the special circumstance true rendering Mr. Grimes death eligible. Neither California law nor the Eighth Amendment even permit a defendant to be sentenced to death under such a

scenario.

It is true, as noted above, that the fact that a correct written instruction was provided to the jury is certainly relevant to the prejudice calculus. (*See*, *e.g.*, *People v. Garceau*, *supra*, 6 Cal.4th at pp. 189-190; *People v. Andrews*, *supra*, 49 Cal.3d at pp. 215-216; *People v. Heishman*, *supra*, 45 Cal.3d at pp. 163-164.) But in each of these cases where an erroneous oral instruction is found harmless, either the jury verdicts themselves showed that the jury made the requisite finding omitted by the instructional error, or the erroneous instruction was cured by the trial court's provision of other written and oral instructions (other than the specific conflicting written instruction at issue). (*See*, *e.g.*, *People v. Garceau*, *supra*, 6 Cal.4th at p. 190; *People v. Andrews*, *supra*, 49 Cal.3d at p. 216; *People v. Heishman*, *supra*, 45 Cal.3d at p. 165.) Here, the jury verdicts did *not* show the jury made the requisite mental state finding omitted by the oral instruction. (6 CT 1296-1297.) Nor was the erroneous oral instruction cured by an

additional written or oral instruction addressing the omitted mental state requirement. (6 CT 1217-1292.) A new penalty phase is required.[21]

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[21] As noted above, the jury here was alternatively instructed it could find the special circumstance allegation true by finding that Mr. Grimes aided the murder with the intent to kill. (6 CT 1259.) And the prosecutor relied on this theory in the alternative as well. (35 RT 9212-9215.) However, instruction on this alternative theory does not affect the necessity of reversing the special circumstance finding and death verdict based on the defective reckless indifference special circumstance instruction.

The fact of the matter is that the record does not reveal on which theory the jury relied in finding the special circumstance allegation true. (6 CT 1296-1297.) In this situation, the invalidity of the reckless indifference theory requires reversal of the special circumstance verdict and death sentence. (*See, e.g., People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court gives jury both a proper and improper theory of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial.]".)

X. THE TRIAL COURT IMPROPERLY CREATED AN UNCONSTITUTIONAL PRESUMPTION, AND LIGHTENED THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT, BY TELLING THE JURY IT COULD FIND MR. GRIMES GUILTY OF THE ROBBERY SPECIAL CIRCUMSTANCE IF IT FOUND (1) POSSESSION OF STOLEN PROPERTY AND (2) SLIGHT CORROBORATING EVIDENCE.

A. The Relevant Facts.

Count two of the information charged Mr. Grimes with an October 18, 1995 robbery. (2 CT 183.) Count three charged an October 18, 1995 burglary. (2 CT 184.) And the count one murder charge included separate robbery and burglary special circumstance allegations which made Mr. Grimes eligible for the death penalty. (2 CT 183.)

The jury was given instructions defining the robbery special circumstance allegation. Thus, the jury was told it could not find the robbery special circumstance true unless several elements had been proven. One of these elements imposed a temporal limitation on defendant's culpability: the robbery special could not be found true unless the state proved "the murder was committed while the defendant was engaged in the commission of a robbery . . . ." (35 RT 9179.) Another element imposed a motive requirement: the robbery special could not be found true unless the state also proved "the murder was committed in order to carry out or advance the commission of the crime of

robbery or burglary or to facilitate the escape therefrom or to avoid detection." (35 RT 9179.) And finally there was a *mens rea* component: the state had to prove that Mr. Grimes either (1) aided the murder with an intent to kill or (2) aided the robbery with reckless indifference to human life. (35 RT 9178.)

The robbery element of the special circumstance allegation was separately defined for the jury. The jury was told there were five distinct elements of robbery; it could not find a robbery unless the state proved beyond a reasonable doubt:

> "One, a person had possession of property of some value, however slight;
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> "Two, such property was taken from that person or from her immediate presence;
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> "Three, the property was taken against the will of that person;
>
> "Four, the taking was accomplished either by force or fear;
>
> "And five, the property was taken with the specific intent permanently to deprive the person of the property." (35 RT 9181.)

Unfortunately, however, the court also gave the jury an alternate theory of culpability in connection with the underlying robbery, a theory which did not require proof of *any* of these five elements. Thus, the jurors were given CALJIC 2.15, which told them they could convict of robbery if they found (1) Mr. Grimes had been in possession

of recently stolen property and (2) there was "corroborating evidence" which "need only be slight, and need not by itself be sufficient to warrant an inference of guilt." (35 RT 9187.)

As discussed below, provision of CALJIC 2.15 requires reversal of the robbery special circumstance found true in this case. To find the robbery special circumstance true, the jury was required to find the murder occurred "in order to carry out or advance the commission of the crime of robbery . . . or to facilitate the escape therefrom or to avoid detection." (35 RT 9179.) By eliminating critical elements from the underlying definition of robbery, the court's alternative instruction on "conscious possession robbery" unconstitutionally lightened the state's burden of proof in connection with the motive element of the special circumstance allegation. Reversal of the robbery special circumstance is required.

B. The Erroneous Provision of a "Possession Of Stolen Property" Theory Of Robbery Requires Reversal Of The Robbery Special Circumstance.

1. Because the jury was given a fundamentally incorrect theory of culpability as to the robbery special circumstance, and because it is impossible to determine if the jury relied on that theory in convicting Mr. Grimes, reversal is required.

Where a jury is given both proper and improper theories of culpability in a criminal case, and the jury verdicts do not indicate the jury relied on the proper theory in convicting a defendant, reversal is required. (*See, e.g., People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court instructs jury on both proper and improper theories of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; *accord People v. Guiton* (1993) 4 Cal.4th 1116, 1120; *see also People v. Morris* (1988) 46 Cal.3d 1, 24; *People v. Boyd* (1985) 38 Cal.3d 762, 770; *People v. Cantrell* (1973) 8 Cal.3d 672, 686; *People v. Robinson* (1964) 61 Cal.2d 373, 406.) As one appellate court has correctly concluded, "[w]here the reviewing court cannot determine upon which theory the jury convicted defendant and one of the theories is an improper basis for conviction, 'it must find the error to have been prejudicial.'" (*People v. Macedo* (1989) 213 Cal.App.3d 554, 561-562.)

That is exactly what happened here. On the one hand, the combination of instructions properly advised the jury it could find the robbery special circumstance true if the murder was "in order to carry out or advance the commission of the crime of robbery" where robbery was properly defined by its five elements. (35 RT 9179.) On the other hand, the jury was also instructed it could find the robbery special circumstance true if the murder was "in order to carry out or advance the commission of the crime of robbery" where robbery was defined as "possession of recently stolen property" with slight corroboration. (35 RT 9187.) This latter theory had no basis in state law and, in fact, eliminates a number of elements of the offense which are specifically required in the robbery statute. As a consequence, of course, provision of this theory to the jury plainly violated Due Process. (*See Suniga v. Bunnell* (9th Cir. 1994) 998 F.2d 664 [defendant charged with murder, jury presented with two theories of culpability only one of which had a basis in state law; held, Due Process was violated]; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587 [same].) But because the jury returned a general verdict in connection with the special circumstance allegation, it is impossible to determine if the jury relied on this patently improper theory of first degree murder. Pursuant to the authorities discussed above, reversal of the robbery special circumstance is therefore required.

2. Telling the jury that it could find the robbery special circumstance true based on a robbery proven by possession of stolen property along with "slight" corroboration undercut the presumption of innocence and improperly lightened the state's burden of proof beyond a reasonable doubt.

Reversal is also required because the trial court's "conscious possession of stolen property" theory of robbery permitted a true finding on the robbery special circumstance allegation based on proof less than reasonable doubt. The starting point for this analysis is the Fifth Amendment requirement that in criminal cases the state prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

Together, these rights require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.) Jury instructions violate these constitutional principles when they relieve the state of the burden of proof beyond a reasonable doubt of every element of the crime charged. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 520-524. *Accord Carella v. California*

(1989) 491 U.S. 263, 265; *Francis v. Franklin* (1985) 471 U.S. 307, 313.)

Here, in order to find the robbery special circumstance true, the jury was told it had to find a robbery. The jury was also instructed possession of recently stolen property was not alone sufficient to prove the charged crime of murder. (35 RT 9187.) This statement of the law is manifestly correct since (as discussed above) robbery contains numerous other elements other than merely the possession of stolen property.

But the jury was then told it could find a robbery so long as the state provided "corroborating evidence." (35 RT 9187.) Not only did this corroborating evidence merely have to "tend[] to prove defendant's guilt," but the corroborating evidence "need only be slight." (35 RT 9187.) In other words, the jury was told it *could* find true a robbery based on proof of a fact which is alone insufficient (possession of stolen property), so long as the state also introduced some other "slight" evidence which "tended" to prove guilt. And by so finding, the jury could find true the special circumstance, making appellant eligible to face the death penalty.

Several courts have considered similar instructions permitting a conviction on the basis of proof of some fact that is insufficient to establish guilt plus other "slight" evidence. These courts have found such instructions violate due process. Thus, the Fifth

Circuit Court of Appeals has repeatedly held that it violates due process to instruct the jury that a defendant may be convicted of conspiracy upon proof of the existence of the conspiracy plus "slight evidence" connecting the defendant to it. (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628-629, cert. denied, 434 U.S. 903; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500-501.) The Fifth Circuit explained in *Partin* that the "slight evidence" instruction "reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*United States v. Partin*, *supra*, 552 F.2d at p. 629. *See United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1228, quoting *United States v. Martinez de Ortiz* (7th Cir. 1989) 883 F.2d 515, 524-525[conc. opn. of Easterbrook, J.]; *United States v. Dunn* (9th Cir. 1977) 564 F.2d 348, 356-357.) Similarly, the trial court's use of a "slight evidence" standard in this case plainly undercut the state's burden of proof beyond a reasonable doubt.

It is true, of course, that the trial court gave a general instruction which correctly described the state's burden of proof. But as the Supreme Court has held, a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict. (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 319-320.) That is just the situation here; this Court has no way of knowing whether the

robbery special circumstance was found true based on CALJIC No. 2.15.

A similar analysis has resulted in reversals in the conspiracy context described above. Thus in *United States v. Hall*, the Fifth Circuit rejected the government's argument that the error was cured by other, proper instructions on reasonable doubt:

> "Despite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt."

(*United States v. Hall*, *supra*, 525 F.2d at 1256.) Such reduction of the government's burden of proof "is impermissibly inconsistent with the 'constitutionally rooted presumption of innocence.'" (*Id.* at p. 1256, fn. 2, quoting *Cool v. United States* (1972) 409 U.S. 100 (per curiam). Accord *United States v. Partin*, *supra*, 552 F.2d 621.)

Put another way, an error which lessens the prosecution's burden is structural and requires automatic reversal. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) This is because, when the jury receives instructions which permit it to convict without applying the reasonable doubt burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of [a *Chapman* harmless error] review is

simply absent." (*Id.* at p. 280.) Reversal of the robbery special circumstance is therefore required.

XI. ADMISSION OF TESTIMONY FROM JAILHOUSE INFORMANT JONATHAN HOWE VIOLATED MR. GRIMES'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Relevant Facts.

From day one in this case the parties recognized Mr. Grimes was not the actual killer. Mr. Grimes passed a polygraph test on this point. (4 CT 673, 679, 686.) Although newly appointed district attorney Scott eventually elected to seek death in this case, Dennis Sheehy -- the original district attorney -- chose not to seek death precisely because Mr. Grimes was not the actual killer. (5 RT 2435-2436.) And in her closing argument at the guilt phase, the prosecutor did not dispute Mr. Grimes was not the actual killer. (35 RT 9198.)

Of course, under the law of aiding and abetting as applied to the felony-murder rule, Mr. Grimes did not have to be the actual killer to be liable for felony murder. But to prove the special circumstances true, the state would have to prove either that Mr. Grimes acted as a major participant in the underlying felonies with a reckless indifference to human life or that he aided the murder with the intent to kill. And of course evidence supporting either of these two theories would also enhance the state's case for death.

The state found such evidence in the form of jailhouse snitch Jonathan Howe. In July of 1998, Howe was serving time in the Shasta County jail, the same jail where Mr. Grimes was incarcerated before trial. (31 RT 8379-8380.) Because of his history with police, Howe had numerous fake names including John Preston, Patrick Moore, John Patrick Moore and John Growney. (31 RT 8395.) By his own admission, Howe was a thrice convicted felon. (31 RT 8392.) Only days before his testimony, he pled guilty to an additional three felony counts. (31 RT 8396-8397.)

On July 13, 1998, Howe and Grimes got into a fight at the jail. (5 CT 1022.) According to jail officers, Howe was yelling that "he was making a knife and when he [was] finished he [was] going to stab everyone." (5 CT 1022.) Grimes told Howe he too had a knife and was going to stab Howe. (5 CT 1022.) In fact, a subsequent search found no knives at all. (5 CT 1023.)

Two days after this fight, Howe spoke to detective O'Connor. (31 RT 8500-8501; 5 CT 1018.) According to Howe, he now remembered that in late May or early June Mr. Grimes spoke with him in jail, confessing that he ordered Wilson and Morris to tie up and kill the victim. (31 RT 8381; 5 CT 1020.) Howe spoke to police in mid-July, after his fight with Mr. Grimes, because (as he explained to the jury) he realized it was the right thing to do. (31 RT 8428.)

Perhaps because of the timing (or because of Howe's history), police were suspicious. Accordingly, they subjected Howe to a computer voice stress analyzer. Certified examiner Denis Carroll asked Howe a series of questions, including two critical questions:

> "In the summer of 1998 did Gary Grimes tell you he ordered Mr. Wilson and Mr. Morris to kill the old lady?"
>
> "Are you fabricating information today to get a cut on your sentence?" (5 CT 1026.)

Howe answered the first question "yes" and the second question "no." (5 CT 1026.) After examining the results of the test, however, examiner Carroll concluded Howe was lying. (5 CT 1026.) Two other examiners reached the same conclusion. (5 CT 1026.)

The state then had the Department of Justice perform a polygraph test on Howe. (30 RT 8228.) According to one Department of Justice analysis of this test, Howe lied again. (30 RT 8228-8229.) According to a second analysis, Howe was not lying. (30 RT 8228.) The state performed yet another polygraph test; when Howe finally passed this one, the state called him as a witness. (31 RT 8344.)

At trial, Howe denied receiving any benefits in exchange for his information. (31 RT 8386-8387.) He told the jury the offer he received in connection with his then-pending charges -- 24 months consecutive to the term he was already serving -- was the same before he provided information and after. (31 RT 8385, 8386-8387.) According to Howe, he was not aware of any way he could receive less than 24 months for his new charges. (31 RT 8387.) He did not even hope to obtain less than 24 months. (31 RT 8405.)

Moments later, deputy district attorney Stewart Jankowitz testified. (31 RT 8437.) Jankowitz was assigned to prosecute Howe. (31 RT 8438.) According to Jankowitz, Howe was wrong: depending on his testimony in Mr. Grimes's case, Howe could indeed receive less than 24 months in prison for the current charges. (31 RT 8445-8446.)

The state had prepared a written agreement with Howe. (5 CT 1154-1157.) For his part, Howe promised to do two things: (1) "provid[e] true, full and accurate information to law enforcement" and (2) to "testify[] truthfully and accurately in all court proceedings." (5 CT 1154.) In turn, the state promised to dismiss a series of counts and enhancements and impose a maximum sentence on Howe's current charges of 24 months consecutive to the time he was already serving, though the actual length of the term could be less if it was determined that he "testified truthfully." (5 CT 1156.) If Howe were

found to have testified falsely, he would not only lose the benefit of the deal, but be subject to perjury charges. (5 CT 1154-1157.)

As more fully discussed below, because the written agreement with Howe placed him under a strong compulsion to testify in accord with his pre-trial statements to officer O'Connor, his testimony would have been excluded on timely motion. Because defense counsel never moved to exclude Howe's testimony on this ground, Mr. Grimes was deprived the effective assistance of counsel. Reversal of the special circumstances and penalty phase is required.

B. Upon A Proper Objection, The Trial Court Would Have Been Required To Exclude Howe's Testimony Because It Was Confined To A Predetermined Formulation.

Both the United States and California Constitutions give defendants in criminal cases a right to assistance of counsel. (United States Constitution, Amendment 6; California Constitution, Art. 1, § 15.) This constitutional right to counsel presumes the right to competent counsel. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319.) A defendant is deprived of this right when his trial attorney fails to act in a reasonably competent manner. (*See, e.g., People v. Frierson* (1979) 25 Cal.3d 142, 160; *People v. Pope* (1979) 23 Cal.3d 412, 425.) Pursuant to these general authorities, the failure to

object to damaging and inadmissible testimony or to make appropriate motions can be the basis for a conclusion that counsel was incompetent. (*People v. St. Andrew* (1980) 101 Cal.App.3d 450; *People v. Schiering* (1979) 92 Cal.App.3d 429; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 485; *People v. Coffman* (1969) 2 Cal.App.3d 681, 690.)

Here, that is exactly what happened. Even before trial, there was little doubt Mr. Grimes was guilty of felony murder. Accordingly, defense counsel conceded the question of guilt in opening statements and closing arguments in the guilt phase. (25 RT 6918-6919; 35 RT 9237.) Thus, the jury here had two questions to decide: (1) did Mr. Grimes act as a major participant with a reckless indifference to human life or act with an intent to kill (which would permit conviction on the special circumstance allegations and make him eligible for the death penalty) and (2) should he die for his part in the crime? A key part of the state's case on both questions was the testimony from Jonathan Howe. And the prosecutor made good use of this evidence, not only in urging the jury to find true the special circumstance allegations, but in urging the jury to sentence Mr. Grimes to die. (35 RT 9212-9214; 41 RT 10879-10880.)

Accordingly, there is no conceivable tactical reason which would justify trial counsel's decision to allow the state to introduce the testimony. Indeed, trial counsel moved to suppress this testimony on several grounds, arguing the evidence was more

prejudicial than probative, its admission violated Due Process because the defense did not have a chance to voir dire the jury on snitch testimony and the testimony would require a delay. (5 CT 1013-1017.) But trial counsel failed to argue the testimony should be excluded because Howe was under a compulsion to testify in accord with his prior statements to police. (5 CT 1013-1017.)

To be sure, counsel cannot be faulted for failing to move to strike this testimony on this ground if, in fact, such a motion would likely have been denied. But in light of California law in this area, a motion to strike Howe's testimony would have been granted.

In this regard, the law is clear that is it entirely proper for the prosecution to introduce the testimony of a witness pursuant to a plea agreement where the witness believes that the agreement merely requires him to testify truthfully. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 768; *People v. Johnson* (1989) 47 Cal.3d 1194, 1229.) It is equally clear, however, that a defendant is denied a fair trial where the plea agreement places the witness under "a strong compulsion to testify in a particular fashion." (*People v. Garrison*, *supra*, 47 Cal.3d at p. 768.)

Applying these general rules, a prosecutor's mere expectation that the witness' testimony will conform to pretrial statements does *not* render the witness' testimony

inadmissible, since that expectation is not a part of the plea bargain. (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1229; *People v. Garrison*, *supra*, 47 Cal.3d at p. 771; *People v. Fields* (1983) 35 Cal.3d 329, 361.) Similarly, where the agreement between the prosecutor and the witness does not explicitly require the witness to testify in a specified manner, and when the witness does not so understand the agreement, the testimony is admissible. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 770; *People v. Allen* (1986) 42 Cal.3d 1222; *People v. Fields*, *supra*, 35 Cal.3d 329.) However, where a plea agreement itself puts a witness under a strong compulsion to testify in accordance with an earlier statement to police, the testimony is tainted by the witness's self interest, and is inadmissible. (*People v. Garrison* (1989) 47 Cal.3d 746, 770-771; *People v. Fields* (1983) 35 Cal.3d 329, 359-361; *People v. Sepeda* (1977) 66 Cal.App.3d 700, 705-706; *People v. Medina* (1974) 41 Cal.App.3d 438, 450-456; *People v. Green* (1951) 102 Cal.App.2d 831, 838-839.)

In *People v. Medina*, *supra*, for example, the Court of Appeal reversed defendants' murder convictions where the state relied on testimony from witnesses who were promised immunity for testimony that would not be "materially different" from the statements they had given to police. (41 Cal.App.3d at p. 450-456.) Similarly, in *People v. Sepeda*, *supra*, the appellate court held inadmissible testimony from a witness who was promised compensation for testimony consistent with statements he had already given

police. (66 Cal.App.3d at p. 706.)

In this case, the written agreement required Howe to "provid[e] true, full and accurate information to law enforcement . . . ." (5 CT 1154.) It also required Howe to "testify[] truthfully and accurately in all court proceedings." (5 CT 1154.) Before calling Howe as a witness at trial, and in connection with the information he gave pre-trial to detective O'Connor, the prosecution subjected Howe to (1) one voice stress test, analyzed by three different examiners, (2) one polygraph examination, analyzed by two different examiners and (3) a second polygraph examination. Only after using these means to determine Howe's pre-trial statements were "truthful," did the state decide to call Howe as a witness.

Having been through this process, there is little doubt Howe knew the state believed his pre-trial statements to detective O'Connor were the truth. Accordingly, as a practical matter, any deviation from this pre-trial script would not only have risked a loss of the potential benefits of the deal, but would also have exposed Howe to a perjury prosecution under the specific terms of the written plea agreement. (5 CT 1155.)

Mr. Grimes concedes that in drafting Howe's plea agreement, the prosecutor here was clever enough not to explicitly require Howe to testify in accord with his pre-trial

statement to detective O'Connor. Yet the practical, real-world effect of the plea agreement as a whole is the same. As a general matter, a prosecutor cannot avoid the proscription on unfair practices by clever and subtle changes in wording. (*See, e.g.*, *People v. Modesto* (1967) 66 Cal.2d 695, 710-711; *People v. Giovannini* (1968) 260 Cal.App.2d 597, 604-605.) But the effect of the agreement here, in conjunction with the numerous pre-trial tests which convinced the prosecutor Howe's pre-trial statements were the "truth," was the same as the agreements in *Medina* and *Sepeda*: Howe knew his trial testimony had to be materially identical to his pretrial statements or he could lose the benefit of his deal and be prosecuted for perjury. This was improper. Had trial counsel posed a timely objection, Howe's testimony would have been ruled inadmissible. There was no tactical reason for this failure here.

Mr. Grimes recognizes a reviewing court will not find ineffective assistance of counsel where the challenged failure could have been the result of an informed reasonable tactical choice rather than of neglect. (*People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426.) In some cases, however, "there simply could be no satisfactory explanation." (*Id.* at p. 426.)

That is the case here. Howe provided key evidence against Mr. Grimes in connection with both the special circumstance findings and the penalty phase. Without

his testimony, the state's case was much weaker in both areas. There is no conceivable tactical reason which would provide a satisfactory explanation for counsel's failure to object to the admission of testimony of Howe's testimony on this ground. Nothing more here is necessary to establish counsel's ineffectiveness. (*See, e.g., People v. Jackson* (1986) 187 Cal.App.3d 499, 505-506 [failure to move for exclusion of prior felonies for impeachment purposes]; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, n.3 [failure to move to delete references to unproven other crimes from tape and transcript admitted into evidence]; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366 [failure to object on collateral estoppel grounds to felony murder instructions]; *People v. Rosales* (1984) 153 Cal.App.3d 353, 360-362 [failure to move for suppression of palm print obtained through illegal arrest]; *People v. Farley* (1979) 90 Cal.App.3d 851, 858-868 [failure to challenge identification testimony as fruit of illegal transportation and arrest of defendant].)

C. There Is A Reasonable Probability That Absent Counsel's Errors, The Result Of The Special Circumstance Trial And Penalty Phases Would Have Been Different.

The only remaining question is prejudice. Where defense counsel has provided ineffective assistance, reversal is required whenever there is a "reasonable probability" that absent the error the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693.) "Reasonable probability" does not require

defendants to show that "counsel's conduct more likely than not altered the outcome of the case." (*Id.* at p. 693.) Instead, reasonable probability is merely a "probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) In statistical terms, appellant must show "a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

Here, Howe provided stark and chilling testimony. He said Mr. Grimes confessed to him he ordered Wilson and Morris to tie up and kill the victim. (31 RT 8381.) According to Howe, Mr. Grimes bragged about his conduct. (31 RT 8381.) He told Howe that police would not be able to tie him to the crime because there was no DNA and he did not touch the body. (31 RT 8383.)

The prosecutor knew well the importance of Howe's testimony. In closing argument at the guilt phase, the prosecutor argued that in finding the special circumstances true on an intent to kill theory, the jury should rely "primarily" on Howe's testimony. (35 RT 9212.) She then relied on that testimony in some detail. (35 RT 9212-9214.) Similarly, at the penalty phase the prosecutor again relied on this evidence, urging the jury to impose death because there was no reason for Howe to lie and there was no "lingering doubt" in light of Howe's testimony. (41 RT 10879-10880.)

As this Court has long noted, the prosecutor's heavy reliance on this evidence during closing argument is a strong indication of how important the evidence was to the jury. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in closing argument reveals how important the prosecutor "and so presumably the jury" treated the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].) The same is true here; the prosecutor's reliance on this evidence shows how important it was to the state's special circumstance and penalty phases cases. Reversal of the special circumstance findings and verdict of death is required.

ISSUES EFFECTING THE PENALTY VERDICT

XII. GIVEN THAT TRIAL COUNSEL CONCEDED MR. GRIMES WAS GUILTY OF FIRST DEGREE MURDER, COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN ADVISING MR. GRIMES TO DECLINE A PLEA BARGAIN TO FIRST DEGREE MURDER WHICH WOULD HAVE PRECLUDED DEATH AS AN OPTION.

A. Introduction.

Prior to trial, the state offered Mr. Grimes a deal: waive his constitutional rights and plead guilty to first degree special circumstances murder and the state would not seek death. The state gave Mr. Grimes 21 days to decide. At the time, Mr. Grimes's lawyer, Richard Maxion, had been on the case for only 13 days. At the end of the 21 day period, and acting on the advice of counsel, Mr. Grimes rejected the plea bargain.

Trial began 16 months later. By this time, defense counsel was now fully familiar with the thousands of pages of discovery in the case. Counsel advised the court that Mr. Grimes was prepared to accept the state's prior offer, and there had been insufficient time to consult with Mr. Grimes when the original plea was rejected. The state turned down the offer. Nevertheless, in both his opening statement and closing argument defense counsel made the only decision a properly prepared lawyer could make given the facts of

this case: he conceded Mr. Grimes was guilty of first degree felony murder.

As more fully discussed below, given the facts of this case, Mr. Grimes received ineffective assistance of counsel during the plea process. In light of the strength of the state's case, properly prepared counsel could have made only one decision: advise the client to accept the plea offer. Reversal of the death sentence is required.

B. The Relevant Facts.

1. Elected district attorney Dennis Sheehy decides not to seek death because Mr. Grimes is not the actual killer.

The crime in this case occurred on October 18, 1995. On that day, John Morris, Patrick Wilson and defendant Gary Grimes broke into the home of Betty Bone. Under the state's version of the crime, Morris murdered Ms. Bone during the course of the burglary; Wilson and Grimes were liable as aiders and abettors under the felony murder rule.

All three men were arrested within days. Morris was arrested on October 21. (32 RT 8637.) He committed suicide the next day in jail. (32 RT 8637.) Wilson was arrested on October 22, 1995. (32 RT 8631-8634.) Mr. Grimes was arrested on October 23. (4 RT 2117.)

On October 24, 1995, the Shasta county district attorney filed a criminal complaint charging both Mr. Wilson and Mr. Grimes with first degree special circumstances murder. (1 CT 1, 4.) Because Mr. Grimes was indigent, public defender James Pearce was appointed to represent him. (1 CT 20.) After the preliminary hearing, the prosecutor filed an information which again charged both defendants with first degree special circumstances murder. (1 CT 39-160; 2 CT 183, 186.) Mr. Grimes pled not guilty. (2 CT 254.)

Under state law, of course, the special circumstance allegation exposed Mr. Grimes to a potential death sentence. At the time these charges were brought, the elected district attorney for Shasta County was Dennis J. Sheehy. (4 CT 666.) Before deciding whether to seek death, the prosecution invited defense counsel Mr. Pearce to provide "any information you wish our office to consider in mitigation." (4 CT 666.) In January of 1997 -- more than four months later -- Mr. Sheehy personally wrote to defense counsel Pearce, explaining that "our death penalty review committee has decided not to seek the death penalty . . . ." (4 CT 667, emphasis in original.) Later, Mr. Sheehy would explain he decided not to seek death because Mr. Grimes was not the actual killer, and Mr. Sheehy did not think a jury would impose death. (5 RT 2435-2436.)

2. Mr. Grimes moves for new counsel.

Five months later, on May 22, 1997, Mr. Grimes filed a one-page handwritten *Marsden* motion to discharge appointed counsel James Pearce. (3 CT 309-310.) The very next day the trial court heard the motion, granted it and appointed Richard Maxion to the case. (3 CT 314.) Mr. Pearce -- who had represented defendant for nearly 18 months and had been appointed only two days after the crime itself -- was off the case.

At the time, there were approximately 2,500 pages of discovery. (3 CT 358.) Trial in this now non-capital case was set for January 13, 1998. (3 CT 358.)

3. After Mr. Sheehy resigns, and only 13 days after defense counsel is replaced with a different lawyer, the new district attorney changes his mind and decides to seek death unless Mr. Grimes waives all rights and pleads guilty.

Mr. Sheehy resigned as District Attorney on April 9, 1997. (5 RT 2431.) The Shasta County Board of Supervisors hired Contra Costa deputy district attorney McGregor Scott to replace Mr. Sheehy. (5 RT 2388.) Mr. Scott became the district attorney on April 14, 1997. (3 CT 322; 5 RT 2388.)

On June 6, 1997 -- roughly two weeks after the court had appointed new lawyers

for Mr. Grimes -- Mr. Scott announced that as the new District Attorney, he had reached a different decision and would be seeking death in the case. (3 CT 323.) In a proceeding which was initially sealed (and from which the public was excluded), Mr. Scott stated the "formal announcement of the office's intention to seek the death penalty will occur on June 27, 1997." (3 CT 323.) The purpose of this three week delay was to give counsel a chance to "become sufficiently acquainted with the case so that he can properly advise his client." (3 CT 323.) Mr. Scott made clear that if Mr. Grimes waived his rights and pled guilty, he would "then be sentenced according to the law as had been previously offered by the former district attorney, and that would be life without the possibility of parole." (3 CT 324.) Defense counsel agreed to this schedule and did not ask for more time.

Three weeks later -- on June 27, 1997 -- the court held another hearing. (3 CT 333.) Counsel for Mr. Grimes stated his client would not be pleading guilty. (3 CT 335.) Accordingly, the district attorney announced "[t]he district attorney will be seeking the death penalty . . . ." (3 CT 336.)

4. Four months *after* providing Mr. Grimes with advice in connection with the guilty plea, defense counsel continues the trial because he is not prepared.

In October of 1997 -- four months *after* having counseled Mr. Grimes in

connection with the guilty plea -- defense counsel sought a continuance of the January 1998 trial. (3 CT 355.) Counsel requested additional time because he was not yet prepared. (3 CT 355-357.) In November 1997 the court found good cause for the continuance, precisely because counsel was unprepared. (3 CT 371.) In August of 1998 -- fully 14 months *after* having counseled Mr. Grimes in connection with the guilty plea -- defense counsel obtained a stipulation permitting the defense to test 13 items of physical evidence which had not yet been tested. (5 CT 921.)

5. After the trial court rejects the claim that Mr. Grimes received ineffective assistance of counsel in turning down the plea offer, defense counsel concedes guilt in his opening statement.

Trial eventually started in October 1998. Because this was now a capital case, Mr. Grimes had a second lawyer appointed in August 1997, Rolland Papendick. (3 CT 360.)

Prior to trial, Mr. Papendick filed a written motion to preclude the district attorney from seeking death in the case. (4 CT 661-665.) The written motion contained three distinct arguments: (1) district attorney Scott's decision to reverse district attorney Sheehy's decision, and force defendant to either waive his right to a jury trial or risk death, constituted cruel and unusual punishment, (2) the district attorney's reversal, and decision to seek death, was arbitrary and capricious and (3) the decision to seek death if

defendant did not plead guilty constituted vindictive prosecution. (4 CT 662-663.)

At oral argument on this motion, Mr. Papendick added a fourth argument, alleging that Mr. Grimes received ineffective assistance of counsel. (4 RT 2032.) Counsel argued that Mr. Maxion had insufficient time between June 6, 1997 (when Mr. Maxion was told the state would seek death if Mr. Grimes did not plead guilty) and June 27 (when Mr. Maxion was required to indicate whether Mr. Grimes would plead guilty) to come up to speed on the case and properly advise Mr. Grimes. (4 RT 2031-2032.)

After hearing evidence in support of the motion, the trial court heard argument. Mr. Papendick returned to the ineffective assistance of counsel component of the claim. (6 RT 2568.) His argument was simple: given that Mr. Maxion had been on the case for less than two weeks when the June 6 announcement was made, and Mr. Grimes was given only 21 days within which to decide whether to take the plea, counsel did not have time to educate himself about the case and properly advise Mr. Grimes. (6 RT 2568.)

The trial court rejected the claim. (6 RT 2571-2572.) "What the court has to consider is that the date and the time limit . . . was agreed upon and that no request was made to extend that. No objection was made that it was inadequate or anything of that nature." The trial court noted if Mr. Maxion had asked for more time to investigate the

case, he would have received it. (6 RT 2571-2572.)

By August 1998, with defense counsel now fully apprised on the case, counsel made clear Mr. Grimes would concede guilt of first degree felony murder at the guilt phase of trial. (6 RT 2582.) In fact, shortly before trial started defense counsel, now fully prepared on the case, announced that Mr. Grimes was willing to take the exact offer the state had made over a year earlier: he would plead guilty in exchange for a life without parole term:

> "We have been having ongoing negotiations. Mr. Grimes made a decision that he was willing to plead guilty and accept a sentence of life without the possibility of parole. We presented that information to the District Attorney last Friday. This morning, approximately 8:30, we received their decision that they wanted to pursue the death penalty. But I think it's important that the record reflect that Mr. Grimes is prepared to accept an offer of life without the possibility of parole." (22 RT 6149.)

The prosecutor refused to accept a guilty plea at this point. (22 RT 6149.)

In his October 1998 opening statement to the jury, defense counsel conceded guilt of first degree felony murder. (25 RT 6918-6919.) And he conceded guilt yet again in closing arguments. (35 RT 9237.) The jury ultimately voted to convict and, later, sentenced Mr. Grimes to death.

As more fully discussed below, Mr. Grimes received ineffective assistance of counsel in connection with the plea offer that was open for 21 days. On the facts of this case no reasonable lawyer would advise his client to turn down such an offer. As defense counsel's concessions of guilt in the opening statement show, guilt was a foregone conclusion here. And as defendant's expressed willingness to plead guilty prior to trial shows, when defense counsel was in a position to know the state's case fully and advise Mr. Grimes accordingly, Mr. Grimes was fully willing to accept the state's offer. The death sentenced must be reversed due to counsel's ineffective representation.

C. Trial Counsel Provided Ineffective Assistance Of Counsel In Connection With The Guilty Plea Offer.

Both the United States and California Constitutions accord defendants in criminal cases a right to the assistance of counsel. United States Constitution, Amendment 6; California Constitution, Article 1, Section 15. This right "guarantees that a criminal defendant will not be convicted without the effective assistance of counsel." (*Harris v. Reed* (7th Cir. 1990) 894 F.2d 871, 877; see *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319.) The right to effective assistance applies not only to trial, but to pre-trial proceedings involving guilty plea negotiations. Thus, a criminal defendant has a right to effective assistance of counsel in deciding whether to accept or reject a proposed plea agreement. (*See, e.g. In re Alvernaz* (1992) 2 Cal.4th 924, 937; *Boria v. Keane* (2d Cir.

1996) 99 F.3d 492, 496; *Johnson v. Duckworth* (7th Cir. 1986) 793 F.2d 898, 900.)

When a defendant alleges he has received ineffective assistance of counsel, he generally has the burden of proving two elements: (1) counsel's conduct fell below an objective standard of reasonableness and (2) counsel's conduct undermines confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668.) As applied to a claim that counsel provided ineffective assistance in connection with entry of a guilty plea, *Strickland* requires a defendant to show (1) counsel's preparation or advice fell below the standard of care, (2) but for counsel's error the outcome of the plea process would have been different. (*Hill v. Lockhart* (1985) 474 U.S. 52 , 58-59; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 937.) Here, both prongs have been satisfied and the death sentence must be reversed.

1. Counsel's conduct fell below the standard of care.

In determining whether counsel's conduct has fallen below the standard of care, the Supreme Court has noted that "[p]revailing norms of practice as reflected in American Bar Association standards" are useful guides "to determining what is reasonable." (*Strickland*, *supra*, 466 U.S. at p. 688.) At the time of the 1998 trial in this case, the American Bar Association's standard on counsel's conduct in connection with the guilty

plea stage were expressed in Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992):

> "A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable."

Where the state has a very strong case, and there is no viable defense, counsel's failure to advise defendant to accept a plea offer falls below the standard of care. (*See, e.,g.*, *Boria v. Keane*, *supra*, 99 F.3d 494-497 [defendant charged with purchasing drugs from an undercover agent, state's evidence includes testimony from the undercover officer and two "ruinous" statements defendant gave to police, on the advice of counsel defendant turns down a plea for a one to three year prison term and after trial received a 20 year term; held, defense counsel's failure to advise defendant to accept the plea offer was below the standard of care]; *United States v. Morris* (6th Cir. 2006) 470 F.3d 596, 599-603 [where defendant was forced to decide whether to accept plea before defense counsel had a chance to review all discovery, interview witnesses or "have knowledge of the strength of the case," counsel's advice against accepting the plea fell below the standard of care]; *Carrion v. Smith* (S.D.N.Y. 2008) 537 F.Supp.2d 518, 530 [where state had "open and shut" case against defendant, with no viable defense, counsel's failure to advise defendant to take favorable plea bargain fell below the standard of care].)

Here there can be no doubt counsel's conduct fell below the standard of care. Appointed counsel Richard Maxion had been on the case just 13 days when the new district attorney issued his June 6, 1997, demand: waive all rights and plead guilty by June 27 or face a death sentence. (3 CT 314, 323-324.) Mr. Maxion's subsequent requests for additional time to prepare makes clear that even months later he was not fully familiar with the case. (*See* 3 CT 355-357, 371.) And Mr. Papendick's subsequent motion to bar the death penalty confirms that Mr. Maxion simply did not have time to adequately review all the discovery and advise Mr. Grimes prior to the June 27 deadline. (4 RT 2031-2032; 6 RT 2568.) Nor had much of the physical testing been completed by June 27. (5 CT 921.)

Moreover, counsel's eventual position in this case shows the evidence of Mr. Grimes's complicity in robbery and felony murder was overwhelming and there was no viable defense. Thus, defense counsel conceded the issue of guilt in his opening statement and closing argument. (25 RT 6918-6919; 35 RT 9237.) On this record, there is no tactical explanation whatever for counsel's failure to advise Mr. Grimes in the strongest possible terms to accept the plea offer.

It is true, of course, that at the guilt phase defense counsel did not concede guilt to the special circumstance allegation. Instead, he argued Mr. Grimes did not harbor a

reckless indifference to human life. (35 RT 9238.) And it is certainly possible to imagine a scenario where a defense lawyer could advise a client against a plea to special circumstances murder where the defense strategy is to attack the special.

But the record removes any doubt as to whether defense counsel in this case relied on such a strategy: he did not. Prior to trial, but after all discovery had been reviewed and all testimony completed, defense counsel made clear that Mr. Grimes was prepared to plead guilty to special circumstances murder. (22 RT 6149.) Of course, this offer from the defense undercuts any suggestion that there was a strategy in place to reject the plea offer in the hopes of fighting the special circumstance finding.

In short, defense counsel was unable to come up to speed on this case in the 21 days he was given. Nor did counsel ask for more time, though the record is clear he could have. Accordingly, he could not have known either the strength of the state's case or the lack of any guilt phase defenses. And when counsel did finally understand the case, he not only made clear Mr. Grimes was willing to accept the plea offer, but he explicitly conceded guilt to the jury. (22 RT 6149; 25 RT 6918-6919.) Counsel's conduct in not advising Mr. Grimes to accept the plea earlier fell below the standard of care. The only remaining question is prejudice.

2. Had counsel advised Mr. Grimes to accept the plea, he would have pled guilty.

As noted above, when a defendant alleges that his trial lawyer was ineffective in the context of a guilty plea, the defendant must establish that but for counsel's error the outcome of the plea process would have been different. (*Hill v. Lockhart*, *supra*, 474 U.S. at pp. 58-59; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 937.) As this Court has concluded, to establish the prejudice necessary to obtain relief "a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*In re Alvernaz*, *supra,* 2 Cal.4th at p. 937.)

In most cases, of course, the prejudice inquiry is complicated because claims as to counsel's conduct in connection with the plea process are not raised until after the defendant has gone to trial, been convicted and received a harsher sentence than was offered at the plea. (*See Alvernaz*, 2 Cal.4th at pp. 929-930.) At that point, of course, defendant has a strong motive to claim that he would have taken the plea had he been properly advised and such declarations are viewed as "self-serving." (*Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

But this case is atypical. Here, the claim that counsel was ineffective was raised

prior to trial. Here, the record shows that when he finally got adequate advice, Mr. Grimes was willing to accept the plea *prior to trial.* (22 RT 6149.) This case does not involve a convicted defendant retrospectively claiming he would have taken a plea offer. This case involves a defendant who was seeking to remedy the constitutional violation before trial even began. On this record there can be no real doubt that had Mr. Grimes received effective assistance prior to the June 27 deadline, he would indeed have accepted the plea. The death sentence must be stricken.[22]

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[22] As noted above, *Alvernaz* also requires the defendant to establish the plea would have been accepted by the court. Here, nothing suggests the trial court would have refused to accept the plea. After all, the original district attorney had decided not to seek death. (4 CT 667.) Moreover, when the plea was offered and discussed in open court, the trial court did not in any way suggest it would not accept the plea. (3 CT 318-327.) Finally, co-defendant Patrick Wilson was permitted to plead guilty. (*See People v. Wilson* C033095, Docket Entries.)

XIII. MR. GRIMES WAS DENIED DUE PROCESS WHEN THE PROSECUTOR THREATENED THAT IF HE DID NOT PLEAD GUILTY TO SPECIAL CIRCUMSTANCES MURDER, THE STATE WOULD SEEK DEATH.

A. The Relevant Facts.

As discussed in Argument XII above, although Mr. Grimes was charged with special circumstances murder, on January 16, 1997, elected district attorney Dennis Sheehy decided *not* to seek death. (4 CT 667.) Accordingly, the maximum sentence Mr. Grimes could receive if found guilty was life without possibility of parole.

Mr. Sheehy resigned on April 9, 1997. (5 RT 2431.) Former Contra Costa deputy district attorney McGregor Scott was hired to replace him. (3 CT 322; 5 RT 2388.) Less than two months later, Mr. Scott advised counsel for Mr. Grimes that he (Scott) had reached a different conclusion than Mr. Sheehy. (3 CT 323.) On June 6, 1997, prosecutor Scott stated he *would* seek death unless Mr. Grimes pled guilty to the then-current charges within 21 days -- thereby waiving his constitutional rights to a jury trial, confrontation and to present a defense as well as his privilege against self-incrimination. Although the case had been pending for more than 20 months (since October 1995) -- and Mr. Grimes had had new counsel assigned only 13 days earlier -- Mr. Scott provided no explanation why this momentous decision had to be made within 21 days.

Trial counsel for Mr. Grimes objected to this process, arguing that the state's conduct was unconstitutional. (4 CT 661-665.) The trial court held a hearing at which both Scott and Sheehy testified. Prosecutor Scott conceded his decision to seek death was not based on any new or different information that Sheehy did not already have and consider. (5 RT 2393-2394. *See also* 6 RT 2458.)

As more fully discussed below, given prosecutor Scott's admission that he did not base his new position on any different information than was available to Mr. Sheehy, it was patently unconstitutional for the prosecutor to, in effect, threaten Mr. Grimes with death unless he waived all his constitutional rights and pled guilty to special circumstances murder. The prosecutor effectively penalized Mr. Grimes for exercising basic constitutional rights which he was fully entitled to exercise. The death penalty must be reversed.

B. The Prosecutor Unconstitutionally Penalized Mr. Grimes For Exercising His Constitutional Rights By Seeking A Death Sentence Because Mr. Grimes Refused To Plead Guilty To Special Circumstances Murder.

Taken together, the Fifth and Sixth Amendments to the United States Constitution, and Article 1, sections 15 and 16 of the California Constitution, provide criminal defendants with the right to a jury trial, the right to confront witnesses against them, the right to present a defense and a privilege against self-incrimination. Each of these rights

is, of course, fundamental to our criminal justice system.

Both the United States Supreme Court and this Court have repeatedly emphasized that the state may not punish a defendant for the exercise of a constitutional right. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363. *Accord United States v. Jackson* (1968) 390 U.S. 570, 580-582.) As this Court has noted in reviewing the Supreme Court's case law, "the state may not punish a defendant for the exercise of a constitutional right, or promise leniency to a defendant for refraining from the exercise of that right." (*People v. Collins* (2001) 26 Cal.4th 297, 306.) Thus, for example, the state may not impose a harsher sentence simply because a defendant elected to exercise his right to a jury trial rather than plead guilty. (*See, e.g., In re Lewallen* (1979) 23 Cal.3d 274, 278-281; *People v. Morales* (1967) 252 Cal.App.2d 537, 543-546.)

The Supreme Court's decision in *Jackson* is instructive. There, defendant was charged with kidnaping in federal court. At the time, the federal kidnaping statute provided that if defendant was convicted by a jury, he could get death. If the defendant pled guilty, or waived jury and was tried by the court, the maximum punishment was life in prison. Defendant argued this part of the statute was unconstitutional.

The Supreme Court agreed, noting that under the federal scheme "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (390 U.S. at p. 580.) According to the Court, the practical impact of this provision is "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." (390 U.S. at p. 581.) The Court recognized that Congress's goal in limiting death to cases recommended by the jury was to "avoid[] the more drastic alternative of mandatory capital punishment in every case." (*Id.* at pp. 581-582.) But despite this laudable goal, the Court held the statute unconstitutional because Congress's chosen method of obtaining this goal "needlessly chill[ed] the exercise of basic constitutional rights." (390 U.S. at pp. 582-583.) The Court succinctly described the vice of the federal statute, noting "the defendant's assertion of the right to jury trial may cost him his life . . . ." (390 U.S. at p. 572.)

In *In re Lewallen*, *supra*, 23 Cal.3d 274, this Court reached a similar result, holding it unconstitutional for the state to impose harsher punishment on a defendant simply because he elected to go to trial rather than plead guilty. There, defendant refused to plead guilty to a particular count prior to trial, went to trial and was convicted of several charges. At sentencing, the trial court expressly imposed a harsher punishment because defendant had refused to plead guilty. Citing *United States v. Jackson*, *supra*,

this Court vacated the harsher sentence, concluding that the state essentially had punished the defendant for the exercise of his right to trial. (23 Cal.3d at pp. 279-281.)

Jackson and *Lewallen* control this case. Here, district attorney Sheehy considered all the evidence and decided not to seek death. The maximum sentence Mr. Grimes could receive, therefore, was life in prison without parole. After Mr. Sheehy resigned, prosecutor Scott reached a different decision based on the very same evidence. Mr. Scott then advised defendant unless he waived all his constitutional rights and pled guilty to the charges, the state would seek death. As in *Lewallen*, the state in this case effectively punished Mr. Grimes by imposing a harsher sentence solely because he exercised his right to a jury trial.[23]

Indeed, this case is like *Jackson* in almost every respect. Just as in *Jackson*, had Mr. Grimes "abandon[ed] the right to contest his guilt before a jury [he would have been] assured that he [could not] be executed." (390 U.S. at p. 580.) Just as in *Jackson*, if Mr. Grimes was "ingenuous enough to seek a jury acquittal [he] [stood] forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (390 U.S. at p. 580.) Just as in *Jackson*, the vice of the prosecutor's conduct here was that "the

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[23] Of course, as this Court has concluded, there is nothing improper when a prosecutor seeks a harsher penalty based on new information about the case, or a new assessment of the credibility of a significant prosecution witness. (*People v. Jurado* (2006) 38 Cal.4th 72, 99-100.) But here, prosecutor Scott's forthright testimony was that his decision was *not* based on any new information, but was based on the very same evidence relied on by Mr. Sheehy.

defendant's assertion of the right to jury trial may cost him his life . . . ." (390 U.S. at p. 572.)

To be sure, in the non-capital context it is clear that the state has greater leeway to burden a criminal defendant's right to a jury trial. (*See Corbitt v. New Jersey* (1978) 439 U.S. 212.) *Corbitt* involved a New Jersey statute dealing with non-capital murder cases. Under New Jersey law, defendants convicted of first degree murder after a jury trial could be sentenced to life imprisonment; second degree murder was punishable by a 30 year prison term. (439 U.S. at pp. 214-215.) The specific New Jersey statute at issue in *Corbitt* provided that if a defendant pled nolo contendere to first degree murder, he could be sentenced either to life or a term or 30 years in prison in the trial court's discretion. (*Ibid.*) In other words, the statute gave trial courts the option of imposing a shorter prison term on a first degree murder defendant who waived his right to a jury trial and pled to the crime. Defendant argued *Jackson* controlled because this statute penalized his exercise of the right to a jury trial.

The Supreme Court rejected the argument, concluding "that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (439 U.S. at p. 219.) The Court distinguished *Jackson*, noting that "[t]he principle difference is that the pressures to forgo trial and to plead to the charge in this case are not what they were in *Jackson*." (439 U.S. at p. 217.) This was so

for two reasons. "First, the death penalty, which is 'unique in its severity and irrevocability,' . . . is not involved here." (439 U.S. at p. 217.) Next, in *Jackson* the risk of the more severe punishment could be completely avoided by pleading guilty, whereas under the New Jersey scheme "the risk of [the more severe] punishment is not completely avoided by pleading [nolo contendere] because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial." (439 U.S. at p. 217.) In his separate concurring opinion, Justice Stewart echoed both points: "[u]nlike the statute at issue in the *Jackson* case, the death penalty is not involved here, and a convicted defendant can be sentenced to the maximum penalty of life imprisonment whether he pleads [nolo contendere] or goes to trial." (439 U.S. at p. 226.) In the non-capital context of *Corbitt*, the Court concluded that "a State may encourage a guilty plea by offering substantial benefits in return for the plea . . . ." (439 U.S. at p. 219.)

The state's conduct in this case contrasts with *Corbitt* in nearly every way. First, unlike *Corbitt* (and like *Jackson*), this case *does* involve the death penalty. Second, unlike *Corbitt* (and like *Jackson*) the prosecutor in this case was indeed "reserv[ing] the maximum punishment for murder for those who insist on a jury trial." (439 U.S. at p. 217.) And finally, unlike *Corbitt*, the prosecutor here was not simply offering "benefits in return for the plea" but he was threatening a significantly more severe sanction unless Mr.

Grimes waived his rights.[24]

In short, Mr. Grimes was facing a maximum sentence of life without parole. Because Mr. Grimes refused to plead guilty, and exercised his right to a jury trial, the prosecutor sought death. It is fair to say that Mr. Grimes received death in this case precisely because he refused to waive his rights and plead guilty. Indeed, as in *Jackson*, Mr. Grimes's "assertion of the right to jury trial may cost him his life . . . ." This was fundamentally improper and unconstitutional; the death sentence must be set aside.

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[24] At first blush, it may seem there is no principled distinction between (1) a prosecutor threatening to add charges if a defendant does not plead guilty and (2) a prosecutor offering to reduce charges if a defendant pleads guilty. But writing for several Supreme Court justices, Justice Blackmum noted important distinctions between these two situations even in the non-capital context. (*See, e.,g. Bordenkircher, supra*, 434 U.S. 368 and n. 2, dissenting opinion of Blackmun, J.) As Justice Blackmun observed, even when the death penalty is not a potential penalty, there are strong policy reasons to guard against the former and encourage the latter. (*Ibid.*)

XIV. THE TRIAL COURT DEPRIVED MR. GRIMES OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS WHEN IT REFUSED TO INSTRUCT THE JURY IT COULD RETURN A LIFE SENTENCE EVEN IF AGGRAVATION OUTWEIGHED MITIGATION.

A. The Relevant Facts.

Prior to the end of the penalty phase, defense counsel asked the court to instruct the jury it could impose a life without parole sentence even in the absence of mitigating evidence. (23 CT 6445.) The trial court refused, ruling that this was covered elsewhere in the instructions. (23 CT 6445; 40 RT 10701.)[25]

The trial court then instructed the penalty phase jury. The court listed the aggravating and mitigating factors set forth in section 190.3. (41 RT 10801-10802.) After defining aggravating and mitigating factors, the court instructed the jury how it was to determine whether death was appropriate:

> "In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in

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[25] The actual instruction requested was as follows:

> "A jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (23 CT 6445.)

> comparison with the mitigating circumstances that it warrants death instead of life without parole." (41 RT 10889.)

The prosecutor took full advantage of the court's ruling. During her closing argument, the prosecutor simplified the task for the jury, explaining that "the process you're going to engage in is basically a weighing of aggravating versus mitigating factors." (41 RT 10808.) And of the eight factors which could conceivably be mitigating, the prosecutor argued that (1) four did not apply to this case at all, (2) defendant only presented evidence as to two of these factors (mental disease or defect and factor K) and (3) on analysis, none of this evidence was really mitigating. (41 RT 10809-10826.) According to the prosecutor, in the balancing process it was being asked to undertake, the jury could impose death based entirely on the circumstances of the crime:

> "I submit that you need to look no further than the defendant's behavior in the murder of Betty Bone, even though you have much more in aggravation." (41 RT 10825.)

The jury returned a death sentence.

B. The Trial Court Violated The Fifth And Eighth Amendments In Refusing Defense Counsel's Request To Instruct The Jury It Could Return A Life Sentence Even In The Absence Of Mitigating Evidence.

The trial court's refusal to instruct the jury that it could return a life verdict even in the absence of mitigation violated both the Due Process Clause and the Eighth Amendment. The starting point for this analysis is the recognition that under California law, the requested instruction was entirely accurate. Penal Code section 190.3 sets forth the penalty phase procedure for capital cases and provides that the trier of fact "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Despite the bare language of the statute, this Court has made clear time and time again that California law does *not* require a death sentence merely because aggravation outweighs mitigation.

Instead, under California law, "[t]he jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather is to determine, after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*People v. Meyers* (1987) 43 Cal.3d 250, 276.) "The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979. *Accord, People v. Stansbury* (1993) 4 Cal.4th 1017, 1065; *People v. Raley*

(1992) 2 Cal.4th 870, 921.)

Thus, the instruction defense counsel requested sought to accurately convey to the jury the state of the law in accord with *Duncan*, *Stansbury* and *Raley*. The question then becomes whether the trial court's refusal to give this instruction violated Due Process.

It did. Under the Due Process Clause a trial court may not deprive a defendant "of an adequate opportunity to present [his] claims fairly within the adversary system." (*Ross v. Moffitt* (1974) 417 U.S. 600, 612. *Accord*, *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [recognizing due process right to present a complete defense].) "[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.)

The rule of *Mathews* has been followed by court around the country. When a state trial court refuses to properly instruct on a defense recognized by state law and supported the evidence, constitutional error has occurred. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1991, 1098-1099; *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 852; *Davis v. Strack* (2nd Cir. 2002) 270 F.3d 111, 116; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734; *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 743; *Clemons v. Delo* (8th Cir. 1999) 177 F.3d 680, 685; *Everette v. Roth* (7th Cir. 1993) 37 F.3d 257, 261; *Whipple v. Duckworth*

(7th Cir. 1995) 957 F.2d 418, 423, overruled on other grounds, *Eaglin v. Welborn* (7th Cir. 1997) 57 F.3d 496; *Woods v. Solem* (8th Cir. 1989) 891 F.2d 196, 199; *Bashor v. Risley* (9th Cir. 1984) 730 F.2d 1228, 1240; *Tyler v. Wyrick* (8th Cir. 1980) 635 F.2d 752.)

That is just what happened here. As discussed above, pursuant to *Duncan*, *Meyers*, *Stansbury* and *Raley*, a jury can give life even in the absence of mitigating evidence. By any definition, then, this basic concept is a legitimate state law defense to imposition of capital punishment. As such, pursuant to the federal authorities discussed above, it violated Due Process for the trial court to refuse to instruct the jury on the defense set forth in *Duncan*, *Stansbury* and *Raley*.

The court's ruling also violated the Eighth Amendment, which entitles a defendant in a capital case to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. Accordingly, that amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *see also*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428, *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The Eighth Amendment requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a

defendant shall live or die," *Gregg v. Georgia* (1976) 428 U.S. 153, 190, (joint opinion of Stewart, Powell, and Stevens, JJ.), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination." (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Pursuant to these principles, the trial court's refusal to advise the jury it could give life even in the absence of mitigation violated the Eighth Amendment. Under state law, the jury *was* entitled to impose a life without parole sentence even if there was no mitigating evidence. But despite defense counsel's specific request, the jury in this case was never told of this aspect of state law. Instead, the only instruction given to the jurors advised them to decide Mr. Grimes's fate by considering the aggravation and mitigation and deciding whether "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (41 RT 10889.) Nothing in this instruction advised any of the jurors of the option of imposing life even if they found no mitigation at all; in fact, the plain language of the instruction *required* the existence of mitigation in order to perform a comparison. The trial court's refusal to explain this option violates the Eighth Amendment precisely because it fundamentally undercuts the reliability of the jury's subsequent death sentence.

Whether the error is analyzed under the Due Process Clause, or the Eighth Amendment, the result is the same. Since this is an error of constitutional dimension, the

state has the burden of proving the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 384 U.S. at p. 24.) Although the circumstances of this crime were undeniably tragic, the case does not present the type of unusually heinous crime the Court often sees giving rise to a death sentence. (*See, e.g., In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) In contrast to these egregious cases, this case involves a single homicide committed during a robbery.

And perhaps even more important, by the state's own admission the defendant in this case did not kill the victim. Mr. Grimes was not the actual killer; he was an aider and abettor to the underlying felony. As the Court knows, imposition of death on an aider and abettor who did not kill, and who may not even have intended to kill, is unusual. (*See, e.g., Enmund v. Florida* (1982) 458 U.S. 782, 794-796 (noting that of the 362 executions since 1954, only six involved an accomplice who did not actually assault the murder victim, and of the then 739 people on death row with sufficient information to evaluate the case, only 41 did not actually assault the murder victim).

Finally, this case does not involve the type of particularly heinous defendant the Court often sees in death penalty cases. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313,

330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, although Mr. Grimes's past was certainly not blameless, his criminal history simply does not compare to these other defendants.

In short, the record here shows a single homicide, committed during a burglary/robbery. By the state's own admission, Mr. Grimes was not the actual killer, but only an aider and abettor. Indeed, the jury may not even have found an intent to kill. On such a record, the state will be unable to establish that the trial court's refusal to accurately instruct the jury it could give life even in the absence of mitigating evidence was harmless. Reversal of the penalty phase is required.

C. Neither *People v. Hines* (1997) 15 Cal.4th 997 Nor *People v. Beeler* (1995) 9 Cal.4th 953 Compel A Contrary Result.

In *People v. Hines* (1997) 15 Cal.4th 997, this Court upheld a trial court's refusal to provide an instruction which, in part, would have told the jury it need not impose death even if aggravation substantially outweighed mitigation. (*Id.* at p. 1070.) Similarly, in *People v. Beeler* (1995) 9 Cal.4th 953, the Court upheld a trial court's refusal to instruct the jury it could return a life verdict even where the aggravating evidence outweighed the

mitigating evidence. (*Id.* at p. 997.)

Neither case controls the outcome here. In *Hines*, the trial court refused to give an instruction which would have told the jury it could not consider aggravating factors unless the jury had been instructed about them, it could consider any mitigation whether or not included in the instructions, it could consider pity and sympathy and it need not impose death even if aggravation substantially outweighed mitigation. (15 Cal.4th at p. 1069-1070.) On appeal, defendant argued the refusal violated defendant's rights under *Hicks v. Oklahoma* (1980) 447 U.S. 343. (*People v. Hines*, S006640, Appellant's Opening Brief at p. 220.) Defendant did not raise a *Mathews*-based Due Process attack at all in *Hines*, nor did he specifically argue the trial court's refusal to provide the language regarding the jury's ability to give life violated the Eighth Amendment. (*Ibid.*) And in rejecting his claim on appeal, this Court did not discuss either *Mathews* or the Due Process Clause/Eighth Amendment implications of the trial court's ruling. (15 Cal.4th at p. 1070.) Cases are, of course, not authority for propositions not presented or discussed. (*See People v. Williams* (2004) 34 Cal.4th 397, 405; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 581; *General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 114.)

Similarly, in *Beeler* the trial court refused to instruct the jury it could impose life even when aggravation outweighed mitigation "because your sympathy or compassion for the defendant or for his family, or any other single mitigating factor, can, standing alone,

justify a sentence of life imprisonment without the possibility of parole." (9 Cal.4th at p. 997.) The Court rejected defendant's claim of error, but did not discuss either the Due Process clause or the Eighth Amendment. (9 Cal.4th at p. 997.) Instead, the Court cited page 842 of its earlier decision in *People v. Edwards* (1991) 54 Cal.3d 787, where it rejected a similar claim. (9 Cal.4th at p. 997.) Significantly, however, the Court in *Edwards* also did not discuss either a Due Process or Eighth Amendment claim in its analysis. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 842.) Since cases are not authority for propositions not considered or discussed, *Beeler* does not compel rejection of the Due Process and Eighth Amendment arguments made here either. (*See People v. Williams*, *supra*, 34 Cal.4th at p. 405; *Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 581.)[26]

In short, neither *Beeler* nor *Hines* dictate the result in this case. Under state law, Mr. Grimes was entitled to have the jury told it could impose life even in the absence of mitigation. The trial court's refusal to give this instruction violated Due Process under both the state and federal constitutions. Because the state cannot prove the error harmless, reversal of the death sentence is required.

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[26] To the extent this Court finds that *Beeler* and *Hines* control the Due Process and Eighth Amendment claims here, and for the reasons explained above, those cases are wrongly decided and should be reconsidered. In this situation, Mr. Grimes is re-raising these issues here to preserve his rights to further review. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].)

XV. BECAUSE THE JURY WAS NEVER INSTRUCTED IT COULD NOT RELY ON ACCOMPLICE ANNA CLINE'S PRIOR STATEMENTS TO POLICE UNLESS THOSE STATEMENTS WERE CORROBORATED, OR THAT THESE STATEMENTS SHOULD BE VIEWED WITH CAUTION, THE PENALTY PHASE VERDICT MUST BE REVERSED.

A. The Relevant Facts.

On September 3, 1985, Anna Cline along with Mr. Grimes robbed James Leonard in his home. (36 RT 9583.) Both Mr. Grimes and Cline later pled guilty to residential robbery. (36 RT 9588; 28 CT 8374.) At the penalty phase, the state introduced testimony about this crime as aggravating evidence under Penal Code section 190.3, subdivision (b). (41 RT 10819-10820.)

Christine Little was Mr. Grimes's probation officer in the 1985 offense. (36 RT 9608.) At the penalty phase of trial, Little testified that shortly after he pled guilty to the residential robbery Mr. Grimes told her all about the robbery. (36 RT 9608.) According to Mr. Grimes, the robbery was Cline's idea. (36 RT 9609.) Cline got Leonard to open his door, then Mr. Grimes entered the home with a pipe wrapped in a towel, along with three shotgun shells in his belt, all to simulate a gun. (36 RT 9609.) He also had pieces of rope to tie up Leonard. (36 RT 9609.) He then took $130 or $140 from Leonard's wallet. (36 RT 9510.) On the way out of the home, Mr. Grimes apologized to Leonard. (36 RT 9613.) He and Cline then bought heroin to use inside a motel room together. (36

RT 9610.)

Anna Cline also testified at the penalty phase. She confirmed Mr. Grimes's statements to probation officer Little, admitting that the robbery was her idea. (36 RT 9584.) She took care of Leonard's wife and knew that Leonard had just sold a car for $300 that day. (36 RT 9584.) She and Mr. Grimes needed money for more drugs. (36 RT 9584.) They agreed ahead of time not to hurt anyone, entered Leonard's home with a pipe wrapped in a towel to resemble a gun, tied up Leonard, got the money and left. (36 RT 9585, 9601.) Nobody was hurt. (36 RT 9585.)

The next day, Cline was arrested and immediately spoke to police about her and Mr. Grimes's involvement in the crime. (36 RT 9588.) Thirteen years later, by the time of Mr. Grimes's 1998 trial, Cline did not recall any details about this statement. (36 RT 9581-9589.)

The state therefore introduced Cline's statement to police made the day after the robbery. According to detective Roy Cash, Cline said that she met "Slow" the day before the robbery; they spent the night together. (38 RT 10014.) The next day, she went to Leonard's house to prostitute herself for money to obtain drugs. (38 RT 10014.) Mr. Grimes waited in the car while she went inside Leonard's house. (38 RT 10014.) Suddenly Mr. Grimes "came busting inside the house and forced her to help him rob

[Leonard]." (38 RT 10014.)[27]

The state also introduced Cline's statements made eleven years later to Sergeant Michael Ashmun. Cline told Ashmun that she was still angry with Grimes because "he rolled over on her when they got busted." (36 RT 9711.) She thought he had only received county jail time. (36 RT 9712.) She looked at talking to Ashmun as "my pay back for what he did to me . . . ." (36 RT 9712.)

According to Cline, she knew Leonard had money and "when we ran out of dope, I suggested it and that's how we ended up getting it." (36 RT 9715.) In this "pay back" version of events, Cline told Ashmun (1) it was Mr. Grimes's idea to make the pipe look like a gun, (2) Mr. Grimes struggled with Leonard, who had refused to give up the money, (3) after Leonard was tied up, Mr. Grimes "wanted to hurt the old man and take money from him" and (4) she told Mr. Grimes "not to do it" and "she didn't want to hurt the old man, so [Mr. Grimes] didn't." (36 RT 9705-9706.) According to Ashmun, Cline

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[27] Detective Cash also testified about Mr. Grimes's statements about the crime. (38 RT 10017.) On the day after the robbery, Mr. Grimes told Cash that he had met Cline the night before; they went to various places where she had prostituted for money so they could buy drugs. (38 RT 10017.) Cline eventually took Mr. Grimes to Leonard's home so she could make an "easy $20." (38 RT 10017.) After Leonard let them inside the home, Cline prostituted herself with Leonard while Mr. Grimes watched. (38 CT 10017-10018.) Afterwards, when Leonard went into the bathroom, Cline took money from Leonard's wallet. (38 RT 10018.) Leonard came out of the bathroom, caught Cline in the theft, and got irate. (38 RT 10018.) Mr. Grimes took out a ratchet he had in his pocket, threatening Leonard. (38 RT 10018.) He tied Leonard up on the bed, then he and Cline left with the money to go buy drugs. (38 RT 10019.)

gave the distinct impression that the entire robbery was "Gary's idea." (36 RT 9714.)

On this record, and as the trial court itself found, "Anna Cline was, without question, an accomplice to the '85 robbery burglary." (39 CT 10402.) After all, Cline committed the robbery alongside Mr. Grimes and both were later convicted of the very same charge of residential robbery. Accordingly, defense counsel sought the panoply of instructions relating to accomplice witnesses, including instructions that both Cline's testimony and her prior statements to police should be "viewed with caution" and needed to be corroborated. (39 RT 10401. *See* CALJIC 3.11 [jury cannot rely on accomplice testimony unless "corroborated" and testimony includes "out-of-court statements purportedly made by an accomplice"]; CALJIC 3.18. ["[t]o the extent that an accomplice gives testimony that tends to incriminate [the] defendant" jury should view that testimony "with caution"].)

The trial court agreed to instruct the jury that Cline's prior statements to police should be "viewed with caution." (39 RT 10402, 10406.) According to the court, "her prior inconsistent statements . . . were introduced for the purpose of showing the extent and nature of his [involvement]" and "[t]hose are the facts and circumstances relating to the '85 burglary robbery" which "have not been adjudicated." (39 RT 10403.) Likewise, the court also agreed that "her testimony should be viewed with caution." (39 RT 10404.) But relying on this Court's decisions in *People v. Easley* (1988) 46 Cal.3d 712, and

People v. Williams (1997) 16 Cal.4th 153, and because Mr. Grimes had pled guilty to residential robbery, the trial court refused to tell the jury it could not rely on Cline's testimony and prior statements unless they were corroborated. (39 RT 10402-10404.)

The trial court asked defense counsel to submit instructions which reflected the court's ruling. (39 RT 10405-10406.) Defense counsel submitted written instructions. (4 SCT 25-26.) Consistent with the court's ruling, these instructions told the jury that (1) Cline "was an accomplice as a matter of law" and (2) "[t]o the extent that an accomplice gives *testimony* that tends to incriminate the defendant, it should be viewed with caution." (4 SCT 25, 26 [emphasis added]. *See* CALJIC 3.16, 3.18.) Yet although the trial court had ruled that Cline's prior statements also should be viewed with caution, defense counsel inexplicably failed to submit a standard instruction which would have explained that for purposes of the instruction that "testimony" of an accomplice should be viewed with caution, the term "testimony" included prior statements to police. (*See* CALJIC 3.11 [defining testimony as "including out-of court statements purportedly made by an accomplice"]. *Accord, People v. Carter* (2003) 30 Cal.4th 1166 [jury must be instructed that "out-of-court statements to police by accomplices" should be viewed with caution].)

Of course, the prosecutor knew full well the value of Cline's prior statements to police. In closing argument, the prosecutor urged the jury to "look at defendant's behavior to determine his mental condition." (41 RT 10812.) According to the

prosecutor, "that's the most telling thing about the defendant" and his behavior "disproves the doctors' opinions as to what his impairments are." (41 RT 10812.) The prosecutor then repeatedly relied on Cline's prior statements to police regarding the Leonard robbery. According to the prosecutor, and directly contrary to the defense position that Mr. Grimes "was a follower" and a "hyperactive, impulsive person" who "had a borderline IQ," these statements proved that Mr. Grimes was actually "not a follower," but "a leader" who was "able to plan," and "was smart enough to blame other people for the crimes that he committed." (41 RT 10812, 10813, 10814, 10877-10878.)

As more fully discussed below, the errors here are two-fold. First, the trial court erred in denying defense counsel's request for instructions which would have precluded jurors from relying on Cline's prior statements to police unless this evidence was corroborated. Because the trial court itself recognized that this evidence "ha[d] not been adjudicated," this Court's decisions in *Easley* and *Williams* simply did not apply. Second, although the court granted defense counsel's request to instruct the jury to view Cline's pre-trial statements with caution, defense counsel erroneously failed to include such an instruction when he submitted instructions to the court, and the jury was never told of this important limitation. Because Cline's prior statements to police were key to the prosecutor's argument that Mr. Grimes should die, reversal of the penalty phase is required.

B. The Trial Court's Refusal To Instruct The Jury That It Could Not Rely On Cline's Prior Statements To Police Unless The Statements Were Corroborated Violated Both State And Federal Law.

1. The trial court erred in denying defense counsel's request for instructions telling the jury it could not rely on Cline's prior statements to police unless corroborated; in fact, the court had a *sua sponte* duty to give such an instruction.

Penal Code section 1111 governs the treatment of accomplice testimony, providing that a conviction may not be based upon such testimony unless it is corroborated:

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

By its own terms, of course, section 1111 is applicable only to accomplice testimony, not prior statements of accomplices. Nonetheless, this Court has invoked "the basic principle that legislative intent prevails over literal construction" to hold an accomplice's prior statement is testimony within the meaning of section 1111. (*People v. Belton* (1979) 23 Cal.3d 516, 526.) Thus the corroboration requirement of section 1111 applies not just to accomplice testimony, but also "to an accomplice's out-of-court statements when such statements are used as substantive evidence . . . ." (*People v. Andrews* (1989) 49 Cal.3d 200, 214.)

"It is well-settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Martin* (1970) 1 Cal.3d 524, 531.)

Consistent with this principle, a trial court has a *sua sponte* duty to instruct the jury on the pertinent principles of accomplice testimony if the accomplice was "liable for prosecution for the identical offense charged against [the defendant]." (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, *citing People v. Guian* (1998) 18 Cal.4th 558, 579, n.1. *See also People v. Gordon* (1973) 10 Cal.3d 460; *People v. Bevins* (1960) 54 Cal.2d 71; *People v. Warren* (1940) 16 Cal.2d 103.) This Court has repeatedly required instructions on the necessity of accomplice corroboration instructions in connection with accomplice testimony at the penalty phase of capital cases. (*See, e.g., People v. Mincey* (1992) 2 Cal.4th 408, 461; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815; *People v. McClellan* (1969) 71 Cal.2d 793, 807-808; *People v. Miranda* (1987) 44 Cal.3d 57, 100;.) According to the Court, "when the prosecution seeks to introduce evidence of the defendant's unadjudicated prior criminal conduct, the jury should be instructed at the penalty phase that accomplice testimony must be corroborated." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 461.)

Here, the trial court itself recognized that Cline was "without question" an accomplice. (39 CT 10402.) She committed the 1985 robbery alongside Mr. Grimes. She was later convicted of the very same offense -- residential robbery -- as Mr. Grimes. (36 RT 9588.) Pursuant to *Mincey*, *Varnum*, *McClellan* and *Miranda*, the court had a *sua sponte* duty to fully instruct the jury it could not rely on Cline's prior statements to police unless this evidence was corroborated. Accordingly, the trial court's refusal to give this instruction on defense counsel's timely request was clear error.

2. This Court's decisions in *Easley* and *Williams* confirm the necessity of corroboration instructions in this case.

As mentioned above, the trial court refused to give a corroboration instruction here in light of this Court's decisions in *People v. Easley*, *supra*, 46 Cal.3d 712 and *People v. Williams*, *supra*, 16 Cal.4th 153. (39 RT 10402-10404.) In *Easley*, recognizing its prior decisions in *Varnum*, *McClellan* and *Miranda*, the Court noted it "ha[s] required corroboration of accomplice testimony at the penalty phase" where "the prosecution sought to introduce evidence of *unadjudicated* prior criminal conduct. (46 Cal.3d at p. 734 [emphasis added].) But the Court then held that an accomplice's testimony that a defendant committed a crime did *not* require corroboration where defendant's guilt of the crime *had* been previously *adjudicated* and "a jury ha[s] already found defendant guilty, beyond a reasonable doubt." (46 Cal.3d at p. 734.) The Court later reiterated these same principles in *Williams*. (16 Cal.4th at p. 276.)

Of course this makes perfect sense. If an accomplice testifies or otherwise gives a statement that defendant committed a prior crime, no corroboration is necessary where the crime had already been fully adjudicated and a jury found defendant committed the crime beyond a reasonable doubt. The same would presumably be true if the defendant entered a plea and freely admitted he committed the crime. Thus, if the prosecutor here had only sought to introduce Cline's testimony or prior statement that she and Mr. Grimes had previously committed a residential robbery, no corroboration would be necessary because Mr. Grimes had already admitted committing the robbery.

But that is not what happened here. As the trial court itself found, the prosecutor also introduced Cline's prior statements "for the purpose of showing the extent and nature of his [(Grimes') involvement] and "[t]hose are the facts and circumstances relating to the '85 burglary robbery" which "have not been adjudicated." (39 RT 10403.) Indeed, the prosecutor went well beyond relying on Cline's statements to prove the prior conviction -- statements which would not have required corroboration under *Easley* and *Williams*. Instead, the prosecutor went further and introduced Cline's specific statements about how the 1985 crime occurred, including her statements that (1) it was Mr. Grimes who "forced her to rob [Leonard]," (2) Mr. Grimes struggled with Leonard and "wanted to hurt the old man" and (3) gave police the overall impression that the robbery was "Gary's idea." (36 RT 9705-9706, 9714; 38 RT 10014.) Of course as the trial court itself recognized, none of these facts had been previously adjudicated by Mr. Grimes's plea or otherwise

admitted by Mr. Grimes. On this record, under this Court's decisions in *Easley*, *Williams*, *Mincey*, *Varnum*, *McClellan* and *Miranda*, the trial court was required to instruct the jury that Cline's testimony -- along with her prior statements to police -- must be corroborated.

3. Because the evidence did not sufficiently corroborate Cline, and because the prosecutor heavily relied on Cline's prior statements to police to urge the jury to return a verdict of death, the trial court's error requires reversal of the penalty phase.

As explained, under state law, Mr. Grimes was entitled to instructions which told the jury it could not rely on Cline's prior statements to police unless the evidence was corroborated. Thus the trial court's failure to give these instructions plainly violated state law and, as a consequence, the due process clause. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [arbitrary deprivation of state law right violates Due Process]. In addition, since state law permitted Mr. Grimes to urge the jury to reject Cline's statements because they were uncorroborated, the trial court's refusal to instruct on this line of defense affirmatively interfered with Mr. Grimes's ability to present a defense to the jury that was fully recognized by state law, in violation of the Fifth Amendment right to present a defense and the Sixth Amendment right to a jury trial. (*See, e.g., Simmons v. South Carolina* (1994) 512 U.S. 154 [at penalty phase of capital trial, jury was instructed not to consider parole; held, instruction violated due process where defense theory was that defendant would never be paroled]; *People v. Mize* (1889) 80 Cal. 41, 44-45 [defendant charged with murder, defense presented evidence of self-defense, jury instructed it could

find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], overruled on other grounds in *Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

The trial court's refusal to give the corroboration instruction also violated the Eighth Amendment, which imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [plurality opinion of Stewart, Powell, and Stevens, JJ.]; *see also*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428, *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The Eighth Amendment requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," (*Gregg v. Georgia* (1976) 428 U.S. 153, 190 [joint opinion of Stewart, Powell, and Stevens, JJ.]), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination." (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Pursuant to these principles, the trial court's failure to give the requested corroboration instructions violated the Eighth Amendment. Under state law, the jury simply could not rely on Cline's prior statements to police unless this evidence was

corroborated. The trial court's refusal to explain this to the jury violates the Eighth Amendment precisely because it undercut the reliability of the evidence which resulted in the jury's subsequent death sentence.

Whether the error is analyzed under the Fifth Amendment, the Sixth Amendment or the Eighth Amendment is of no import. Under any framework, the error is subject to the so-called *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California*, *supra*, 386 U.S. at p. 24.) But even if this Court were to solely focus on the state law error, and apply the state's lower standard of prejudice, reversal would still be required. (*See People v. Watson*, *supra*, 46 Cal.2d 818.)

"[T]he failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record." (*People v. Miranda*, *supra*, 44 Cal.3d at p. 100.) The corroborating evidence must "tend[] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth . . . ." (*People v. Thurman* (1972) 28 Cal.App.3d 725, 729.)

Here, Cline testified that (1) she and Mr. Grimes committed the Leonard robbery, (2) both agreed that no one would be hurt and (3) it was all her idea. (36 RT 9584-9585,

9601.) Of course this testimony was entirely corroborated. Mr. Grimes not only pled guilty to residential robbery, but later admitted to probation officer Little that (1) he and Cline committed the robbery, (2) no one was hurt and he actually apologized to the victim, and (3) it was Cline's idea. (36 CT 9609-9611, 9613.) There was simply no harm in failing to instruct the jury that Cline's *testimony* must be corroborated.

Cline's prior statements to police are another story. Under the version Cline gave to police (1) Mr. Grimes "came busting inside the house and forced her to help him rob [Leonard]," (2) Mr. Grimes's struggled with the victim and "wanted to hurt the old man and take money from him," and (3) it was "Gary's idea." (36 RT 9705-9706, 9714; 38 RT 10014.) But in stark contrast to Cline's testimony, no evidence whatsoever corroborated this version of events. On this record, under state law, the jury simply could not rely on these uncorroborated statements in its calculus to determine whether death was appropriate. But the jury was never told this.

And the prosecutor's argument exacerbated the error. As noted above, the prosecutor urged the jury to "look at defendant's behavior to determine his mental condition." (41 RT 10812.) The prosecutor relied on Cline's statements to directly rebut the defense theory that Mr. Grimes "was a follower" and a "hyperactive, impulsive person" who "had a borderline IQ." According to the prosecutor, Cline's prior statements to police about the Leonard robbery proved that Mr. Grimes was actually "not a

follower," but "a leader" who was "able to plan," and "was smart enough to blame other people for the crimes that he committed." (41 RT 10812, 10813, 10814, 10877-10878.)

Moreover, as explained in Argument XIV-B, this was not a case where the aggravating evidence regarding the crime and the defendant was so aggravating that death was a foregone conclusion. As noted there, while the homicide here (as in virtually every homicide) was tragic, the fact of the matter is that defendant was *not* the actual killer. In addition, and in comparison to many capital cases this Court sees which often involve multiple murders or murders combined with depraved sexual acts, this crime involved a single homicide committed by someone other then defendant during a robbery. Finally, although Mr. Grimes had not led a blameless past, this was not a case where the defendant had a history of prior murders.

On such a record as this, where no evidence corroborated Cline's prior statements to police, and where the prosecutor heavily relied on this evidence to urge the jury to reject the defense theory of the case and impose death, the error cannot be deemed harmless under any standard of prejudice. Reversal of the penalty phase verdict is required.

XVI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND DEPRIVED MR. GRIMES OF HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO RULE ON THE ADMISSIBILITY OF KEY EVIDENCE PRIOR TO VOIR DIRE.

A The Relevant Facts.

The state charged Mr. Grimes with capital murder. Prior to trial, the state provided a notice detailing the aggravating evidence it would present at the penalty phase. (4 CT 612-614.) This notice referenced a number of acts which involved "the use or attempted use of force or violence or the express or implied threat to use force or violence," including five criminal incidents occurring in December 1993, December 1995, March 1996, December 1996 and January 1998. (4 CT 613-614.)

In July of 1998 -- two months before voir dire began -- defense counsel asked for a hearing to determine whether the prosecution had sufficient evidence to prove these five incidents. (4 CT 704.) Counsel pointed out that this Court required the notice of aggravation to occur "prior to voir dire" so counsel could conduct voir dire "with adequate knowledge of the facts that will be presented as to the issue of penalty . . . ." (4 CT 711.) Accordingly, counsel argued that a refusal to hold such a hearing prior to voir dire would violate Mr. Grimes's "federal constitutional rights to due process, an impartial jury, and a reliable determination of penalty as guaranteed by the Fifth, Sixth, Eighth and

Fourteenth Amendments." (4 CT 711.)

The trial court addressed this motion prior to voir dire, indicating it would require an offer of proof from the prosecutor sometime before the penalty phase and it would then determine if a hearing was required. (4 RT 2089-2090.) Defense counsel reiterated his concern that "having a ruling prior to voir dire would be appropriate . . . ." (4 RT 2090.) Counsel explained there "might be issues in voir dire that we want to address that may have some relationship to what evidence is going to come in." (4 RT 2090.) The trial court refused to hold a hearing prior to voir dire, stating it did not want to be "constrained to rule on every significant piece of evidence that might come in in the second phase of the trial in order to better enable everyone to handle voir dire." (4 RT 2090.)

Voir dire began several days later on September 1, 1998. (9 RT 3142.) In light of the court's ruling, defense counsel did not ask any of the jurors ultimately selected in the case even a single question on any of the violent acts. (10 RT 3404-3408 [Juror 27096]; 10 RT 3499-3502 [Juror 27244]; 11 RT 3723-3736 [Juror 27168]; 12 RT 3813-3825 [Juror 26909]; 13 RT 4079-4082 [Juror 26529]; 13 RT 4115-4122 [Juror 26921]; 13 RT 4140-4146 [Juror 27315]; 14 RT 4372-4380 [Juror 26808]; 14 RT 4538-4549 [Juror 26778]; 17 RT 5029-5036 [Juror 24777]; 17 RT 5116-5122 [Juror 28638]; 17 RT 5141-5146 [Juror 27417]; 18 RT 5310-5316]; 19 RT 5447-5453 [Juror 27551]; 19 RT 5464-

5469 [Juror 27541]; 19 RT 5509-5529 [Juror 26550]; 20 RT 5674-5678 [Juror 27546]; 22 Rt 6170-6176 [Juror 29824].)

As the trial court promised, after the guilt phase verdict -- but prior to the penalty phase -- the trial court returned to the question of the prior criminal conduct. In connection with the five incidents which were the subject of defense counsel's motion, the court ruled admissible the December 1993, December 1995 and January 1998 incidents but inadmissible the March 1996 and December 1996 incidents. (35 RT 9412-9465; 36 RT 9471-9482, 9517-9518.) Of the three incidents ruled admissible, the prosecutor ultimately introduced evidence of one: the December 1993 incident. (36 RT 9632-9648.)

It is fair to say this incident was important to the state's case. The state called prosecution witness Marie McCosker. Ms. McCosker testified she was Mr. Grimes's girlfriend in 1993. (36 RT 9633.) They had bought a car together; she wanted to take the car to see one of her children. (36 RT 9633.) They argued. (36 RT 9633-9634.) He choked her, grabbed the keys, got in the car with her and drove 20 minutes to Modesto. (36 RT 9634-9635.) He held her down by the neck during the entire drive. (36 RT 9636.) Police arrested him in Modesto (36 RT 9633-9643.)

The prosecutor urged the jury to consider this evidence in deciding whether Mr.

Grimes should die. In urging the jurors to impose death, the prosecutor briefly reprised the circumstances of the crime. (41 RT 10817-10819.) The prosecutor turned to December 1993 assault and kidnaping of Ms. McCosker, and urged the jury to consider the "crime itself and how violent it was . . . ." (41 RT 10822.) The prosecutor also urged the jury to consider "the striking similarity as to the choking that we have in this case." (41 RT 0822.) Because the trial court had refused to rule on the admissibility of this evidence prior to voir dire, however, defense counsel's voir dire had not covered this incident at all. As more fully discussed below, this denied Mr. Grimes both his right to an impartial jury and his right to the effective assistance of counsel at jury voir dire.

B. The Trial Court's Refusal To Decide Prior To Voir Dire Which Prior Criminal Acts Were Admissible Violated Mr. Grimes's Constitutional Right To An Impartial Jury.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to a jury trial. This right necessarily includes the right to trial before a fair and impartial jury. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508; *People v. Diaz* (1951) 105 Cal.App.2d 690, 697.) Trial by an impartial jury is a right basic to our system of justice. (*Irvin v. Dodd* (1961) 366 U.S. 717, 722.)

Pursuant to this fundamental principle, the Supreme Court has long made clear that

where a state procedure infringes upon a criminal defendant's right to an impartial jury, the defendant's subsequent conviction is unconstitutional and cannot stand. (*Groppi v. Wisconsin*, *supra*, 400 U.S. at pp. 508-509 [defendant was charged with a misdemeanor and sought a change of venue because of adverse pretrial publicity, state courts denied the motion because state law did not permit a venue change in misdemeanor cases, defendant was convicted: held, conviction reversed because the Sixth Amendment guarantee of a jury trial requires state to afford procedures which ensure a fair and impartial jury]; *Ham v. South Carolina* (1972) 409 U.S. 524 [black defendant charged with narcotics violation, defense lawyers precluded from questioning jurors on racial prejudice, defendant was convicted: held, reversal required because state did not afford procedures designed to ensure a fair and impartial jury]; *Morford v. United States* (1950) 339 U.S. 258, 259 [criminal conviction reversed where the defendant was not allowed to voir dire the jury on possible prejudice caused by his membership in the Communist party]; *Aldridge v. United States* (1931) 283 U.S. 308.)

Groppi, *Ham* and *Morford* recognize that the right to an impartial jury carries with it the right to take reasonable steps to ensure that the jury is impartial. The Court has also recognized that one such step, the right to challenge jurors, is "one of the most important of the rights secured to the accused." (*Pointer v. Texas* (1894) 151 U.S. 396, 408.) "Any system for the empaneling of a jury that [prevents] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." (*Id.*) As the Fifth Circuit

Court of Appeals has noted in this exact context, "[a] defendant does enjoy a federal constitutional right to a trial before a fair and impartial jury, with the concomitant right to peremptory challenge a limited number of prospective jurors in the selection proceedings." (*Moreno v. Estelle* (5th Cir. 1983) 717 F.2d 171, 179, cert. denied, 466 U.S. 975 (1984).)

As a practical matter, the right to challenge jurors has little meaning without the right to ask questions on voir dire. (*Swain v. Alabama* (1965) 380 U.S. 202, 221.) "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." (*Dennis v. United States* (1950) 330 U.S. 162, 171-172.) It is thus unquestionable that jury voir dire is indispensable to the right to an impartial jury. As the Supreme Court has held, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 730 [error for trial court to preclude inquiry into whether jurors would automatically vote for death].)

Moreover, not only does voir dire expose actual bias, but through the peremptory challenge counsel is able to weed out those jurors who harbor unspoken prejudice against the accused. As this Court noted in *People v. Crowe* (1973) 8 Cal.3d 815, 831, n. 31, "[a]lthough each of the jurors asserted that he knew of no reason why he could not serve as an impartial juror, such assertions do not eliminate the necessity for additional

reasonable inquiry to uncover concealed or subtle bias." It is because most people are unwilling to confess they are biased or partial that the peremptory challenge has been described as one of the most effective safeguards of the right to trial by an impartial jury. (*Swain v. Alabama*, *supra*, 380 U.S. at p. 219-221; *People v. Williams* (1981) 29 Cal.3d 392, 405.) As with the challenge for cause, the peremptory challenge is useless unless counsel has had an opportunity to *meaningfully* examine the jurors fully on issues which may be a source of bias or prejudice. (*United States v. Rucker* (4th Cir. 1977) 557 F.2d 1046, 1049.)

To be meaningful, of course, "the adequacy of *voir dire* examination must permit the defendant an 'opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause.'" (*Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661. *See also United States v. Sababu* (7th Cir. 1989) 891 F.2d 1308, 1325; *United States v. Hill* (6th Cir. 1984) 738 F.2d 152, 155; *United States v. Vargas* (1st Cir. 1979) 606 F.2d 341, 344; *United States v. Barnes* (2nd Cir. 1979) 604 F.2d 121, 124, cert. denied, 446 U.S. 907 (1980); *United States v. Rucker*, *supra*, 557 F.2d at p. 1049; *United States v. Segal* (3rd Cir. 1976) 534 F.2d 578, 581.) When the voir dire procedure deprives a criminal defendant of the right to intelligently exercise his peremptory challenges, reversal is required without a showing of prejudice. (*See, e.g., Knox v. Collins*, *supra*, 928 F.2d at p. 661; *United States v. Vargas*, *supra*, 606 F.2d at p. 344; *United States v. Rucker*, *supra*, 557 F.2d at p. 1049.)

In this case, the issue is whether the court improperly denied Mr. Grimes his right to conduct voir dire examination on a critical issue. Just like racial prejudice in *Ham*, or Communist Party membership in *Morford*, evidence of prior criminal activity presents a serious issue of impartiality for the jurors. Indeed, in the context of the guilt phase, this Court has long recognized that because evidence of prior crimes may be so prejudicial, and in order to ensure the constitutional right to trial before an impartial jury, defendants are entitled to inquire fully into possible prejudice resulting from introduction of other crimes evidence:

> "Whether or not a prospective juror will be influenced by knowledge of any such previous offense, whether he will be governed by the rule of law which rigidly excludes such a consideration, and whether or not if chosen as a juror, he will obey an instruction by the court to dismiss from his mind all consideration of any separate and different offense of which he may have obtained knowledge in any way, [except for the limited purpose for which the evidence was admitted], is a question of vital importance to an accused person in the circumstances of the defendant here . . . . He had a right to inquire of the panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury." (*People v. Ranney* (1931) 213 Cal. 70, 75-76.)

Given the normative nature of the jury's decision whether a defendant lives or dies, the presence of prior violence may be equally critical to the penalty phase. Indeed, here the trial court itself agreed this evidence was "significant" to the state's case. (4 RT 2090.) But the court went on to rule it did not "want to be constrained" to ruling on the admissibility of such evidence "in order to better enable everyone to handle voir dire." (4

RT 2090.) This effectively deprived defense counsel of any opportunity to question jurors about how they would treat this important evidence. And as the prosecutor's closing argument would later prove, this was one of the most prejudicial and important aspect of the state's case in aggravation.

As a practical matter, without such questioning of the jurors Mr. Grimes was not only precluded from an opportunity to ask questions to see if any of the jurors should be struck for cause because they would not consider mitigation in this situation, but he was also deprived of an "opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause." (*Knox v. Collins*, *supra*, 928 F.2d at p. 661.) Without the ability to meaningfully and intelligently exercise these challenges, defense counsel's ability to ensure a fair and impartial trial was fatally compromised. Reversal of the penalty phase is required.

C. The Trial Court's Refusal To Decide Which Prior Criminal Acts Were Admissible Prior To Voir Dire Deprived Mr. Grimes Of The Effective Assistance Of Counsel.

The Sixth Amendment right to counsel guarantees criminal defendant's the effective assistance of counsel at all critical stages of the proceedings. (*Coleman v. Alabama* (1970) 399 U.S. 1, 9-10.) Given the fundamental role played by defense counsel in ensuring a reliable result, the right to counsel is not satisfied by the mere

appointment of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668.) Instead, the Sixth Amendment requires counsel "who plays the role necessary to ensure that the trial is fair." (*Id.* at p. 685.)

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

Alternatively, state interference can cause even the most diligent of counsel to be unable to play the role necessary to ensure a fair trial. Thus, a trial court may itself violate a defendant's right to the effective assistance of counsel by rulings which interfere with the ability of counsel to represent his client. (*Id.*; *accord Geders v. United States* (1980) 425 U.S. 80 [trial court precludes defense counsel from consulting with defendant during an overnight recess in trial; held, Sixth Amendment right to counsel violated]; *Herring v. New York* (1975) 422 U.S. 853 [trial court refused to allow counsel to make closing argument in bench trial; held, Sixth Amendment violated]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 613 [after state rested, trial court required defendant to testify first or not at all; held, Sixth Amendment violated].)

The "state interference" strand of the Court's Sixth Amendment jurisprudence

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

The lower federal courts have recognized some of the varied instances in which a trial court can prevent counsel from rendering effective assistance of counsel. These cases confirm that a criminal defendant is denied his right to effective assistance of counsel whenever a trial court's rulings fundamentally interfere with the ability of counsel to properly represent that defendant. (*See, e.g.*, *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237; *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 460; *United States v. Harvill* (9th Cir. 1974) 501 F.2d 295, 295-296; *Wright v. United States* (9th Cir. 1964) 339 F.2d 578, 579; *Hintz v. Beto* (5th Cir. 1967) 379 F.2d 937, 942. *See Mudd v. United States* (D.C.Cir. 1986) 798 F.2d 1509, 1511-1512; *United States v. Green* (D.C. Cir. 1982) 680 F.2d 183, 189.) As the Fifth Circuit Court of Appeals has succinctly stated, "[t]he actions of the trial court may cause the ineffectiveness of counsel's assistance." (*Bradbury v. Wainwright* (5th Cir. 1983) 658 F.2d 1083, 1087.)

Of course, an impartial jury is a critical ingredient in any fair trial. Accordingly,

jury voir dire is considered a critical stage of the criminal proceedings at which a defendant is entitled to effective representation by counsel. (*People v. McGraw* (1981) 119 Cal.App.3d 582, 587; *People v. Locklar* (1978) 84 Cal.App.3d 224, 228.)

This Court recognized this very point in *People v. Daniels* (1991) 52 Cal.3d 815. There, the Court held that in a capital case, the state must provide the defense with notice of the aggravating evidence it will rely on to seek death *prior* to voir dire. The Court noted that a later disclosure (after voir dire) would deprive defendant "of the ability to conduct voir dire with adequate knowledge of the facts that will be presented on the issue of penalty as well as the issue of guilt." (52 Cal.3d at p. 879.) It would make no sense to require the state to give notice of aggravating evidence *before* voir dire (as this Court did in *Daniels*) to ensure defense counsel had a chance to adequately question the jury, yet permit trial courts to delay ruling on the admissibility of that aggravating evidence until *after* voir dire (as the trial court did here), thereby preventing adequate questioning.

Given the importance of voir dire to a fair trial, this Court has been vigilant in preventing trial courts from impeding either party's ability to exercise for-cause and peremptory challenges by substantive limits during the voir dire process. Parties are entitled to question prospective jurors to learn whether the juror's views about capital punishment would prevent or impair the juror's ability to return (1) "a verdict of death in the case before the juror" or (2) "a verdict of life without parole in the case before the

juror." (*People v. Cash* (2002) 28 Cal.4th 703, 719-720.) More specifically, a trial court acts improperly when it prevents defense counsel from establishing grounds for a for-cause challenge by asking prospective jurors whether they would automatically vote for death in light of particular aggravating evidence. (*See, e.g., People v. Cash, supra*, 28 Cal.4th at p. 720-722 [defendant charged with capital murder, state's case in aggravation included prior violent conduct, trial court precluded defense counsel from asking jurors whether they would automatically vote for death if the state presented this aggravating evidence; held, trial court's ruling was unconstitutional]. *See People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004-1005.)

Here, the state's notice of aggravation made clear its intent to rely on a number of different prior incidents involving violence. Defense counsel sought a ruling on the admissibility of these incidents "prior to voir dire" precisely so that he could question the jurors "with adequate knowledge of the facts that will be presented as to the issue of penalty . . . ." (4 CT 711.) But the trial court elected to delay its ruling because it did not want to be "constrained to rule on every significant piece of evidence that might come in in the second phase of the trial in order to better enable everyone to handle voir dire." (4 RT 2090.)

With all due respect, ruling in a timely fashion on the admissibility of "significant" penalty phase evidence so counsel can intelligently voir dire the jury was not something

the court should have been avoiding; it was something the court should have been doing. Just as in *Cash*, the court's ruling effectively precluded voir dire as to whether jurors could even consider mitigation in light of the aggravating evidence which would be admitted. If effectively precluded voir dire which, even if it did not reveal actual bias as the basis for a for-cause challenge, could have revealed sufficient bias for an intelligent exercise of a peremptory challenge. In short, the trial court's ruling here deprived Mr. Grimes of the effective assistance of counsel at jury voir dire. Reversal of the penalty phase is required.

XVII. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AND VIOLATED DUE PROCESS BY URGING THE JURY TO RETURN A DEATH VERDICT BECAUSE DEFENDANT DID NOT PRESENT EVIDENCE THE TRIAL COURT HAD EXCLUDED AT THE PROSECUTOR'S OWN REQUEST.

A. The Relevant Facts.

As explained in Argument XI-C, the prosecutor -- in her own words -- relied "primarily" on the testimony of Jonathan Howe in urging the jury to find Mr. Grimes had the requisite intent to kill. (35 RT 9212.) According to Howe, Mr. Grimes confessed to ordering Morris and Wilson to kill the victim. (31 RT 8380, 8381; 5 CT 1020.)

The defense theory was that Howe was lying. To attack Howe's credibility, the defense proffered evidence that Morris -- the actual killer -- alone made the decision to kill the victim and in fact, Mr. Grimes was shocked when it unexpectedly happened. The evidence came from Morris's own mouth. He told Albert Lawson that Mr. Grimes was "in the house but took no part in the actual killing and [was] in some other place in the house." (24 RT 6747, 6797.) Likewise, he told Misty Abbott that (1) Mr. Grimes "did not take part in the killing," (2) Mr. Grimes had not "participated in the killing" and (3) after he "did the lady" Mr. Grimes "looked at him as if [he was] saying, what in the hell are you doing, dude." (24 RT 6750, 6797.) Of course this evidence would have directly undercut Howe's testimony that Mr. Grimes ordered the killing.

Not surprisingly, the prosecutor vehemently objected to the admission of this evidence. (24 RT 6750-6753, 6759-6761, 6784-6791.) The trial court ruled the evidence inadmissible. (24 RT 6797.)

At the guilt phase, the prosecutor relied heavily on Howe's testimony in her closing argument to support the special circumstance allegations. (35 RT 9212-9214, 9293-9294.) The jury ultimately found these allegations true. (6 RT 1297.) At the penalty phase the prosecutor again relied heavily on Howe's testimony. According to the prosecutor, the jury should return a verdict of death because Howe's testimony left no "lingering doubt." (41 RT 10879-10880.)

The prosecutor then took it one step further. Despite having successfully kept from the jury substantial evidence from Morris that Howe was *not* telling the truth about Mr. Grimes ordering the killing, the prosecutor turned around and explicitly relied on the absence of this exact same evidence in her closing argument. In no uncertain terms, the prosecutor told the jury:

> "When the Defense talks about lingering doubt, Jonathan Howe is not a factor in it. *They've never given you a reason to doubt his testimony.*" (41 RT 10879-10880, emphasis added.)

As discussed below, this was patent misconduct. The prosecutor knew full well

that evidence *did* exist which would give the jury a very good reason to doubt Howe's testimony. Yet it was precisely because the prosecutor successfully moved to exclude this evidence that the defense had no way to respond to the prosecutor's argument. This violated due process and requires reversal of the verdict of death.

B. The Prosecutor's Arguments Constituted Gross Misconduct And Therefore Violated Mr. Grimes's Federal Due Process Rights To A Fair Trial.

When a prosecutor's closing argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process," she commits misconduct. (*Darden v. Wainwright* (1986) 477 U.S. 168, 170 (1986). Of course, one of the hallmarks of due process is providing a defendant a fair opportunity to meet the state's case against him. (*Crane v. Kentucky*, *supra*, 476 U.S. 683, 690.)

Pursuant to this principle, due process precludes a prosecutor from asking a jury to convict a defendant because he failed to present certain evidence without having given the defendant a full opportunity to present that evidence. (*See Simmons v. South Carolina* (1994) 512 U.S. 154; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5 n.1.) Applying the same principle, due process precludes a prosecutor from asking a jury to convict a defendant because he has failed to introduce evidence which the court has specifically excluded on the prosecution's own motion. (*Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1217-1218 ; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-144,

abrogated on other grounds, *Huddleston v. United States* (1988) 485 U.S. 681; *United States v. Toney* (6th Cir. 1979) 599 F.2d 787, 790-791; *State v. Bass* (N.C. 1996) 465 S.E.2d 334, 337-338; *People v. Doggett* (1990) 225 Cal.App.3d 751, 757-758 (1990); *People v. Varona* (1983) 143 Cal.App.3d 566, 570. *See Franklin v. Duncan* (N.D.Cal. 1995) 884 F.Supp. 1435, 1454 n.19, *aff'd. and adopted in full*, *Franklin v. Duncan* (9th Cir. 1995) 70 F.3d 75.) Because there is no way for a defendant to respond to such an argument, such arguments by prosecutors violate a petitioner's "constitutional rights . . . to rebut evidence and argument used against him . . . ." (*Paxton v. Ward*, *supra*, 199 F.3d at p. 1218.) Indeed, this type of argument is nothing short of "foul play." (*United States v. Toney*, *supra*, 599 F.2d at p. 790.)

The same rule applies here. Here, on the prosecutor's own motion, the trial court excluded evidence which showed Howe was lying. The prosecutor then filled this evidentiary gap with argument to the contrary. According to the prosecutor, because Howe testified that Mr. Grimes ordered the killing, and because there was no "reason to doubt his [Howe's] testimony," there could be no "lingering doubt." (41 RT 10879-10880.)

But as the prosecutor knew well, there *was* reason to doubt Howe's testimony. The only reason the jury did not hear this evidence was because the prosecutor herself had kept it out by objection. The prosecutor's reliance on the absence of evidence she herself

had moved to exclude violated Due Process.

C. Because The Evidence Referenced By The Prosecutor In Closing Argument And Excluded At Her Own Request Went To The Heart Of The Case, The Verdict Of Death Must Be Reversed.

The next question is whether the misconduct was prejudicial. To the extent the misconduct deprived Mr. Grimes of due process under the federal Constitution, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*People v. Bell* (1989) 49 Cal.3d 502, 533-534. *See Chapman v. California*, *supra*, 386 U.S. at p. 24.) To the extent the misconduct violated Mr. Grimes's rights under state law, reversal is required because there is a reasonable probability that the error impacted the outcome of the penalty phase. (*People v. Hill* (1998) 17 Cal.4th 800, 844. *See People v. Watson* (1956) 46 Cal.2d 818, 836.) Under either standard, reversal is required here.

The very fact that the prosecutor relied on the absence of this evidence in closing argument shows its importance. (*See United States v. Kojoyan*, *supra*, 8 F.3d at p. 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].)

Moreover, the point the prosecutor was making about the believability of Howe's testimony did not relate to some minor, tangential point. Instead, it went directly to

whether Mr. Grimes intended to kill and whether there was residual doubt. Both of these inquiries are at the heart of the jury's penalty phase determination as to whether Mr. Grimes should live or die.

Indeed, the prosecutor told the jury in no uncertain terms that it could reject entirely the defense theory of "lingering doubt" precisely because Howe's testimony went completely uncontradicted. According to the prosecutor, there was simply no "reason to doubt his testimony." (41 RT 10879-10880.) In other words, the prosecutor told the jury that it should return a verdict of death precisely because of the absence of evidence which she very well knew existed.

Of course, this left the jury with a fundamentally distorted view of the truth. The fact of the matter is that there *was* a very good reason to doubt Howe's testimony: although Howe testified that Mr. Grimes ordered the killing, Morris himself confessed that he alone made the decision to kill the victim and in fact, Mr. Grimes was shocked when the killing occurred. This evidence directly undercut Howe's testimony that Mr. Grimes directed the killing. In light of the trial court's order excluding this evidence, defense counsel was simply unable to respond to the prosecutor's argument and the jury erroneously was lead to believe there was no evidence rebutting Howe's testimony.

The absence of this evidence would not be lost on the jury. As the prosecutor

recognized, jurors could well believe that the absence of evidence contradicting Howe meant there was no "lingering doubt" about Mr. Grimes's participation in the offense. Asking the jury to sentence Mr. Grimes to die based on the absence of evidence which *in fact* existed, but which was excluded at the prosecutor's request, was fundamentally unfair and cannot be deemed harmless. Reversal of the verdict of death is required.

D. The Merits Of This Claim Are Properly Before This Court.

Mr. Grimes recognizes, of course, that trial counsel raised no objection to the prosecutor's misconduct. Respondent may try to avoid the merits of this issue by arguing that trial counsel's failure to object and request an admonition bars Mr. Grimes from raising it on appeal. There are two reasons to reject this argument.

First, this Court has made clear that prosecutorial misconduct may be raised on appeal if a "timely objection and admonition would not have cured the harm." (*People v. Clair* (1992) 2 Cal.4th 629, 662; *People v. Green* (1980) 27 Cal.3d 1, 34.) In this regard the Court has also said that statements from a district attorney assume great influence on the jury due to the district attorney's appearance as an objective and official representative of the state. (*See, e.g., People v. Purvis* (1963) 60 Cal.2d 323, 341; *People v. Perez* (1962) 58 Cal.2d 229, 247.) As the Court itself has noted, "juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made

by him are apt to have great influence." (*People v. Perez*, *supra*, 58 Cal.2d at p. 247.)

Thus, when a prosecutor impermissibly refers to a defendant's failure to present certain evidence, it is unlikely that an admonition by the court will protect the accused. (*Cf. People v. Perez*, *supra*, 58 Cal.2d at 243-244; *People v. Laursen* (1968) 264 Cal.App.2d 932, 937-939.) As courts have long noted where a prosecutor improperly references a defendant's failure to speak with police, such errors are "so readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value." (*United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1352.) Thus, review of this issue is appropriate notwithstanding the absence of an objection below.

Second, and assuming *arguendo* that an objection and admonition would have cured the harm, the question is whether Mr. Grimes should lose the right to have this Court consider whether prejudicial misconduct occurred because of trial counsel's failure to object. Of course, the failure to object to inadmissible testimony or to make appropriate motions can be the basis for a conclusion that trial counsel was ineffective. (*See, e.g., People v. Sundlee* (1977) 70 Cal.App.3d 477, 485; *People v. Coffman* (1969) 2 Cal.App.3d 681, 690.) This explains why in capital cases, this Court routinely addresses the merits of claims despite a defense lawyer's failure to object where that failure was not the result of a reasoned, tactical judgment. (*See, e.g., People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Mickey* (1991) 54 Cal.3d 612, 665; *People v. Ashmus* (1991)

54 Cal.3d 932, 976; People v. Morris (1991) 53 Cal.3d 152, 196; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.) If an admonition could somehow have cured the harm in this case, there could have been no tactical reason not to object and request an admonition. This Court should therefore address the merits of this claim.

XVIII. THE TRIAL COURT VIOLATED BOTH STATE AND FEDERAL LAW IN DISCHARGING JUROR 27417 FOR MISCONDUCT PRIOR TO THE PENALTY PHASE, FAILING TO GRANT A MISTRIAL IN CONNECTION WITH THE GUILT PHASE BASED ON THE SAME MISCONDUCT, THEN REFUSING TO GRANT A NEW TRIAL WHEN JUROR 24777 COMMITTED THE IDENTICAL CONDUCT.

A. Introduction.

The guilt phase began on October 20, 1998. (5 CT 1089.) As discussed in some detail above, defendant's complicity in the underlying felony murder was never placed at issue. Instead, the only issue for the jury was whether defendant, who was not the killer, either intended to kill or acted with reckless indifference to human life and so should also be guilty of the felony murder special circumstance. The trial court gave standard instructions advising the jurors not to discuss the case with nonjurors. (23 RT 6562.)

Deliberations began on November 24, 1998. (6 RT 1294.) The jury reached its verdict on November 25, 1998, convicting of murder and finding the special circumstance true. (6 CT 1296-1297.)

The penalty phase began on December 3, 1998. (6 CT 1336.) Again, the trial court admonished the jurors not to discuss the case with nonjurors. (35 RT 9358.)

But before the end of the case, the court learned that two jurors -- Juror 27417 and

Juror 24777 -- discussed the case with nonjurors. Yet although each juror committed almost identical conduct, the court found misconduct and dismissed Juror 27417 (at the state's request) but refused to find misconduct as to Juror 24777 (over defense objection). Here is what happened in a nutshell.

During penalty phase deliberations, Juror 27417 expressed remorse to several nonjurors over the guilt phase verdict and concern about the fairness of the two sentencing options before him. At that point, the district attorney came forward with information that this juror had mentioned his concerns to coworkers during both the guilt and penalty phases of trial. When confronted, Juror 27417 forthrightly admitted that he had indeed mentioned the case to coworkers. He expressed surprise that mentioning the case violated the court's admonition and assured the court that his comments did not affect his ability to deliberate in the case. The court nonetheless found "serious and willful misconduct" and because "this juror is unable to perform his duties as a juror hence forth," the court discharged Juror 27417 from deliberating in the penalty phase and seated a new juror at the state's request. (42 RT 11083, 11084.)

In light of the trial court's finding that Juror 27417 had committed "serious and willful misconduct," and because the record showed that the misconduct occurred in both the guilt and penalty phases, defense counsel sought a mistrial as to the guilt phase. The trial court denied the motion, despite noting -- with some understatement as it would turn

out -- that "there's reason to believe" this same misconduct had occurred during the guilt phase. The court replaced the juror for the penalty phase and the reconstituted jury returned a verdict of death hours later.

After the verdict, defense counsel moved for a new trial based on actions of a second juror, juror 24777. Defense counsel supplied affidavits from three witnesses who spoke directly with Juror 24777. At a hearing all three witnesses gave detailed and consistent testimony that prior to penalty phase deliberations, juror 24777 not only had a discussion about the facts of the case with them, but predicted that defendant would most likely receive the death penalty. When Juror 24777 was confronted with this information, she simply denied this discussion ever took place. The court found Juror 24777 "entirely credible" and alternatively ruled there was "no evidence any misconduct which could result in prejudice." (43 RT 11310, 11311.) The court denied the new trial motion. (43 RT 11312.)

As more fully discussed below in Argument C-1, the trial court erred in discharging Juror 27417. Although this juror violated the court's admonition not to refer to the case with nonjurors during the guilt and penalty phases, the violation was technical only; the juror's misconduct was not deliberate and certainly did not demonstrate the juror was unable to perform his duties. But as discussed in Argument C-2, assuming the trial court's ruling was correct, then the court was further obliged to

declare a mistrial as to the guilt phase where the misconduct also occurred. Finally, as discussed in Argument C-3, and again assuming the court was correct in discharging juror 27417 for discussions with nonjurors, then the court was also obliged to grant a new penalty phase when three nonjurors testified Juror 24777 discussed the case with them as well. Reversal is required.

B. The Relevant Facts.

1. The trial court discharges Juror 27417 for committing misconduct by discussing the case with nonjurors.

Penalty phase deliberations began at approximately 4:00 p.m. on December 17, 1998. (6 CT 1380.) Shortly thereafter, Juror 27417 delivered a handwritten note to the court. (6 CT 1380.) The note read, "Judge Boeckman, I have a disturbing issue I need to talk to you about, before I can continue with deliberations." (28 CT 8266.)

The next morning, on Friday, December 18, 1998, the trial court brought Juror 27417 into the courtroom. (6 CT 1427; 41 RT 10902.) The juror handed the court a letter. (41 RT 10903.) In the letter, Juror 27417 told the court that in guilt phase deliberations, "I had reasonable doubt that the special circumstances of Gary having an intent to kill was true." (28 CT 8267.) He instead, "reluctantly agreed that the special circumstances of Gary acting with reckless indifference to human life was true." (28 CT

8267.)

But upon learning from opening statements that Mr. Grimes faced a minimum term of "life without parole," Juror 27417 now had concerns about the sentencing choices available to him. According to the juror, "I am finding it very difficult to accept, with good conscience, either sentence set before me" because "I do not believe the crime he committed is deserving of such a severe punishment." (28 CT 8267.)

Upon inquiry, however, Juror 27417 told the court in no uncertain terms that he was "willing" and "able" to deliberate with his fellow jurors and could "follow the instructions." (41 RT 10943.) He explained that he wrote the note and letter because he thought "the whole process seemed unfair to Gary." (41 RT 10950.) He was "sure there are good reasons" for a "first and second phase" but believed he had not "seen the whole picture." (41 RT 10950.) He also felt that at the guilt phase of trial, he did not have "a good definition of what reckless indifference means." (41 RT 10950.) He thought "those two things just are extremely disturbing to me that I am being forced now to make a decision that I don't feel is fair." (41 RT 10951.) He assured the court that he was nonetheless "willing" to follow the law. (41 RT 10951.) With these assurances, Juror 27417 was permitted to resume deliberations with the remaining jurors. (41 RT 10951; 6 CT 1427.)

Obviously, this was not a juror the prosecution wanted to remain on the case. Perhaps it is no surprise then that on Monday, December 21, 1998, the prosecutor informed the trial court that he had received information that Juror 27417 "had been discussing his unwillingness to impose certain penalties and that he was having trouble deliberating with members of the jury to other people that he works with." (42 RT 10954.) The prosecutor asked the court's permission to send an investigator to interview Juror 27417's co-workers at his company, CH-2M Hill. (42 RT 10955.) The court expressed grave concern that "any violation of the instruction to jurors not to discuss the case with anyone to be serious." (42 RT 10959.) The court explained why this kind of misconduct was so serious, noting that "a violation of the court's instructions with regard to not talking to outsiders" indicates that the juror "can't be relied upon to be following the court's instructions in other regards," thus was "adequate cause to excuse a juror and substitute and alternate." (42 RT 10967, 10968.) Over defense objection, the court ordered a hearing on the matter. (42 RT 10969.)

The trial court first heard from the two district attorney employees -- Molly Bigelow and Tim Kam -- who learned about the potential misconduct. Bigelow testified that she learned on Friday from fellow worker Howard Welch that the prosecutor was having problems with a juror who worked at CH-2M Hill. (42 RT 10988.) Bigelow called her sister Kelly who happened to be married to Mike Urkov, a co-worker of Juror 27417 at CH-2M Hill. (42 RT 10987-10988.) Bigelow asked Kelly for the juror's name.

(42 RT 10989.) Kelly did not know, but indicated that her husband was aware of a problem. (42 RT 10991.) Bigelow called Urkov who told her that he learned from the juror there was a problem. (42 RT 10990.)

Tim Kam testified that on the prior Thursday, he was at a dinner party with Joel Kimmelshue who worked at CH-2M Hill. (42 RT 11001.) Kelly Urkov was also at the dinner party. (42 RT 11001.) Kimmelshue told Kam that his co-worker was a juror on Mr. Grimes's case, then asked how the case was going. (42 RT 11001-11002.) Kam told Kimmelshue that the jury was deliberating. (42 RT 11001.) Kimmelshue told Kam that this juror had "held up" the guilt phase, then began to explain what the juror had said. (42 RT 11002.) Kam stopped the conversation. (42 RT 11002.) On Saturday, Kam saw Bigelow at another dinner party. (42 RT 11004.) Kam told Bigelow what Kimmelshue had said. (42 RT 11004.)

Over defense objection, the trial court decided to inquire of Kimmelshue and Urkov. (42 RT 11009-11010, 11017.) Kimmelshue testified that he worked with Juror 27417. (42 RT 11024.) He claimed Juror 27417 had spoken to him three times within the last month-and-a-half or two months. (42 RT 11025.) The first conversation occurred when the juror was "early in service" on the case. (42 RT 11027.) It was a general conversation about being a juror. (42 RT 11026.) Juror 27417 did not discuss the details about the case. (42 RT 11027.) The second conversation occurred two or three weeks

later at "the end of a phase where they were going to decide about, I guess, some -- as far as I can recall, some wording determining how the conviction would go." (42 RT 11028.) Juror 27417 indicated he needed to research what the meaning of "reckless indifference to human life" and that he was "one of the last people to come around to those terms." (42 RT 11030.) He joked about "looking it up in a dictionary." (42 RT 11041.) The third conversation occurred within the last week on Tuesday, Wednesday or Thursday. (42 RT 11031.) Kimmelshue asked Juror 27417 "how the trial was going." (42 RT 11032.) Juror 27417 replied that "they were deliberating between death penalty and life in prison and that he was undecided as to which way he was going to go." (42 RT 11032.)

Mike Urkov testified that he too worked with Juror 27417. (42 RT 11045.) He first spoke to Juror 27417 during jury selection. (42 RT 11047-11048.) He then had "three or so" more conversations after Juror 27417 began serving on the jury. (42 RT 11048.) He specifically recalled one conversation where Juror 27417 "was concerned specifically that he didn't fully understand the consequences of the first phase and how they related to the second phase" and regretted "not being able to revisit that first decision" which "put them on a path that there was only a couple of decisions that could be made from there, something of that manner." (42 RT 11048.) He said the decision was "between a death penalty sentence and life without parole, something of that nature," and that he was "actively reviewing the case, conscientiously," but it was "difficult." (42 RT 11049.) Urkov recalled this discussion occurred while the trial "was still in

evidence." (42 RT 11050.) Juror 27417 also told Urkov that "[a] woman, elderly woman, was beaten and killed by two other people and the defendant was present." (42 RT 11053.) The last time he spoke to Juror 27417 about the case was two or three weeks earlier. (42 RT 11050.)

Based on this testimony, defense counsel conceded that there was "a technical violation of the court's direction not to discuss the case." (42 RT 11061.) But counsel argued "we do not believe that the violation constitutes serious misconduct to warrant or to the point that he is, quote, no longer able to do his duty as a juror." (42 RT 11062.) Moreover, according to counsel, there had been no showing that "the misconduct of the discharged juror has destroyed the integrity of the remaining jurors in terms of objective facts or events surrounding the misconduct itself." (42 RT 11063.) The trial court disagreed, finding that the juror's conduct " goes well beyond inadvertent or very minor references to the status of a case or something of that nature," but instead "this is very clear and it is serious and it is willful misconduct." (42 RT 11064.) The court indicated that unless Juror 27417 "causes me to change my view," it "found good cause to excuse him for -- because he's unable to follow the court's instructions." (42 RT 11065.)

Juror 27417 freely admitted that he discussed the case with Kimmelshue and Urkov. (42 RT 11073.) He did not believe he had "done anything wrong." (42 RT 11074.) He was well aware that the trial court had instructed him "not to discuss the

case." (42 RT 11074.) He "tried to do that" and "not discuss it," but guessed "it depends how -- how we define what discussing the case means." (42 RT 11075.)

Juror 27417 recalled talking to his coworkers about "the phrase, 'reckless indifference,' seemed to be the pivotal phrase that we were focusing on" and "the meaning of it was going to determine whether this special circumstance were true or not." (42 RT 11075.) He told the court he did not know "if you define that as discussing it with them or not." (42 RT 11076.) The court told the juror, "I definitely would." (42 RT 11076.) The juror expressed surprise at the court's answer, exclaiming, "Oh, you would? Okay." (42 RT 11076.)

Juror 27417 also recalled telling his coworkers he "didn't feel there were some jurors who were giving Gary the benefit of the doubt." (42 RT 11077.) He was just "sharing his frustrations that [he] felt some people sort of had made up their mind, that they believed a certain story and weren't willing to look at the whole picture." (42 RT 11078.) He finally recalled telling his coworkers a general outline of the case "like you have your opening remarks" and "what they're saying happened." (42 RT 11081.) He did not believe the discussions went beyond responses like, "Uh-huh, I see" and "I'm glad I'm not in your shoes." (42 RT 11080.) He did not believe "anything ha[d] been said to influence [him] in any way." (42 RT 11074, 11080.)

On this record, the trial court found that Juror 27417 committed "serious and willful misconduct." (42 RT 11083.) The court found "this is not a close case" and "this juror repeatedly and admittedly discussed this case with outsiders and that he was aware of the court's admonition when he did it." (42 RT 11084.) Because "this juror is unable to perform his duties as a juror hence forth," the court discharged the juror. (42 RT 11084.) On his way out, the juror apologized for the trouble he had caused. (42 RT 11089.)

Based on the trial court's finding that Juror 27417 had committed misconduct by speaking to his coworkers, defense counsel moved for a mistrial. (42 RT 11087.) According to counsel, "the verdict on the first phase is suspect due to juror misconduct." (42 RT 11087.)

The trial court denied the motion. (42 RT 11087.) According to the court, "[t]he misconduct that the court bases its decision is to discharge all relates to what happened on what I've heard here relating to the time of the second verdict [sic] and there after." (42 RT 11087.) The court agreed "there's reason to believe there may have been -- although it's not clear, some communication prior to that," but ruled that "a mistrial's inappropriate." (42 RT 11087.)

The next day, on December 22, 1998, the newly formed jury commenced

deliberations. (6 CT 1438.) Several hours later, the jury returned a verdict of death. (6 CT 1438.)

2. The trial court refuses to find Juror 24777 committed misconduct by discussing the case with nonjurors.

On January 12, 1999, defense counsel filed a new trial motion. (6 CT 1477-1492.) According to counsel, another juror -- Juror 24777 -- committed the same "serious and willful" misconduct for which Juror 27417 was discharged, speaking to nonjurors Kathleen Hash, Tina Ferreria and Susan Mayberry during the penalty phase. (6 CT 1485-1487.) The trial court ordered an evidentiary hearing. (42 RT 11166.)[28]

Kathleen Hash testified that she knew Juror 24777 through the Trinity House, Shasta Alcohol and Drug Progam, in Redding. (43 RT 11195.) Hash graduated from the program on December 2, 1998. (43 RT 11195.) On the day before graduation, Hash overheard Juror 24777 talking about Mr. Grimes's case with another woman ("Client A") in the child care classroom. (43 RT 11196.)[29] She was "talking about being on a jury, of

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[28] The new trial motion also again raised the claims that (1) the trial court erred in removing Juror 27417 and alternatively, (2) if the court did not err, then the misconduct also affected the first phase of trial. (6 CT 1483-1485.) The court again rejected these claims and denied the new trial motion. (42 RT 11145, 11152.)

[29] "Client A" refers to a client of Trinity House. Her name was sealed to protect her privacy. (43 RT 11290.)

three men and an elder lady, and she was on the trial for the one gentleman, and that the jury had not made a decision yet on what was going to happen, but more than likely he was going -- he was looking at life or death, and more likely he was going to get the death penalty." (43 RT 11196.)

Juror 24777's discussion also got the attention of Tina Ferreria and Susan Mayberry, who were also in the child care classroom. (43 RT 11215.) According to Hash, she "got our ears in there, and she just started talking about it, and we asked her questions, and she answered." (43 RT 11196.) Juror 24777 more specifically told the women that "[t]here was three men, and the one man that actually -- the one man that actually did the killing to the elderly lady killed himself in jail . . . ." (43 RT 11201.) She also told them "[t]he guy had driven the truck into the lake." (43 RT 11202.) Mayberry told the group "I don't believe in the death penalty." (43 RT 11222.)[30]

Tina Ferreria also recalled this conversation, and largely confirmed Hash's testimony. Ferreria explained that Juror 24777 was the child care facilitator at Trinity House. (43 RT 11229.) One day in late November or early December 1998, while in the child care classroom, Ferreria asked Juror 24777 if she was serving on the case where a

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[30] Hash was good friends with Theresa Skates and Neil Miller. (43 RT 11208.) Skates and Miller were friends of Mr. Grimes; they visited him in jail. (43 RT 11208, 11295-11296, 11298.) Hash did not discuss the case with them, but on Christmas Day, Skates and Miller were talking about their friend Mr. Grimes receiving the death penalty and Hash realized Mr. Grimes's case was the same case Juror 243777 had discussed. (43 RT 11208, 11210.)

"lady was killed with a can of chili beans." (43 RT 11230, 11231, 11232.) Juror 24777 replied, "No, it was an old lady." (43 RT 11230.) Juror 24777 went further, detailing that her jury service was in connection with "[t]he one with the old lady that they stole her car and left it in the lake." (43 RT 11230.) Ferreria recalled that Client A, Hash and Mayberry were also present. (43 RT 11234.)

Susan Mayberry recalled that prior to Christmas, Juror 24777 told her in the child care classroom that she was a juror in Mr. Grimes's case. (43 RT 11246, 11247.) Juror 24777 said that "it went to the death penalty." (43 RT 11249.) Mayberry responded that "you don't want my views on the death penalty" because "that usually causes a lot of conflict." (43 RT 11249.) She did not recall Hash being present, but did recall Client A and Ferreria being present. (43 RT 11251.)

Juror 24777 testified this conversation never took place. She never spoke to Hash. (43 RT 11259.) She never said that Mr. Grimes "would most likely receive the death penalty." (43 RT 11259.) She never said the case "involved the murder of an elderly lady" and "the defendant had stolen a truck and driven it into a lake." (43 RT 11260.) She never said "three men were accused of killing the elderly lady and that one guy had hung himself in jail." (43 RT 11261.) She never answered any questions about the case. (43 RT 11260.) She also never spoke to Ferreria. (43 RT 11261.) She was never asked if the case involved "a murder in which a can of chili was used to kill a lady." (43 RT

11261.) She never told Ferreria that "the case involved a murder of the old lady or that the defendant had driven a truck into the lake." (43 RT 11261.) She also never spoke to Mayberry. (43 RT 11263.) She never said that she was on the jury of Mr. Grimes's case. (43 RT 11263.) She would never have a discussion about the death penalty at work. (43 RT 11263.) But she did recall someone once asking her if she would have a difficult decision when deciding the case. (43 RT 11271.) She responded that she would "have to listen to what the judge told me, what the law said, and what the facts were." (43 RT 11271.) In other words, Juror 24777 denied everything.

The trial court found that Juror 24777 was "entirely credible" and concluded "no discussion of this case was done by (Juror 24777) as suggested by any of these witnesses." (43 RT 11310.) As to Kathleen Hash, the court specifically found her "less than credible." (43 RT 11310.) As to Juror 24777's comments about the case to Susan Mayberry and Tina Ferreria, the court concluded that even if "the comments alleged to have been made by the other two nonjuror witnesses, Ms. Ferreria and Ms. Mayberry" actually occurred, there was "no evidence of any misconduct which could result in prejudice." (43 RT 11310, 11311.) The court did not refer to its previous comments -- made in connection with Juror 27417 -- that discussions by a juror with nonjurors constituted "serious and willful misconduct" and reflected an inability "to perform . . . duties as a juror." (42 RT 11083-11084.) Instead, the court denied the new trial motion. (43 RT 11312.)

C. The Trial Court Erred In Discharging Juror 27417 For Speaking To Nonjurors At The Penalty Phase, Refusing To Grant A Mistrial Of The Guilt Phase For This Same Misconduct, Then Refusing To Grant A New Penalty Phase Upon Learning That Juror 24777 Committed Worse Misconduct.

1. The trial court should not have discharged Juror 27417 from the penalty phase.

"If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." (Pen. Code § 1089.) "A trial court's ruling whether to discharge a juror for good cause under section 1089 is reviewed for abuse of discretion. [Citations.]" (*People v. Guerra* (2001) 37 Cal.4th 1067, 1158.) "[A] court's decision to remove a juror must be supported by evidence showing a demonstrable reality that the juror is unable to perform the duties of a juror. [Citation.]." (*People v. Wilson* (2008) 44 Cal.4th 758, 840.) "This is a 'heightened standard' [citation] and requires a 'stronger evidentiary showing than mere substantial evidence' [citation]." (*Ibid.*)

"[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, 'open to [corroboration by] sight, hearing, and the other senses' [citation], which suggests a likelihood that one or more members of the jury were influenced by improper bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "When the

overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares information with other jurors, the event is called juror misconduct." (*Id.* at p. 295.)

Misconduct can be good cause for discharge of a juror under section 1089. (*People v. Ledesma* (2006) 39 Cal.4th 641, 743.) In determining whether discharge is required in a particular case, it should be remembered "[m]isconduct by a juror . . . usually raises a rebuttable 'presumption' of prejudice. [Citations]." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 295.) But it must also be remembered that "[i]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors" and "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (*People v. Danks* (2004) 32 Cal.4th 269, 302 [citations omitted].) Thus, when a juror discusses a pending case with a nonjuror in violation of the standard instruction forbidding such discussions, courts may not reflexively discharge the juror; instead, the court must look to "the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) "Trivial violations that do not prejudice the parties do not require removal of a sitting juror." (*Id.*)

As these authorities make clear, the improper dismissal of a deliberating juror

violates state law. But it also violates the Fifth Amendment right to a fair trial and the Sixth Amendment right to a jury trial. As the Supreme Court has made clear, the fundamental right to a fair jury trial is violated when the state is allowed to discharge for cause jurors who agree to consider the facts and apply the law given to them by the court. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Discharging holdout jurors eviscerates the core of the jury trial right; as the Supreme Court has long noted, the state "may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521. *See Fay v. New York* (1947) 332 U.S. 261, 294.)

Here, there is no question that Juror 27417 violated the trial court's admonition not to speak to others about the case. Not only did his two coworkers -- Kimmelshue and Urkov -- testify this occurred, but Juror 27417 candidly admitted that he mentioned the case to these coworkers. (42 RT 11025-11032, 11045-11050, 11073-11081.) Indeed, the only real question here is whether these discussions were "trivial violations" or whether they instead affirmatively established to a "demonstrable reality" that "actual prejudice may have ensued." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 840.) As discussed below, under established law, Juror 27417's comments did not come close to establishing a "demonstrable reality" that "actual prejudice may have ensued."

As an initial matter, Juror 27417 did not deliberately and willfully disobey the trial

court's admonishment. Instead, the juror told the court that he was well aware of the court's order "not to discuss the case," and he "tried to do that" and "not discuss it." (42 RT 11075.) He did not think his superficial chats with coworkers were actually "discussions" in violation of the court's order. (42 RT 11075.) Indeed, he was genuinely surprised when the court informed him that it would consider the chats to be "discussions," exclaiming, "Oh, you would? Okay." (42 RT 11076.) He also apologized to the court and parties for what he did. (42 RT 11089.) Put simply, this was not a juror who deliberately and willfully refused to follow the court's instructions. (*See People v. Holloway* (2004) 33 Cal.4th 96, 125 [no error for failing to discharge juror who "had not thought" he violated admonition because he "did not see" conversation with nonjuror as "'talking about' or 'discuss[ing]'" the case].)

In fact, the record actually reveals that this juror was very conscientious about his duties as a juror. Prior to deliberating in the penalty phase, he took it upon himself to bring his "concerns" about the penalty phase to the court's attention. (6 CT 1427; 28 CT 8266, 8267; 41 RT 10902.) But he assured the court he was "willing" and "able" to deliberate and "follow the instructions." (41 RT 10943.) Indeed, the misconduct itself reveals that this juror took his duty very seriously. According to his coworkers, during the guilt phase, the juror was wrangling with the meaning of the phrase "reckless indifference with human life" to make the right decision and then, during the penalty phase, was "actively reviewing the case, conscientiously" to make this "difficult"

decision. (42 RT 11030, 11049.)

Moreover, these conversations were hardly consequential. Kimmelshue testified that Juror 27417 (1) made general comments about the case, (2) indicated a struggle with the phrase "reckless indifference to human life" and was "one of the last people to come around to those terms" and (3) said the jury was undecided "between death penalty and life in prison." (42 RT 11026, 11030, 11032.) Urkov testified that Juror 27417 (1) indicated he did not understand the consequences of the first phase and regretted his decision, (2) said the jury was deciding between "a death penalty sentence and life without parole," and (3) told him the case involved an elderly woman who was killed by two while the defendant was present. (42 RT 11048, 11049, 11053.) In response to all his comments, these coworkers had responded, "Uh-huh, I see" or "I'm glad I'm not in your shoes." (42 RT 11080.) According to Juror 27417, nothing "ha[d] been said to influence [him] in any way." (42 RT 11074, 11080.) These were hardly in depth conversations about the case which could have had an affect on the juror's ability to impartially deliberate. (*Compare People v. Wilson*, *supra*, 44 Cal.4th at p. 839 [juror improperly discharged when voiced out loud "various concerns about the case"] *with People v. Ledesma*, *supra*, 39 Cal.4th at p. 743 [juror properly discharged who "needed to "'straighten things out in [his] head,'" so "recounted the story of the case to his wife" who then "gave some opinion [sic] which left me with the same decision that I had before."]; *People v. Daniels* (1991) 52 Cal.3d 815, 863, 866 [juror properly discharged

when he discussed the details of the case with nonjurors and expressed his belief that he "couldn't see how a man that was in a wheelchair could shoot another man and get out of the wheelchair and get another gun to shoot the other officer" and "can't see how that nigger was able to kill two policemen."].)

Put simply, the trial court erred in discharging Juror 27417. This was a conscientious juror who had merely voiced general concerns to his coworkers about the case. This was a "trivial violation" and did not establish to a "demonstrable reality" that "actual prejudice may have ensued." (*See People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) The penalty phase must be reversed.

2. Assuming Juror 27417's violation was something more than technical, and actually rose to the level of misconduct, the court should have granted a mistrial in connection with the guilt phase.

Assuming the trial court was entirely correct that Juror 27417 committed such willful and serious misconduct which demonstrated an inability to serve as a juror, then reversal of the guilt phase was also required. The reason is simple. Juror 27417 had conversations with his coworkers from the very beginning of the case.

In this regard, Kimmelshue testified that the first conversation occurred when Juror 27417 was "early in service" on the case. (42 RT 11027.) The conversation took place a

month-and-a-half or two months earlier than the December 21, 1998 hearing. (42 RT 11025.) This places the conversation squarely in the middle of the guilt phase which began on October 20, 1998 and ended on November 25, 1998. (5 CT 1089.) According to Kimmelshue, the second conversation took place took place two to three weeks after the first, at "the end" of the guilt phase, and possibly during deliberations: Juror 27417 expressed a struggle with the meaning of "reckless indifference to human life." (42 RT 11028, 11030.) The last conversation occurred the prior week during penalty phase deliberations "between death penalty and life in prison." (42 RT 11032.) And Urkov had approximately four conversations with Juror 27417 during his service on the case. (42 RT 11047-11048.)

Thus, the record shows that Juror 27417 spoke about the case throughout both the guilt and penalty phases of trial. The trial court itself recognized that "there's reason to believe there may have been -- although it's not clear, some communication prior to [the penalty phase]." (42 RT 11087.) The court found that Juror 27417 committed "serious and willful misconduct" which showed he "unable to follow the court's instructions." (42 RT 11065, 11084.) But the trial court simply ignored the guilt phase misconduct and decided to discharge Juror 27417 based on "what happened on what I've heard here relating to the time of the second verdict [sic] and there after." (42 RT 11097.)

With all due respect, what is sauce for the goose is sauce for the gander: the state

cannot have it both ways. It cannot be that speaking to coworkers during the penalty phase showed Juror 27417 was incapable of fulfilling his duties as a juror in the penalty phase, but speaking to his coworkers during the guilt phase showed Juror 27417 was fully capable of fulfilling his duties in the guilt phase. If Juror 27417's conduct in speaking to nonjurors rendered him incapable of fulfilling his duties as a juror, then he was incapable of doing so in both phases and the mistrial motion should have been granted. The court erred in allowing the guilt phase verdict to stand. (*Compare People v. Wilson*, *supra*, 44 Cal.4th at p. 841 [at defendant's capital trial, trial court discharges juror for bias after guilt phase but during penalty phase, on appeal defendant argues that reversal of guilt phase was also required; held, because evidence did not support finding that juror was biased during penalty phase, court presumes juror was also not biased at guilt phase].)

This ruling violated both state and federal law. Assuming Juror 27417 committed "serious and willful" misconduct and was incapable of fulfilling his duties, the court's refusal to grant a mistrial as to the guilt phase deprived Mr. Grimes of his state law right to 12 fair jurors applying the law as well as his Fifth and Sixth Amendment right to a fair jury trial and his constitutional rights under *Hicks v. Oklahoma*, *supra*, 447 U.S. 343 [arbitrary deprivation of state created right violates Due Process] and *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, 645-646, overruled on other grounds, *Klauser v. Gray* (2002) 537 U.S. 1041 [arbitrary and unequal application of state law to state and criminal defendant violates the constitution]. Reversal of the guilt phase is required.

3. The trial court erred in refusing to grant a mistrial in light of Juror 27417's repeated discussions about the case with nonjurors.

Finally, and again assuming the trial court was entirely correct that Juror 27417 committed "serious and willful misconduct" by speaking to his coworkers, the court's decision that Juror 24777 did *not* commit serious and willful misconduct must fail. Exactly like Juror 27417, Juror 24777 spoke to nonjurors about the case. But Juror 24777 went into far more detail about the facts of the case than Juror 27417 ever did. (*Compare* 42 RT 11053 [Juror 27417 told Urkov "[a] woman, elderly woman, was beaten and killed by two other people and the defendant was present."] *with* 43 RT 11201, 11202 [Juror 24777 told Hash "[t]here was three men, and the one man that actually -- the one man that actually did the killing to the elderly lady killed himself in jail" and "[t]he guy had driven the truck into the lake"] *and with* 43 RT 11230 [Juror 24777 told Ferreria it was "[t]he one with the old lady that they stole her car and left it in the lake"].)

Moreover, while Juror 27417 merely shared with nonjurors his struggle with the phrase "reckless indifference to human life" and later regret over the guilt phase verdict, Juror 24777 actually told nonjurors prior to penalty phase deliberations that defendant was "more likely . . . going to get the death penalty." (43 RT 11196.) This comment indicates a prejudgment of the case; misconduct pure and simple. *(See People v. Nesler* (1997) 16 Cal.4th 561, 587.) And unlike Juror 27417 comments which received innocuous responses like ""Uh-huh, I see" and "I'm glad I'm not in your shoes," Juror

24777's comments actually prompted one nonjuror to declare her beliefs about the death penalty. (42 RT 11080; 43 RT 11222.)

Put simply, whatever can be said about Juror 24777's discussions with nonjurors, it is very clear that these discussions were far more detailed and egregious than the discussions Juror 27417 had with nonjurors. In other words, if Juror 27417 committed "serious and willful misconduct," Juror 24777 also committed far more serious and willful misconduct. The court erred in denying the mistrial motion.

Mr. Grimes recognizes, of course, that Juror 24777 denied she ever had the Trinity House discussion with Hash, Ferreria and Mayberry. (43 RT 11259, 11260, 11261, 11262, 11263.) The trial court found her "entirely credible" and concluded "no discussion of this case was done by (Juror 24777) as suggested by any of these witnesses." (43 RT 11310.)

But a court's credibility determination can only be accepted if "supported by substantial evidence." (*People v. Danks*, *supra*, 32 Cal.4th at p. 304.) In light of the three separate witnesses coming forth with detailed testimony that the discussion *did* take place, Juror 24777's proclamations of innocence ring hollow. Indeed, these three witnesses all corroborate each other's stories that this discussion took place in each other's presence near December 1 in the child care room at Trinity House. (43 RT 11195-

11196, 11215, 11230, 11234, 11246, 11246, 11251.) In stark contrast, Juror 24777's story that she was completely innocent of any wrongdoing and said not a word to anyone was corroborated by nothing. On this record, the court's credibility determination is simply unsupported by any evidence much less substantial. It cannot be accepted.

And the fundamental irony of the trial court's rulings cannot escape comment. Juror 27417 -- who the prosecution wanted off the jury -- forthrightly admitted speaking to nonjurors and apologized for his unintentional wrongdoing. He was deemed entirely incapable of serving as a juror, although his guilt phase service (in which he voted to convict) was deemed acceptable. And Juror 27417 himself sent a note to the judge in an attempt to voice his concerns over the penalty phase determination. Juror 24777 -- whose conduct was relied on as the basis of defense counsel's new trial motion -- obstinately denied any wrongdoing at all despite being contradicted by three witnesses who testified consistently as to the content and timing of her improper comments. Yet she was deemed entirely credible.

The trial court's rulings in this case cannot stand. If the court was correct about Juror 27417, reversal of the guilt phase is required. If the court was incorrect about Juror 27417, reversal of the penalty phase is required. In either event, as noted above, the trial court's refusal to discharge juror 24777 who had also committed "serious and wilful" misconduct, and was therefore incapable of fulfilling her oath as a juror, violated both

state and federal law. And the trial court's unequal application of the state law rule against juror contact with non-jurors -- and its disparate treatment of Jurors 27417 and 24777 -- also violated Mr. Grimes's federal constitutional rights. (*See Gray v. Klauser*, *supra*, 282 F.3d at 645-646 [arbitrary and unequal application of state law to state and criminal defendant violates the constitution]. Reversal of the penalty phase is required.

XIX. EVEN IF NONE OF THE ERRORS REQUIRE REVERSAL WHEN CONSIDERED ALONE, WHEN CONSIDERED TOGETHER THE ERRORS VIOLATED MR. GRIMES'S RIGHT TO DUE PROCESS AND REVERSAL OF THE GUILT, SPECIAL CIRCUMSTANCE AND PENALTY VERDICTS IS REQUIRED.

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Such cumulative error impacts a defendant's federal Constitutional right to due process. (*See, e.g., Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 [cumulative effect of three significant trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process . . ."]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [collecting cases].)

Here, as discussed in Arguments I-XVIII above, there are numerous reasons to reverse the guilt, special circumstance and penalty verdicts in this case. But even if none of these errors are sufficient to require reversal when considered alone, when considered in combination with one another, the errors rise "to the level of reversible and prejudicial error" as to each phase of the trial. Moreover, because many of these errors strike at the reliability of the special circumstance and penalty verdicts, the combination of errors also violated Mr. Grimes's rights under the Eighth Amendment as well. Reversal of the guilt, special circumstance and penalty verdicts is required.

ISSUES EFFECTING THE PRIOR PRISON TERM ALLEGATIONS

XX. MR. GRIMES'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS REQUIRED TO WAIVE A JURY TRIAL ON THE PRIOR CONVICTION ALLEGATIONS IN ORDER TO BIFURCATE THOSE ALLEGATIONS FOR TRIAL.

A. The Relevant Facts.

The information charged Mr. Grimes with six substantive crimes. (2 CT 183-186.) In addition, the information charged a number of enhancing allegations, including (1) an allegation that Mr. Grimes was on parole from state prison in violation of section 1203.085(b), (2) allegations that Mr. Grimes served four prior prison terms in violation of section 667.5(b), and (3) allegations that Mr. Grimes had two prior serious felonies. (2 CT 187-188.)

Prior to trial, defense counsel moved to bifurcate trial on the prior prison term and prior conviction allegations under *People v. Calderon* (1994) 9 Cal.4th 69. (7 RT 2867.) In *Calderon*, this Court held a trial court may refuse to bifurcate trial on prior conviction allegations only where defendant "will not be unduly prejudiced by having the truth of the alleged prior conviction determined in a unitary trial." (9 Cal.4th at p. 72.) Trial counsel here cited *Calderon* and argued the defense did not "want certain information getting to the jury . . . ." (7 RT 2867.)

The court correctly noted these enhancing allegations "require factual findings by somebody unless there's either a stipulation or bifurcation, et cetera." (7 RT 2867.) Defense counsel repeated his request for bifurcation and offered to "waive jury on those questions of fact and have the matter heard after the jury verdict . . . ." (7 RT 2867.) The prosecutor indicated she had no objection to this procedure. (7 RT 2868-2869.) The trial court gave counsel an opportunity to discuss the matter with Mr. Grimes. (7 RT 2869.) The court then took a jury waiver from Mr. Grimes.

The court first explained to Mr. Grimes that his defense lawyers did not want the guilt phase jury to learn about these prior convictions:

> "[Y]our attorneys have indicated they want this jury, when this jury is deciding the issue of whether or not the People have proven the charges against you beyond a reasonable doubt, to be influenced in any way by also considering the allegations of these prior felony convictions and related matters." (7 RT 2870.)

The court went on to explain that a jury waiver was necessary in order to keep the jury from hearing these allegations:

> "In order to avoid having the jury deal with that issue, your attorneys are recommending to you, apparently, that you waive your right to have the jury decide that issue. And that you have those issues, as to each one of these prior special allegations, be decided solely by the court." (7 RT 2870.)

In light of the information he had been given, Mr. Grimes then agreed to waive his right to a jury trial. (7 RT 2870-2873.)

This colloquy shows Mr. Grimes was specifically advised that "in order to avoid having the jury" hear evidence about his prior convictions, he was *required* to waive his right to a jury trial on those allegations. He did so. After the jury returned its guilt phase verdicts, the trial court found these allegations true. (35 RT 9373-9376.) At sentencing, the trial court imposed a three-year term for the count six vehicle theft and then doubled that term under the two-strikes law by virtue of its findings on the prior conviction allegations. (43 RT 11363.) The court added a one year term for each of the four prison term priors it had found true. (43 RT 11378.) The total determinate term was 10 years, 7 years of which was directly attributable to the court's findings on the prior conviction allegations.

As discussed more fully below, the advice given to Mr. Grimes about waiving his right to a jury trial was wrong. In fact, a waiver of jury trial on the prior conviction allegations was *not* required in order to bifurcate trial on the allegations. Because Mr. Grimes's jury trial waiver on the prior conviction allegations was improper, the trial court's subsequent true findings on those allegations must be vacated, and the seven years imposed by virtue of those findings stricken.

B. Because The Trial Waiver Here Was Obtained Through Mistake And Mis-Advice, The Waiver Is Invalid.

Article I, section 16, of the California Constitution, gives a defendant in a criminal prosecution the right to a trial by jury. (*People v. Ernst* (1994) 8 Cal.4th 444, 444-445.) The right is fundamental. (*Id.* at pp. 448-449.) Under California law, Mr. Grimes was entitled to a jury trial in connection with the prior conviction allegations. (*See, e.g.*, *People v. McGee* (2006) 38 Cal.4th 682; *People v. Kelii* (1999) 21 Cal.4th 452; *People v. Wiley* (1995) 9 Cal.4th 580, 585.)

The California Constitution contains a requirement that a jury trial waiver in a criminal proceeding be made "by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., Art I, section 16.) A defendant's waiver may not be accepted by the court, however, "unless it is knowing and intelligent, that is, "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it," as well as voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*People v. Collins*, (2001) 26 Cal.4th 297, 305, citations omitted].) Where a defendant's waiver of a constitutional right hinges on "[m]istake, ignorance or any other factor overcoming the exercise of free judgment," the waiver is involuntary. (*People v. Cruz* (1974) 12 Cal.3d 562, 566-567.)

Here, as discussed above, Mr. Grimes had been accurately told that his lawyers did not want the guilt phase jury "to be influenced in any way by also considering the allegations of these prior felony convictions and related matters." (7 RT 2870.) Accordingly, his lawyers were asking for bifurcation of the prior conviction allegations. But then the trial court advised Mr. Grimes that "[i]n order to avoid having the jury deal with that issue" he was required to "waive your right to have the jury decide that issue." (7 RT 2870.)

In fact, the advice the trial court and counsel gave was wrong. As this Court is aware, trial courts throughout the state routinely grant bifurcation motions even where the defendant does *not* waive his right to a jury trial. (*See, e.g., People v. Mosby* (2004) 33 Cal.4th 353, 356 n.1; *People v. Wiley* (1995) 9 Cal.4th 580, 584.) Bifurcation does not require waiver of the right to a jury trial; it simply permits the jury trial to be divided into two sections.

Mr. Grimes was, therefore, given fundamentally incorrect advice in deciding whether to waive his right to a jury trial. Accordingly, his waiver was either involuntary or improperly counseled (depending on whether the source of the mis-advice was counsel or the court). In either event, the trial court's subsequent findings on the prior conviction allegations must be vacated, and the seven years of prison time imposed because of the improper waiver must be vacated.

XXI. BECAUSE APPELLANT SERVED A SINGLE CONTINUOUS PERIOD OF CONFINEMENT FOR TWO OF THE ALLEGED PRIOR CONVICTIONS, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT TWO SECTION 667.5(B) ALLEGATIONS.

The state alleged Mr. Grimes served separate prison terms for four prior felony convictions within the meaning of section 667.5(b). (2 CT 187-188.) According to the state, Mr. Grimes served a separate prior prison term for (1) an October 18, 1983 vehicle theft, case number 194227, (2) an April 3, 1986 robbery, case number 37318, (3) an April 23, 1991 possession of a firearm by a felon, case number 265702, and (4) an April 25, 1991 escape, case number 265687. (2 CT 187-188.)

To prove the allegations, the state introduced Mr. Grimes's so-called "969(b)" packet into evidence. (35 RT 9373; 28 CT 8362-8391.) This packet reveals that Mr. Grimes did indeed serve separate prison terms for case numbers 194227 and 37318. (28 CT 8374, 8378.) This packet also reveals, however, Mr. Grimes only served *one* prior prison term for *both* case numbers 265702 and 265697. (28 CT 8372.)

The trial court nonetheless found all four section 667.5(b) allegations true. (35 RT 9375.) At sentencing, the court imposed a one-year term for each of these four allegations. (7 CT 1608.) As more fully discussed below, because the state only proved Mr. Grimes served *three* separate prison terms within the meaning of section 667.5(b), the trial court erred in imposing *four* one-year terms. One of these terms must be stricken.

Under section 667.5(b), a one-year enhancement is imposed for each "prior prison term . . . ." A prior prison term means a "continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes . . . ." (Pen. Code § 667.5, subd. (g).) When one period of confinement is imposed for multiple convictions, this is considered a single prison term for purposes of the section 667.5(b) enhancement. (*People v. Jones* (1998) 63 Cal.App.4th 744, 746-750; *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1669; *People v. James* (1980) 102 Cal.App.3d 728, 733.)

Here, Mr. Grimes served a single continuous period of confinement for case numbers 265702 and 265697. (28 CT 8372.) Because the prison terms imposed for these two convictions were imposed and served at the same time, there was only one prior prison term within the meaning of section 667.5. Without sufficient evidence that Mr. Grimes served two prior prison terms for these offenses, the trial court's finding that the state had proven two separate 667.5(b) allegations in connection with these offenses violates Due Process. (*Jackson v. Virginia* (1979) 443 U.S. 307.) The Court should strike the true finding on one of these allegations and vacate one of the one-year prison terms.

CONCLUSION

For all these reasons, the conviction, special circumstance and death verdict should be reversed. In addition, the prior conviction allegations and one of the prior prison term allegations must be stricken.

DATED: 6/23/09

Respectfully submitted,

CLIFF GARDNER
CATHERINE WHITE
LAZULI WHITT

By Cliff Gardner
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 62409 words in the brief.

Dated: 6/23/09.

Cliff Gardner

CERTIFICATE OF SERVICE

I, Cliff Gardner, am over 18 years of age. My business address is 19 Embarcadero Cove, Oakland, California, 94606. I am not a party to this action.

On 6/24/09 I served the within

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Oakland, California, in a sealed envelope, postage prepaid, and addressed as follows:

Attorney General
P.O. Box 944255
Sacramento, CA

Dorothy Streutker
California Appellate Program
101 2nd Street
Suite 600
San Francisco, CA 94105

Mr. Gary Grimes
P27200
San Quentin State Prison
San Quentin, CA 94974

Shasta County Superior Court
1500 Court Street
Redding, CA 96001

Shasta County District Attorney
1525 Court Street
3rd Floor
Redding, CA 96001

Rolland Papendick
905 Washington Street
Red Bluff, CA 96080
(trial counsel)

I declare under penalty of perjury that the foregoing is true.

Executed on 6/24/09 in Oakland, California.

Cliff Gardner