SUPREME COURT COPY

**IN THE SUPREME COURT OF CALIFORNIA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>MATTHEW A. SOUZA,<br><br>Defendant and Appellant. | ) | NO. S076999<br><br>Alameda County Superior Court No. C122159B |

SUPREME COURT
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DEPUTY

# APPELLANT'S OPENING BRIEF

ON AUTOMATIC APPEAL FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Alameda
The Honorable Joseph Hurley, Judge Presiding

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COPY

DEATH PENALTY

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... xiii

STATEMENT OF APPEAL ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF FACTS ..... 4

THE GUILT PHASE ..... 4

A. The Prosecution's Case ..... 4

1. The Regina Watchman party and the assault upon Rebecca Souza. ..... 4

2. Ms. Souza's conduct and emotional state following the assault. ..... 8

3. The shooting at the Watchman apartment. ..... 10

4. Evidence gathered after the shooting. ..... 15

B. The Defense Case. ..... 21

THE PENALTY PHASE ..... 25

A. The Prosecution's Case. ..... 25

B. The Defense Case. ..... 26

ARGUMENT ..... 31

I. THE JOINDER OF THE SOUZA BROTHERS' TRIALS VIOLATED MATTHEW SOUZA'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, PROOF BEYOND A REASONABLE DOUBT ON THE TRUTH OF THE SPECIAL CIRCUMSTANCE ALLEGATION, AND A RELIABLE JURY DETERMINATION ON THE ELEMENTS RENDERING HIM DEATH ELIGIBLE. ..... 31

A. Introduction. ..... 31

B. The Applicable Legal Principles. ..... 36

1. Standard of review. ..... 36

2. Mutually antagonistic or irreconcilable defenses. ..... 38

C. The Joinder Of The Souza Brothers' Trials Was Erroneous And Deprived Matthew Of His Rights To A Fair Trial And A Reliable Jury Determination Of His Guilt Or Innocence Of Capital Murder Based On Proof Beyond A Reasonable Doubt As Guaranteed By The Fifth, Sixth, Eighth and Fourteenth Amendments. ..... 43

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER AND ATTEMPTED VOLUNTARY MANSLAUGHTER IN A REASONABLE HEAT OF PASSION VIOLATED MATTHEW'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND TO PRESENT A DEFENSE AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.... 54

A. Introduction. ..... 54

B. Where Supported By Substantial Evidence, State Law And The Federal Constitution Mandate Instructions On Voluntary Manslaughter And Attempted Voluntary Manslaughter In The Heat Of Passion As Lesser-Included Offenses To Charges Of Murder And Attempted Murder. ..... 56

1. The general legal principles applicable to, and evidence supporting instruction on, voluntary manslaughter in a reasonable heat of passion. ..... 62

2. "Provocation" does not necessarily have to come from the victim killed so long as an act or event would provoke a reasonable person into a heat of passion directed at the victim. ..... 68

C. Because There Was Substantial Evidence That The Shooting Of All Of The Victims Was Committed In A Reasonable Heat Of Passion, The Trial Court Violated State Law And The Federal Constitution By Refusing To Instruct On The Lesser-Included Offenses Of Voluntary Manslaughter And Attempted Voluntary Manslaughter. ..... 88

1. The shooting deaths of Dewayne Arnold and Regina Watchman ..... 89

2. The shootings of Leslie Trudell, Beulah John and Rodney James ..... 99

D. Counsel Did Not Invite The Errors. ..... 103

E. The Errors Require Reversal. ..... 106

1. Respondent bears the burden of proving the errors harmless beyond a reasonable doubt because they violated Matthew's federal constitutional rights. ..... 106

2. The jury's verdicts do not prove beyond a reasonable doubt that it resolved the questions omitted by the voluntary manslaughter instructions under a correct application of the law ..... 107

3. The jury's verdicts do not prove beyond a reasonable doubt that it determined the shootings of Leslie Trudell, Beulah John, and Rodney James were intentional or that the omission of instructions as to those victims was harmless. ..... 112

4. Considering the evidence as a whole, respondent cannot prove beyond a reasonable doubt that the errors did not affect the verdicts. ..... 116

III. THE CUMULATIVE EFFECT OF THE OMISSION OF CRITICAL INSTRUCTIONS ON HEAT OF PASSION AND PROVOCATION AND THEIR RELATIONSHIP TO PREMEDITATION ALONG WITH THE PROSECUTOR'S REPEATED MISSTATEMENTS OF THE APPLICABLE LEGAL PRINCIPLES VIOLATED STATE LAW AND MATTHEW'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, AND TO A RELIABLE GUILT PHASE DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS ..... 122

A. Introduction. ..... 122

B. The General Legal Principles Regarding Instructions, Arguments, And The Interplay Between The Two. ..... 124

1. The trial court's instructional obligations ..... 124

2. The prosecutor's duties ..... 127

3. The interplay between instructions and argument ..... 128

C. The Legal Principles Applicable To Second-Degree Murder In A Subjective Or Unreasonable Heat Of Passion. ..... 129

D. The Trial Court Violated State Law And The Federal Constitution By Failing To Provide Complete And Accurate Instructions On The Defense Theory That Matthew Was Guilty Of The Lesser-Included Offense Of Second-Degree Murder Due To An Unreasonable Heat Of Passion. ..... 134

E. The Interplay Between The Instructions And Arguments Created A Reasonable Likelihood That The Jury Was Misled To Apply The Instructions In A Way That Violated The Federal Constitution. ..... 141

F. Reversal Is Required. ..... 152

IV. REVERSAL OF THE ATTEMPTED MURDER CONVICTIONS IS REQUIRED DUE TO AN AMBIGUOUS INSTRUCTION RESULTING IN A REASONABLE LIKELIHOOD THAT THE JURORS MISUNDERSTOOD THAT IT COULD RETURN GUILTY VERDICTS WITHOUT FINDING THAT THE PERPETRATOR SPECIFICALLY INTENDED TO KILL THE VICTIMS AND NOT MERELY THE TARGETS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. ..... 156

A. Introduction. ..... 156

B. Attempted Murder Requires Proof Beyond A Reasonable Doubt That The Defendant Specifically Intended To Kill The Particular Victim, Not Someone Else. ..... 157

C. From The Instructions And Arguments As A Whole, It Is Reasonably Likely That The Jurors Misunderstood That It Did Not Need To Find That Matthew Specifically Intended To Kill James And John In Order To Convict Him Of Attempting To Murder Them With Premeditation And Deliberation. ..... 158

D. The Error Was Not Waived. ..... 161

E. The Attempted Murder Convictions Must Be Reversed Because Respondent Will Be Unable To Prove The Error Harmless Beyond A Reasonable Doubt. ..... 162

V. THE PROVISION OF CALJIC 17.41.1 VIOLATED MATTHEW'S

SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL ..... 163

VI. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR VIOLATED MATTHEW'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS BY USING FALSE EVIDENCE IN THE GUILT AND PENALTY PHASES TO SECURE MATTHEW'S CONVICTIONS AND DEATH SENTENCE. ..... 166

A. Introduction. ..... 166

B. The Prosecutor's Use Of False Evidence Throughout His Guilt And Penalty Phase Arguments Violated Matthew's State And Federal Due Process Rights To Fundamental Fairness. ..... 166

C. Reversal Is Required. ..... 173

VII. THE TRIAL COURT'S EXCLUSION OF QUALIFIED JURORS AND REFUSAL TO EXCLUDE DISQUALIFIED JURORS UNDER THE WAINWRIGHT V. WITT STANDARD VIOLATED MATTHEW'S RIGHTS TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. ..... 178

A. Introduction. ..... 178

B. The General Legal Principles. ..... 179

C. Prospective Juror Madali. ..... 182

1. Prospective juror Madali's responses to the jury questionnaire and on voir dire and her dismissal for cause. ..... 182

2. The exclusion of prospective juror Madali for cause was unsupported by substantial evidence that her feelings about the death penalty would prevent or substantially impair her ability to perform her duties as a juror. ..... 187

D Prospective Juror Froyland. ..... 196

1. Prospective juror Froyland's responses to the jury questionnaire

and on voir dire and his dismissal for cause.....196

2. The exclusion of prospective juror Froyland for cause was unsupported by substantial evidence that his feelings about the death penalty would prevent or substantially impair his ability to perform his duties as a juror. .....197

3. Counsel's "non-opposition" to the court's dismissal of Mr. Froyland for cause did not waive Matthew's right to challenge the error on appeal.....198

E. Juror No. 5. .....200

1. Juror No. 5's responses to the jury questionnaire and on voir dire and the court's refusal to dismiss him for cause.....200

2. The court's refusal to dismiss Juror No. 5 based upon its implicit finding that he could follow his oath and perform his duties as a juror was unsupported by the evidence. .....202

3. Matthew's right to a fair and impartial jury was not waived by his counsel's failure to exercise a peremptory challenge to exclude Juror No. 5. .....205

F. The Actions Of The Trial Court And The Prosecutor Produced A Jury Culled Of All Those Who Revealed During Voir Dire That They Had Conscientious Scruples Against Or Were Otherwise Opposed To Capital Punishment, Which Violated Matthew's Rights to A Fair And Impartial Jury And Requires Reversal. .....215

1. The trial court applied the Witt standard in an arbitrary and capricious manner, which was fundamentally unfair and amounted to an abuse of discretion not entitled to deference.....216

a. "Death-inclined" jurors whom the court refused to excuse for cause. .....218

b. "Life-inclined" jurors whom the court excused for cause.....225

2. The prosecutor's exercise of peremptory challenges to excuse the few life-inclined jurors who remained produced a jury from which all such jurors were excluded and violated Matthew's rights to a fair and impartial jury. .....228

VIII. THE PENALTY PHASE JUDGMENT MUST BE REVERSED BECAUSE IT IS REASONABLY LIKELY THAT THE JURORS READ THE COURT'S MODIFIED LINGERING DOUBT INSTRCTION TO PRECLUDE CONSIDERATION OF THEIR LINGERING DOUBTS REGARDING MATTHEW'S ROLE IN THE CRIMES, IN VIOLATION OF STATE LAW AND THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS. ..... 231

A. Introduction. ..... 231

B. The Controlling Legal Principles. ..... 232

C. It Is Reasonably Likely That The Jurors Misunderstood That They Were Precluded From Considering And Giving Effect To Their Lingering Doubts That Matthew Was The Actual Shooter In Deciding Whether To Execute Him Or Spare His Life ..... 239

1. The instructions. ..... 241

2. The arguments. ..... 249

D. Reversal Is Required ..... 255

IX. THE OMISSION OF, AND AFFIRMATIVE DIRECTION TO DISREGARD, PREVIOUSLY GIVEN EVIDENTIARY INSTRUCTIONS IN THE PENALTY PHASE VIOLATED STATE LAW, MATTHEW'S RIGHTS TO A FAIR TRIAL AND A RELIABLE PENALTY PHASE JUDGMENT UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT. ..... 265

A. Introduction. ..... 265

B. The Omission Of, And Affirmative Direction To Disregard, Critical Evidentiary Instructions In The Penalty Phase Violated State Law And Matthew's Rights To A Fair Penalty Phase Trial And A Reliable Penalty Phase Judgment Under the Fifth, Eighth, And Fourteenth Amendments. ..... 266

C. The Penalty Judgment Must Be Reversed. ..... 269

X. THE COURT'S EXCLUSION OF HIGHLY RELEVANT MITIGATING EVIDENCE VIOLATED MATTHEW'S RIGHTS UNDER

STATE LAW, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT ..... 280

A. Introduction. ..... 280

B. The Trial Court's Exclusion Of Highly Relevant Mitigating Evidence Violated State Law As Well As Matthew's Rights Under The Eighth And Fourteenth Amendments ..... 281

C. The Error Require That Matthew's Death Sentence Be Reversed. ..... 290

XI. THE TRIAL COURT'S PROVISION OF AN INCOMPLETE INSTRUCTION ON VICTIM IMPACT EVIDENCE VIOLATED STATE LAW AND MATTHEW'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR PENALTY TRIAL AND A RELIABLE PENALTY JUDGMENT AND REQUIRES REVERSAL. ..... 291

A. Introduction. ..... 291

B. The Special Victim Impact Instruction Was Incomplete, Improper, And Permitted The Jury To Consider Improper Evidence In Aggravation In Violation Of State Law And Matthew's Rights Under the Fifth, Eighth, And Fourteenth Amendments ..... 291

C. Reversal Is Required ..... 297

XII. THE CUMLATIVE EFFECT OF THE ERRORS REQUIRE REVERSAL OF THE PENALTY JUDGMENT ..... 297

A. Reversal Of Any One Of The Convictions Requires Reversal Of The Penalty Judgment ..... 297

B. The Errors Committed In The Guilt Phase Require Reversal Of The Penalty Judgment Even If They Do Not Require Reversal Of Any Of The Convictions. ..... 299

C. The Cumulative Effect Of The Guilt And Penalty Phase Errors Requires Reversal Of The Penalty Judgment. ..... 301

XIII. MATTHEW'S DEATH SENTENCE IS CRUEL AND/OR UNUSUAL BECAUSE IT IS GROSSLY DISPROPORTIONATE TO HIS PERSONAL CULPABILITY. ..... 301

XIV. THE TRIAL COURT'S REFUSAL TO PROVIDE AN INSTRUCTION CLEARLY GUIDING THE JURY'S CONSIDERATION OF THE SCOPE AND PROOF OF MITIGATING CIRCUMSTANCES VIOLATED MATTHEW'S RIGHTS UNDER STATE LAW, AS WELL AS THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND REQUIRES THAT HIS DEATH SENTENCE BE REVERSED.....314

XV. THE PROVISION OF CALJIC NO. 8.85, WHICH INCLUDED INAPPLICBLE FACTORS AND FAILED TO SPECIFY WHICH FACTORS COULD BE MITIGATING ONLY, VIOLATED MATTHEW'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT.....321

XVI. THE PROVISION OF CALJIC NO. 8.88 DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION, VIOLATED MATTHEW'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT.....326

A. The Instruction Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction.....327

B. The Instruction Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment.....330

C. The Instruction Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole.....332

XVII. THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT.....336

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MATTHEW'S TRIAL, VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ITS APPLICATION TO MATTHEW'S TRIAL REQUIRES REVERSAL OF THE PENALTY JUDGMENT.....340

A. Matthew's Death Sentence Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad. ..... 342

B. Matthew's Death Sentence Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution ..... 345

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution ..... 351

1. Matthew's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated. ..... 352

a. In the wake of Apprendi, Ring, and Blakely, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt. ..... 354

b. The requirements of jury agreement and unanimity. ..... 362

2. The Due Process and the Cruel and Unusual Punishment Clauses of the state and federal constitutions require that the jury in a capital case be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty ..... 367

3. Even if proof beyond a reasonable doubt were not the constitutionally required burden of persuasion for finding (1) that an aggravating factor exists, (2) that the aggravating factors outweigh the mitigating factors, and (3) that death is the appropriate sentence, proof by a preponderance of the evidence would be constitutionally compelled as to each such finding ..... 372

4. Some burden of proof is required in order to establish a tie-breaking

rule and ensure even-handedness ..... 374

5. Even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect. ..... 374

6. California law violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating factors. ..... 375

7. California's Death Penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty ..... 378

8. The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by Matthew's jury ..... 382

D. Failure To Require Instruction On Presumption Of Life. ..... 384

E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants ..... 385

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution. ..... 391

1. International Law ..... 392

2. The Eighth Amendment ..... 393

XIX. THE METHOD OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION UPON CRUEL AND UNUSUAL PUNISHMENTS ..... 395

A. Introduction. ..... 396

B. The Department Of Corrections' Failure To Adopt The Regulations Mandated By Penal Code Section 3604 Violates Matthew's Right To Procedural Due Process. ..... 397

C. California's Lethal Injection Procedure Violates The Eighth Amendment Prohibition Against Cruel And Unusual Punishments. ..... 401

XX. THE TRIAL COURT'S RESTITUTION ORDERS WERE UNAUTHORIZED AND MUST BE STRICKEN. ..... 407

CONCLUSION ..... 414

## TABLE OF AUTHORITIES

**Cases**


Adams v. Texas (1980) 448 U.S. 38 ..... 180

Addington v. Texas (1979) 441 U.S. 418 ..... 368

Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862 ..... 177, 301

Alcaraz v. Block (9th Cir. 1984) 746 F.2d 593 ..... 244

Aliwoli v. Carter (7th Cir. 2000) 225 F.3d 826 ..... 128

Allen v. Woodford (9th Cir. 2004) 366 F.3d 823 ..... 287

Andrews v. Collins (5th Cir. 1994) 21 F.3d 612 ..... 234

Antwine v. Delo (8th Cir. 1995) 54 F.3d 1357 ..... 267

Apodaca v. Oregon (1972) 406 U.S. 404 ..... 165

Apprendi v. New Jersey (2000) 530 U.S. 466 ..... 44

Arizona v. Fulminante (1991) 499 U.S. 279 ..... 165

Arnold v. State (Ga. 1976) 224 S.E.2d 386 ..... 328

Arrieta-Agressot v. United States (1st Cir. 1993) 3 F.3d 525 ..... 128

Attridge v. Cencorp (2nd Cir. 1987) 836 F.2d 113 ..... 164

Austin v. United States (1967 D.C. App. Ct.) 382 F.2d 129 ..... 119

Ballard v. Estelle (9th Cir. 1991) 937 F.2d 453 ..... 236

Ballew v. Georgia (1978) 435 U.S. 223 ..... 363

Bank of Jackson County v. Cherry (11th Cir. 1993) 980 F.2d 1362 ..... 397

Barclay v. Florida (1976) 463 U.S. 939 ..... 379

Barker v. Yukins (6th Cir. 1999) 199 F.3d 867 ..... 335

Bashor v. Riley (9th Cir. 1984) 730 F.2d 1228 ..... 62, 126

Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073 ..... 257

Beazley v. Johnson (5th Cir. 2001) 242 F.3d 248 ..... 393

Beck v. Alabama (1980) 447 U.S. 625 ..... 44

Bell v. Ohio (1978) 438 U.S. 637 ..... 260
Belmontes v. Woodford (9th Cir. 2003) 350 F.3d 861 ..... 129
Berger v. United States (1934) 295 U.S. 78 ..... 127
Blakely v. Washington (2004) 542 U.S. ___, 124 S.Ct. 2531 ..... 352
Blystone v. Pennsylvania (1990) 494 U.S. 299 ..... 316
Booth v. Maryland (1987) 482 U.S. 496 ..... 292
Bostick v. United States (D.C. App. Ct. 1992) 605 A.2d 916 ..... 80
Boyde v. California (1990) 494 U.S. 370 ..... 129
Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091 ..... 61
Brown v. Louisiana (1977) 447 U.S. 323 ..... 364
Brown v. United States (D.C. App. Ct. 1990) 584 A.2d 537 ..... 69
Bruno v. Rushen (9th Cir. 1983) 721 F.3d 1193 ..... 176
Buchanan v. Angelone (1998) 522 U.S. 269 ..... 235
Bush v. Gore (2000) 531 U.S. 98 ..... 390
Buzgheia v. Leasco Sierra Grove (1997) 60 Cal.App.4th 374 ..... 247
Calderon v. Superior Court (2001) 87 Cal.App.4th 933 ..... 37
Caldwell v. Mississippi (1985) 472 U.S. 320 ..... 62
California v. Brown (1987) 479 U.S. 538 ..... 267
California v. Ramos (1983) 463 U.S. 992 ..... 389
California v. Trombetta (1984) 467 U.S. 479 ..... 151
Campbell v. Wood (9th Cir. 1994) 18 F.3d 662 ..... 402
Carella v. California (1989) 491 U.S. 263 ..... 59
Cargle v. Mullin (10th Cir. 2003) 317 F.3d 1196 ..... 280
Cargle v. State (Ok App. Ct. 1995) 909 P.2d 806 ..... 294
Carter v. Kentucky (1981) 450 U.S. 288 ..... 142
Chambers v. Mississippi (1973) 410 U.S. 284 ..... 151
Chandler v. Florida (1981) 449 U.S. 560 ..... 267
Chandler v. United States (11th Cir. 2000) 218 F.3d 1205 ..... 234
Chapman v. California (1967) 386 U.S. 18 ..... 107

Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941 ..... 390
Clark v. United States (1933) 289 U.S. 1 ..... 164
Clemons v. Mississippi (1990) 494 U.S. 738 ..... 296
Coleman v. Calderon (9th Cir. 1999) 210 F.3d 1047 ..... 272
Commonwealth v. Bell (PA 1986) 516 A.2d 1172 ..... 70
Commonwealth v. Means (Pa. 2001) 773 A.2d 143 ..... 294
Commonwealth v. O'Neal (Mass. 1975) 327 N.E.2d 662 ..... 385
Conde v. Henry (9th Cir. 1999) 198 F.3d 734 ..... 61
Conservatorship of Roulet (1979) 23 Cal.3d 219 ..... 369
Consorti v. Armstrong World Industries, Inc. (2nd Cir. 1995) 72 F.3d 1003 ..... 381
Cool v. United States (1972) 409 U.S. 100 ..... 336
Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424 .... 360
Cooper v. State (Fla. Sup. Ct. 1999) 739 So.2d 82 ..... 309
Cordova v. Lynaugh (5th Cir. 1988) 838 F.2d 764 ..... 62
D.P.P. v. Camplin (1978) 67 Crim. App. 14 ..... 78
Davis v. Georgia (1976) 429 U.S. 122 ..... 182
Dear Wing Jung v. United States (9th Cir. 1962) 312 F.2d 73 ..... 399
Delo v. Lashley (1983) 507 U.S. 272 ..... 384
Douglas v. Alabama (1964) 380 U.S. 415 ..... 271
Douglas v. Woodford (9th Cir. 2002) 316 F.3d 1079 ..... 261
Drayden v. White (9th Cir. 2000) 232 F.3d 704 ..... 293
Eddings v. Oklahoma (1982) 455 U.S. 104 ..... 188
Enmund v. Florida (1982) 458 U.S. 782 ..... 256, 302
Estelle v. Gamble (1976) 429 U.S. 97 ..... 402
Estelle v. McGuire (1991) 502 U.S. 62 ..... 129
Estelle v. Williams (1976) 425 U.S. 501 ..... 384
Everette v. Roth (7th Cir. 1994) 37 F.3d 257 ..... 60
Evitts v. Lucey (1985) 469 U.S. 387 ..... 335
Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295 ..... 236

Fierro v. Gomez (N.D. Cal. 1994) 865 F.Supp.1387 ..... 402
Ford v. Wainwright (1986) 477 U.S. 399 ..... 324
Francis v. Franklin (1985) 471 U.S. 307 ..... 246
Frolova v. U.S.S.R. (7th Cir. 1985) 761 F.2d 370 ..... 392
Furman v. Georgia (1972) 408 U.S. 238 ..... 337, 342
Gall v. Parker (6th Cir. 2000) 231 F.3d 265 ..... 193
Gardner v. Florida (1977) 430 U.S. 349 ..... 62, 267
Gentile v. State Bar of Nev. (1991) 501 U.S. 1030 ..... 211
Gideon v. Wainwright (1963) 372 U.S. 335 ..... 334
Godfrey v. Georgia (1980) 446 U.S. 420 ..... 330, 342
Gomez v. Fierro (1996) 519 U.S. 918 ..... 402
Gray v. Klauser (9th Cir. 2001) 282 F.3d 633 ..... 181
Gray v. Mississippi (1987) 481 U.S. 648 ..... 182
Green v. Georgia (1979) 442 U.S. 95 ..... 237
Gregg v. Georgia (1976) 428 U.S. 153 ..... 192
Griffin v. United States (1991) 502 U.S. 46 ..... 363, 373
Hain v. Gibson (10th Cir. 2002) 287 F.3d 1224 ..... 293
Hamilton v. Vasquez (9th Cir. 1994) 17 F.3d 1149 ..... 264
Harmelin v. Michigan (1991) 501 U.S. 957 ..... 302
Harris v. Dugger (11th Cir. 1989) 874 F.2d 756 ..... 264
Hendricks v. Vasquez (9th Cir. 1993) 974 F.2d 1099 ..... 383
Hicks v. Oklahoma (1980) 447 U.S. 343 ..... 236
Hildwin v. Florida (1980) 490 U.S. 638 ..... 363
Hilton v. Guyot (1895) 159 U.S. 113 ..... 394
Hitchcock v. Dugger (1987) 481 U.S. 393 ..... 244
Hooks v. Ward (10th Cir. 1999) 184 F.3d 1206 ..... 125
Howell v. State (Alask. Ct. App. 1996) 917 P.2d 1202 ..... 70
Hudson v. McMillian (1992) 503 U.S. 1 ..... 401
Hughes v. United States (6th Cir. 2001) 258 F.3d 453 ..... 181

In re Anderson (1968) 69 Cal.2d 613 ..... 199
In re Carpenter (1995) 9 Cal.4th 634 ..... 211
In re Cordero (1988) 46 Cal.3d 161 ..... 81
In re Ferguson (1971) 5 Cal.3d 525 ..... 127
In re Foss (1974) 10 Cal.3d 910 ..... 302
In re Hitchings (1993) 6 Cal.4th 97 ..... 211
In re Horton (1991) 54 Cal.3d 82 ..... 210
In re Kemmler (1890) 136 U.S. 436 ..... 401
In re Lucas (2004) 33 Cal.4th 682 ..... 261
In re Lynch (1972) 8 Cal.3d 410 ..... 302
In re Martin (1987) 44 Cal.3d 1 ..... 264
In re Mendes (1979) 23 Cal.3d 847 ..... 206
In re Mosher (1969) 1 Cal.3d 379 ..... 104
In re Reed (1983) 33 Cal.3d 914 ..... 311
In re Rodriguez (1975) 14 Cal.3d 639 ..... 303
In re Rodriguez (1981) 119 Cal.App.3d 457 ..... 127
In re Sergio R. (1991) 228 Cal.App.3d 588 ..... 113
In re Stanford (2002) 537 U.S. 968 ..... 310
In re Sturm (1974) 11 Cal.3d 258 ..... 376
In re Thomas C. (1986) 183 Cal.App.3d 786 ..... 81
Izazaga v. Superior Court (1991) 54 Cal.3d 356 ..... 334
Jackson v. Calderon (9th Cir. 2000) 211 F.3d 1148 ..... 259
Jackson v. Herring (11th Cir. 1995) 42 F.3d 1350 ..... 259
James v. Borg (9th Cir. 1994) 24 F.3d 20 ..... 259
Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. 110 ..... 395
Johnson v. Armantrout (8th Cir. 1992) 961 F.2d 748 ..... 212
Johnson v. Mississippi (1988) 486 U.S. 578 ..... 298, 325
Johnson v. State (Nev. 2002) 59 P.3d 450 ..... 355, 359
Johnson v. Texas (1993) 509 U.S. 350 ..... 260

Johnson v. Zerbst (1938) 304 U.S. 458 ..... 209
Killian v. Poole (9th Cir. 2002) 282 F.3d 1204 ..... 167
King v. United States (D.C. 1967) 372 F.2d 383 ..... 175
Kinsella v. United States (1960) 361 U.S. 234 ..... 389
LaGrand v. Lewis (D. Ariz. 1995) 883 F.Supp. 469, aff'd (9th Cir. 1998) 133 F.3d 1253 ..... 406
LeMons v. Regents of University of California (1978) 21 Cal.3d 869 ..... 246
Lindsey v. Washington (1937) 301 U.S. 397 ..... 407
Livingston v. State (Fla. 1988) 565 So.2d 1288 ..... 311
Lockett v. Ohio (1978) 438 U.S. 586 ..... 62, 237
Lockhart v. McCree (1986) 476 U.S. 162 ..... 187
Lowenfield v. Phelps (1988) 484 U.S. 231 ..... 337, 340
Maher v. People (Mich Sup. Court 1862) 10 Mich. 212 ..... 73
Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614 ..... 177
Marshall v. Union Oil (9th Cir. 1980) 616 F.2d 1113 ..... 398
Matthews v. Eldridge (1976) 424 U.S. 319 ..... 369
Maxwell v. Bishop (1970) 398 U.S. 262 ..... 199
Mayfield v. Woodford (9th Cir. 2001) 270 F.3d 915 ..... 262
Maynard v. Cartwright (1988) 486 U.S. 356 ..... 328
McCullough v. Bennett (N.D.N.Y. 2003) 317 F.Supp.2d 112 ..... 212
McDonald v. Pless (1915) 238 U.S. 264 ..... 164
McGautha v. California (1971) 402 U.S. 183 ..... 188
McKenzie v. Day (9th Cir. 1995) 57 F.3d 1461 ..... 393
McKoy v. North Carolina (1990) 494 U.S. 433 ..... 234
Miller v. Lockhart (8th Cir. 1995) 65 F.3d 676 ..... 278
Miller v. United States (1870) 78 U.S. 268 ..... 394
Mills v. Maryland (1988) 486 U.S. 367 ..... 322
Minister of Justice v. Burns (2001) 1 S.C.R. 283 ..... 392
Monge v. California (1998) 524 U.S. 721 ..... 362

Morgan v. Illinois (1992) 504 U.S. 719 ..... 179
Morrison v. Colorado (Co. 2000) 19 P.2d 668 ..... 214
Mullaney v. Wilbur (1975) 421 U.S. 684 ..... 59
Murray's Lessee (1855) 59 U.S. (18 How.) 272 ..... 363
Murray's Lessee v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272 ..... 373
Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d 926 ..... 264
N. Mariana Islands v. Bowie (9th Cir. 2001) 243 F.3d 1109 ..... 127
Nance v. State (Ga. 2000) 526 S.E.2d 560 ..... 204
Napue v. Illinois (1959) 360 U.S. 264 ..... 166
Newlon v. Armantrout (8th Cir. 1989) 885 F.2d 1238 ..... 267
Ohio Adult Parole Authority v. Woodward (1998) 523 U.S. 272 ..... 397
Osborne v. Ohio (1990) 495 U.S. 103 ..... 59
Parker v. Dugger (1991) 498 U.S. 308 ..... 262
Parker v. Gladden (1966) 385 U.S. 363 ..... 264
Patton v. United States (1930) 281 U.S. 276 ..... 211
Paxton v. Ward (10th Cir. 1999) 199 F.3d 1197 ..... 167, 267
Payne v. Arkansas (1958) 356 U.S. 560 ..... 51
Payne v. Tennessee (1991) 501 U.S. 808 ..... 282
People . Kanawyer (2003) 113 Cal.App.4th 1233 ..... 81
People v Bacigalupo (1993) 6 Cal.4th 857 ..... 343
People v. Abbaszadeh (2003) 106 Cal.App.4th 642 ..... 173
People v. Adrian (1982) 135 Cal.App.3d 335 ..... 316
People v. Alcala (1984) 36 Cal.3d 604 ..... 98, 119
People v. Allen (1986) 42 Cal.3d 1222 ..... 356, 387
People v. Anderson (1968) 70 Cal.2d 15 ..... 98
People v. Anderson (1972) 6 Cal.3d 628 ..... 302
People v. Anderson (1987) 43 Cal.3d 1104 ..... 338
People v. Anderson (2001) 25 Cal.4th 543 ..... 318, 356

People v. Aranda (1938) 12 Cal.2d 307 ..... 113
People v. Aranda (1965) 63 Cal.2d 518 ..... 35
People v. Arias (1996) 13 Cal.4th 92 ..... 37, 384
People v. Ashmus (1991) 54 Cal.3d 932 ..... 256
People v. Ayala (2000) 23 Cal.4th 225 ..... 206
People v. Bacigalupo (1993) 6 Cal.4th 457 ..... 331
People v. Barnett (1998) 17 Cal.4th 1104 ..... 208
People v. Barton (1995) 12 Cal.4th 186 ..... 57
People v. Bell (1989) 49 Cal.3d 502 ..... 127
People v. Bemore (2000) 22 Cal.4th 809 ..... 206
People v. Bender (1945) 27 Cal.2d 164 ..... 130
People v. Benson (1990) 52 Cal.3d 754 ..... 316
People v. Berry (1976) 18 Cal.3d 509 ..... 65
People v. Birks (1998) 19 Cal.4th 108 ..... 64
People v. Birreuta (1984) 162 Cal.App.3d 454 ..... 67
People v. Bittaker (1989) 48 Cal.3d 1046 ..... 346
People v. Blakeley (2000) 23 Cal.4th 82 ..... 59
People v. Bland (2002) 28 Cal.4th 313 ..... 70
People v. Bobo (1990) 229 Cal.App.3d 1417 ..... 81, 381
People v. Bolden (1990) 217 Cal.App.3d 1591 ..... 126
People v. Bolton (1979) 23 Cal.3d 208 ..... 173
People v. Bonillas (1989) 48 Cal.3d 757 ..... 316
People v. Bonin (1988) 46 Cal.3d 659 ..... 269
People v. Borchers (1958) 50 Cal.2d 321 ..... 65
People v. Boulerice (1992) 5 Cal.App.4th 463 ..... 211
People v. Boyd (1985) 38 Cal.3d 762 ..... 64
People v. Boyde (1988) 46 Cal.3d 212 ..... 37
People v. Boyette (2002) 29 Cal.4th 318 ..... 182
People v. Bradford (1997) 14 Cal.4th 1005 ..... 407

People v. Bradford (1997) 15 Cal.4th 1229 ..... 180
People v. Brady (1987) 190 Cal.App.3d 124 ..... 115
People v. Breaux (1991) 1 Cal.4th 281 ..... 329
People v. Breverman (1998) 19 Cal.4th 142 ..... 57
People v. Bridgehouse (1946) 47 Cal.2d 406 ..... 63, 65
People v. Brooks (1986) 185 Cal.App.3d 687 ..... 63
People v. Brophy (1954) 122 Cal.App.2d 638 ..... 127, 149
People v. Brown (1988) 45 Cal.3d 1247 ..... 128
People v. Brown (1989) 212 Cal.App.3d 1409 ..... 64
People v. Brubaker (1959) 53 Cal.2d 37 ..... 59
People v. Bull (Ill. 1998) 705 N.E.2d 824 ..... 391
People v. Burnick (1975) 14 Cal.3d 306 ..... 369
People v. Cain (1995) 10 Cal.4th 1 ..... 242
People v. Carlson (1974) 37 Cal.App.3d 349 ..... 84
People v. Carpenter (1997) 15 Cal.4th 312 ..... 264
People v. Carpenter (1999) 21 Cal.4th 1016 ..... 321
People v. Carrera (1989) 49 Cal.3d 291 ..... 104, 272
People v. Carter (2003) 30 Cal.4th 1116 ..... 268
People v. Carter (2003) 30 Cal.4th 1166 ..... 234
People v. Cash (2002) 28 Cal.4th 703 ..... 181
People v. Castillo (1997) 16 Cal.4th 1009 ..... 126
People v. Castro (1994) 27 Cal.App.4th 578 ..... 313
People v. Champion (1995) 9 Cal.4th 879 ..... 161
People v. Chavez (1980) 26 Cal.3d 344 ..... 150
People v. Claire (1992) 2 Cal.4th 629 ..... 128
People v. Clark (1993) 5 Cal.4th 950 ..... 302, 381
People v. Coffman (2004) 34 Cal.4th 1 ..... 208
People v. Cole (2003) 33 Cal.4th 1158 ..... 302
People v. Coleman (1969) 71 Cal.2d 1159 ..... 251

People v. Collins (1976) 17 Cal.3d 687 ..... 164
People v. Collins (2001) 26 Cal.4th 297 ..... 210
People v. Cooper (1991) 53 Cal.3d 771 ..... 264
People v. Costello (1943) 21 Cal.2d 760 ..... 334
People v. Cotter (1992) 6 Cal.App.4th 1671 ..... 412
People v. Cox (1991) 53 Cal.3d 618 ..... 199, 233
People v. Cox (2003) 30 Cal.4th 916 ..... 313
People v. Crandell (1988) 46 Cal.3d 833 ..... 115
People v. Crittenden (1994) 9 Cal.4th 83 ..... 174, 180, 276
People v. Cummings (1993) 4 Cal.4th 1233 ..... 36, 103
People v. Cunningham (2001) 25 Cal.4th 926 ..... 180
People v. Daggett (1990) 225 Cal.App.3d 751 ..... 51
People v. Daniels (1991) 52 Cal.3d 815 ..... 266, 268
People v. Davenport (1995) 11 Cal.4th 1171 ..... 242
People v. Davis (1994) 7 Cal.4th 797 ..... 338
People v. Dewberry (1959) 51 Cal.2d 548 ..... 244
People v. Dillon (1983) 34 Cal.3d 441 ..... 302
People v. Duncan (1991) 53 Cal.3d 955 ..... 317, 359
People v. Dyer (1988) 45 Cal.3d 26 ..... 345
People v. Earp (1999) 20 Cal. 4th 826 ..... 233
People v. Easley (1983) 34 Cal.3d 858 ..... 247
People v. Edelbacher (1989) 47 Cal.3d 983 ..... 96
People v. Edgmon (1968) 267 Cal.App.2d 759 ..... 66
People v. Edwards (1991) 54 Cal.3d 787 ..... 128, 274
People v. Ellison (2003) 111 Cal.App.4th 1360 ..... 172
People v. Engelman (2002) 28 Cal.4th 436 ..... 163
People v. Espinoza (1992) 3 Cal.4th 806 ..... 127
People v. Estrada (1998) 63 Cal.App.4th 1090 ..... 213
People v. Evans (1994) 25 Cal.App.4th 358 ..... 147

People v. Fairbank (1997) 16 Cal.4th 1223 ..... 352
People v. Falsetta (1999) 21 Cal.4th 903 ..... 126
People v. Farnam (2002) 28 Cal.4th 107 ..... 355, 379
People v. Farnham (2002) 28 Cal.4th 107 ..... 209
People v. Fauber (1992) 2 Cal.4th 792 ..... 293, 376
People v. Feagley (1975) 14 Cal.3d 338 ..... 369
People v. Fitzpatrick (1992) 2 Cal.App.4th 1285 ..... 131
People v. Flannel (1979) 25 Cal.3d 668 ..... 58
People v. Frohner (1976) 65 Cal.App.3d 94 ..... 52
People v. Fudge (1994) 7 Cal.4th 1075 ..... 126
People v. Garceau (1993) 6 Cal.4th 140 ..... 208
People v. Geiger (1985) 35 Cal.3d 510 ..... 64
People v. Ghent (1987) 43 Cal.3d 739 ..... 180
People v. Gilbert (1969) 1 Cal.3d 475 ..... 61, 111
People v. Glenn (1991) 229 Cal.App.3d 1461 ..... 335
People v. Gonzalez (1990) 51 Cal.3d 1179 ..... 251
People v. Graham (1969) 71 Cal.2d 303 ..... 104
People v. Grant (2003) 113 Cal.App.4th 579 ..... 37
People v. Green (1980) 27 Cal.3d 1 ..... 337
People v. Griffin (2004) 33 Cal.4th 536 ..... 242, 360
People v. Guiton (1993) 4 Cal.4th 1116 ..... 325
People v. Gurule (2002) 28 Cal.4th 557 ..... 322
People v. Gutierrez (2002) 28 Cal.4th 1083 ..... 63
People v. Gutierrez (2003) 112 Cal.App.4th 704 ..... 101
People v. Hamilton (1963) 60 Cal.2d 105 ..... 301
People v. Hamilton (1989) 48 Cal.3d 1142 ..... 230
People v. Hansen (2000) 23 Cal.4th 355 ..... 407
People v. Hardy (1992) 2 Cal.4th 86 ..... 38
People v. Harris (1984) 36 Cal.3d 36 ..... 282

People v. Haskett (1982) 30 Cal.3d 841 ..... 292
People v. Hawkins (1995) 10 Cal. 4th 920 ..... 233
People v. Hawthorne (1992) 4 Cal.4th 43 ..... 268, 355
People v. Heard (2003) 31 Cal.4th 946 ..... 180
People v. Hernandez (2003) 30 Cal.4th 835 ..... 357
People v. Hill (1992) 3 Cal.4th 959 ..... 180
People v. Hill (1998) 17 Cal.4th 800 ..... 127
People v. Hillhouse (2002) 27 Cal.4th 469 ..... 194
People v. Hines (1997) 15 Cal.4th 997 ..... 313
People v. Hitchings (1997) 59 Cal.App.4th 915 ..... 381
People v. Holt (1997) 15 Cal.4th 619 ..... 199, 323
People v. Hoskins (1978 Mich. Sup. Ct.) 267 N.W.2d 417 ..... 64
People v. Iniguez (1994) 7 Cal.4th 847 ..... 64
People v. James (1976) 56 Cal.App.3d 876 ..... 96
People v. Jeffers (1996) 41 Cal.App.4th 917 ..... 126
People v. Jennings (1991) 53 Cal.3d 334 ..... 325
People v. Jiminez (1950) 95 Cal.App.2d 840 ..... 98
People v. Johnson (1988) 47 Cal.3d 576 ..... 37
People v. Johnson (1992) 3 Cal.4th 1183 ..... 145
People v. Johnson (1993) 6 Cal.4th 1 ..... 134
People v. Jones (2003) 30 Cal.4th 1084 ..... 233
People v. Kane (1946) 27 Cal.2d 693 ..... 318
People v. Kasim (1997) 56 Cal.App.4th 1360 ..... 167
People v. Kaurish (1990) 52 Cal.3d 648 ..... 192
People v. Keenan (1988) 46 Cal.3d 478 ..... 37
People v. Kelley (1980) 113 Cal.App.3d 1005 ..... 334
People v. Kirkpatrick (1994) 7 Cal.4th 988 ..... 224
People v. Kraft (2000) 23 Cal.4th 978 ..... 289
People v. Kwolek (1995) 40 Cal.App.4th 1521 ..... 412

People v. Lanphear (1980) 26 Cal.3d 814 ..... 199
People v. Lara (2001) 86 Cal.App.4th 139 ..... 105
People v. Lee (1999) 20 Cal.4th 47 ..... 58
People v. Levitt (1984) 156 Cal.App.3d 500 ..... 70
People v. Lewis (2001) 25 Cal.4th 610 ..... 58
People v. Livaditis (1992) 2 Cal.4th 759 ..... 145, 238
People v. Logan (1917) 175 Cal. 45 ..... 63
People v. Lucas (1995) 12 Cal.4th 415 ..... 208
People v. Lucero (1988) 203 Cal.App.3d 1011 ..... 103
People v. Lucero (1988) 44 Cal.3d 1006 ..... 128
People v. Malone (1988) 47 Cal.3d 1 ..... 126
People v. Marks (1988) 45 Cal.3d 1335 ..... 57
People v. Marlow (1995) 48 Cal.App.4th 740 ..... 312
People v. Marshall (1990) 50 Cal.3d 907 ..... 104
People v. Marshall (1996) 13 Cal.4th 799 ..... 107
People v. Martin (1986) 42 Cal.3d 437 ..... 376
People v. Massie (1967) 66 Cal.2d 899 ..... 38
People v. Mata (1955) 133 Cal.App.2d 18 ..... 334
People v. Maury (2003) 30 Cal.4th 342 ..... 242
People v. Mayfield (1997) 14 Cal.4th 668 ..... 134
People v. Mayo (1961) 194 Cal.App.2d 527 ..... 319
People v. McCoy (2001) 24 Cal.4th 1111 ..... 83
People v. Medina (1995) 11 Cal.4th 694 ..... 365
People v. Melton (1988) 44 Cal.3d 713 ..... 238
People v. Memro (1995) 11 Cal.4th 786 ..... 181
People v. Mendoza (2000) 24 Cal.4th 130 ..... 37
People v. Michaels (2002) 28 Cal.4th 486 ..... 325
People v. Mickey (1991) 54 Cal.3d 612 ..... 64
People v. Millwee (1998) 18 Cal.4th 297 ..... 208

People v. Milner (1988) 45 Cal.3d 227 ..... 330
People v. Mincey (1992) 2 Cal.4th 408 ..... 180
People v. Miranda (1987) 44 Cal.3d 57 ..... 96
People v. Montiel (1993) 5 Cal.4th 877 ..... 126
People v. Moore (1954) 43 Cal.2d 517 ..... 320
People v. Morales (1989) 48 Cal.3d 527 ..... 344
People v. Morris (1991) 53 Cal.3d 185 ..... 206
People v. Musslewhite (1998) 17 Cal.4th 1216 ..... 293
People v. Navarro (1972) 7 Cal.3d 248 ..... 301
People v. Nguyen (1988) 204 Cal.App.3d 181 ..... 128
People v. Nguyen (1995) 40 Cal.App.4th 28 ..... 127
People v. Nicolaus (1991) 54 Cal.3d 551 ..... 317, 346
People v. Noguera (1992) 4 Cal.4th 59 ..... 293
People v. Ochoa (2001) 26 Cal.4th 398 ..... 180
People v. Olivas (1976) 17 Cal.3d 236 ..... 385
People v. Orabuena (1976) 56 Cal.App.3d 540 ..... 113
People v. Padayao (1994) 24 Cal.App.4th 1610 ..... 312
People v. Padilla (2002) 103 Cal.App.4th 675 ..... 84
People v. Peak (1944) 66 Cal.App.2d 894 ..... 332
People v. Pensinger (1991) 52 Cal.3d 1210 ..... 132
People v. Perez (1962.) 58 Cal.2d 229 ..... 127
People v. Pinholster (1992) 1 Cal.4th 865 ..... 35
People v. Pollock (2004) 32 Cal.4th 1153 ..... 293
People v. Pope (1979) 23 Cal.3d 412 ..... 207
People v. Powell (1967) 67 Cal.2d 32 ..... 274
People v. Prieto (2003) 30 Cal.4th 226 ..... 161, 356
People v. Ratliff (1986) 41 Cal.3d 675 ..... 59
People v. Renteria (1964) 61 Cal.2d 497 ..... 64
People v. Rice (1976) 59 Cal.App.3d 998 ..... 334

People v. Riel (2000) 22 Cal.4th 1153 ..... 241
People v. Rincon-Pineda (1975) 14 Cal.3d 864 ..... 266
People v. Rios (2000) 23 Cal.4th 450 ..... 59
People v. Risenhoover (1968) 70 Cal.2d 39 ..... 199
People v. Rivera (1984) 157 Cal.App.3d 736 ..... 83
People v. Robertson (1982) 33 Cal.3d 21 ..... 249
People v. Roder (1983) 33 Cal.3d 491 ..... 129
People v. Rodriguez (1986) 42 Cal.3d 730 ..... 388
People v. Roybal (1998) 19 Cal.4th 481 ..... 279
People v. Rupe (1988) 206 Cal.App.3d 1537 ..... 382
People v. Saille (1991) 54 Cal.3d 1103 ..... 134
People v. Salas (1976) 58 Cal.App.3d 460 ..... 244
People v. Samayoa (1997) 15 Cal.4th 795 ..... 397
People v. Sanchez (1864) 24 Cal. 17 ..... 130
People v. Sanchez (1995) 12 Cal.4th 1 ..... 153
People v. Sanchez (2001) 26 Cal.4th 834 ..... 151
People v. Sandoval (1992) 4 Cal.4th 155 ..... 267
People v. Sapp (2003) 31 Cal.4th 240 ..... 337
People v. Saunders (1995) 11 Cal.4th 475 ..... 268
People v. Scott (1944) 24 Cal.2d 774 ..... 37
People v. Scott (1994) 9 Cal.4th 331 ..... 215, 413
People v. Scott (1996) 14 Cal.4th 544 ..... 114
People v. Sears (1970) 2 Cal.3d 180 ..... 316
People v. Smith (1907) 151 Cal. 619 ..... 63
People v. Smith (1973) 33 Cal.App.3d 51 ..... 113
People v. Smith (2003) 30 Cal.4th 581 ..... 293, 316
People v. Smithey (1999) 20 Cal.4th 936 ..... 161
People v. Snow (2003) 30 Cal.4th 43 ..... 356
People v. Son (2000) 79 Cal.App.4th 224 ..... 381

People v. Spurlin (1984) 156 Cal.App.3d 119 ..... 54
People v. St. Martin (1970) 1 Cal.3d 524 ..... 125
People v. Stanley (1995) 10 Cal.4th 764 ..... 344
People v. Steger (1976) 16 Cal.3d 39 ..... 130
People v. Stewart (1983) 145 Cal.App.3d 967 ..... 247
People v. Stewart (2004) 33 Cal.4th 425 ..... 180
People v. Superior Court (Romero) (1996) 13 Cal.4th 497 ..... 244
People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183 ..... 61
People v. Surplice (1962) 203 Cal.App.2d 784 ..... 181
People v. Sutic (1953) 41 Cal.2d 483 ..... 113
People v. Talle (1952) 111 Cal.App.2d 650 ..... 127
People v. Tapia (1994) 25 Cal.App.4th 984 ..... 105
People v. Taylor (1961) 197 Cal.App.2d 372 ..... 130
People v. Taylor (1990) 52 Cal.3d 719 ..... 363, 367
People v. Terry (1964) 61 Cal.2d 137 ..... 233
People v. Thomas (1977) 19 Cal.3d 630 ..... 369
People v. Thompkins (1987) 195 Cal.App.3d 244 ..... 131, 319
People v. Tufunga (2001) 21 Cal.4th 935 ..... 75
People v. Turner (1984) 37 Cal.3d 302 ..... 35
People v. Turner (1990) 50 Cal.3d 708 ..... 106
People v. Valdez (2004) 32 Cal.4th 73 ..... 104
People v. Valentine (1946) 28 Cal.2d 121 ..... 63
People v. Van Ronk (1985) 171 Cal.App.3d 818 ..... 57
People v. Varona (1983) 143 Cal.App.3d 566 ..... 52, 167
People v. Velasquez (1980) 26 Cal.3d 425 ..... 199
People v. Venegas (1998) 18 Cal.4th 47 ..... 106
People v. Vera (1997) 15 Cal.4th 269 ..... 150
People v. Viramontes (2001) 93 Cal.App.4th 1256 ..... 64
People v. Vogel (1956) 46 Cal.2d 798 ..... 70

People v. Wagner (1975) 13 Cal.3d 612 ..... 173
People v. Walker (1988) 47 Cal.3d 605 ..... 346
People v. Warner (1978) 20 Cal.3d 678 ..... 181
People v. Warren (1988) 45 Cal.3d 471 ..... 129
People v. Watson (1899) 125 Cal. 342 ..... 244
People v. Watts (1976) 59 Cal.App.3d 80 ..... 106
People v. Weaver (2001) 26 Cal.4th 876 ..... 181, 302
People v. Webb (1956) 143 Cal.App.2d 402 ..... 132
People v. Webster (1991) 54 Cal.3d 411 ..... 210
People v. Welch (1993) 5 Cal.4th 228 ..... 182
People v. Wharton (1991) 53 Cal.3d 522 ..... 65
People v. Wheeler (1978) 22 Cal.3d 258 ..... 179
People v. Wickersham (1982) 32 Cal.3d 307 ..... 57
People v. Williams (1988) 199 Cal.App.3d 469 ..... 57
People v. Wilson (1967) 66 Cal.2d 749 ..... 59
People v. Wilson (Ill. App. Ct. 1987) 515 N.E.2d 812 ..... 42
People v. Wims (1995) 10 Cal.4th 293 ..... 272
People v. Woods (1993) 12 Cal.App.4th 1139 ..... 382
People v. Yeoman (2003) 31 Cal.4th 93 ..... 161
People v. Yrigoyen (1955) 45 Cal.2d 46 ..... 266
People v. Zapien (1993) 4 Cal.4th 929 ..... 192
People v. Zemavasky (1942) 20 Cal.2d 56 ..... 150
People v. Zito (1992) 8 Cal.App.4th 736 ..... 407
Perez v. Marshall (9th Cir. 1997) 119 F.3d 1422 ..... 165
Phillips v. Queen (1968) 2 A.C. 130 ..... 78
Plyler v. Doe (1982) 457 U.S. 202 ..... 336
Presnell v. Georgia (1978) 439 U.S. 14 ..... 368
Proffitt v. Florida (1976) 428 U.S. 242 ..... 374
Pulley v. Harris (1984) 465 U.S. 37 ..... 302, 344

Ramirez v. Castro (9th Cir. 2004) 365 F.3d 755 ..... 302
Ray v. State (Fla. Sup, Ct. 2000) 755 So.2d 604 ..... 312
Regina v. Davies (1975) Q.B. 691 ..... 70
Regina v. Mawgridge (Q.B. 1707) 84 Eng. Rep. 1107 ..... 69
Regina v. Welsh (1868) 11 Cox Crim. C. 336 ..... 69
Reid v. Covert (1957) 354 U.S. 1 ..... 389
Richardson v. United States (1999) 526 U.S. 813 ..... 365
Ring v. Arizona (2002) 536 U.S. 584 ..... 44
Rogers v. McMullen (11th Cir. 1982) 673 F.2d 1185 ..... 211
Rose v. Clark (1986) 478 U.S. 570 ..... 165
Ross v. Oklahoma (1988) 487 U.S. 81 ..... 208
Rufo v. Simpson (2001) 86 Cal.App.4th 573 ..... 287
Rupe v. Wood (9th Cir. 1996) 93 F.3d 1434 ..... 237
Sabariego v. Maverick (1888) 124 U.S. 261 ..... 394
Sanders v. Woodford (9th Cir. 2004) 373 F.3d 1054 ..... 280, 296
Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378 ..... 247
Sandoval v. Calderon (9th Cir. 2001) 241 F.3d 765 ..... 267
Santosky v. Kramer (1982) 455 U.S. 743 ..... 369
Sattazahn v. Pennsulvania (2003) 537 U.S. 101 ..... 44
Saunders v. Woodford (9th Cir. 2004) 373 F.3d 1054 ..... 298
Shannon v. United States (1994) 512 U.S. 573 ..... 127
Shufflin v. People (1875 N.Y.) 62 N.Y. 229 ..... 80
Silva v. Woodford (9th Cir. 2002) 279 F.3d 825 ..... 236
Simmons v. South Carolina (1994) 512 U.S. 154 ..... 237
Simpson v. United States (D.C. App. Ct. 1993) 632 A.2d 374 ..... 73
Skinner v. Oklahoma (1942) 316 U.S. 535 ..... 386
Skipper v. South Carolina (1986) 476 U.S. 1 ..... 192
Smith v. McCormick (9th Cir. 1990) 914 F.2d 1153 ..... 255
Smith v. Singletary (11th Cir. 1995) 61 F.3d 815 ..... 258

Smith v. Stewart (9th Cir. 1998) 140 F.3d 1263 ..... 281
Smith v. Texas (Nov. 15, 2004) ____ U.S. ___, 2004 U.S. Lexis 7668 ..... 282
Sochor v. Florida (1992) 504U.S. 537 ..... 296
Solem v. Helm (1983) 463 U.S. 277 ..... 302
Speiser v. Randall (1958) 357 U.S. 513 ..... 368
Stanford v. Kentucky (1980) 492 U.S. 361 ..... 310
State v. Fowler (1978 Iowa Sup. Ct.) 268 N.W.2d 220, 224 ..... 80
State v. Gesch (Wisc. 1992) 482 N.W.2d 99 ..... 214
State v. Hightower (N.J. 1996) 680 A.2d 649 ..... 294
State v. Koskovich (N.J. 2001) 776 A.2d 144 ..... 294
State v. Michael (W.Va. 1914) 82 S.E. 611 ..... 70
State v. Nesbit (Tenn. 1998) 978 S.W.2d 872 ..... 294
State v. Pierre (Utah 1977) 572 P.2d 1338 ..... 354
State v. Ring (Az. 2003) 65 P.3d 915 ..... 359
State v. Rizzo (Conn. 2003) 833 A.2d 363 ..... 372
State v. Russo (1910 Del.) 77 A. 743 ..... 80
State v. Whitfield (Mo. 2003) 107 S.W.3d 253 ..... 359
State v. Yanz (1901 Conn.) 50 A. 37 ..... 80
Stewart v. Dugger (11th Cir. 1989) 877 F.2d 851 ..... 234
Strickland v. Washington (1984) 466 U.S. 668 ..... 207
Stringer v. Black (1992) 503 U.S. 222 ..... 296
Sullivan v. Louisiana (1993) 508 U.S. 275 ..... 59
Tanner v. United States (1987) 483 U.S. 107 ..... 164
Tapia v. Superior Court (1991) 53 Cal.3d 282 ..... 407
Tarver v. Hopper (11th Cir. 1999) 169 F.3d 710 ..... 234
Taylor v. Kentucky (1978) 436 U.S. 478 ..... 128
Tejada v. Dubois (1st Cir. 1998) 142 F.3d 18 ..... 213
Tennard v. Dretke (2004) 542 U.S. __, 124 S.Ct. 2562 ..... 234
Tennessee v. Teague (Tenn. 1995) 897 S.W.2d 248 ..... 233

Thompson v. Oklahoma (1988) 487 U.S. 815 ..... 309
Townsend v. Sain (1963) 372 U.S. 293 ..... 375
Tripp v. State (1977 Md. App. Ct.) 374 A.2d 384 ..... 80
Tuilaepa v. California (1994) 512 U.S. 967 ..... 324
Turner v. Murray (1986) 476 U.S. 28 ..... 389
Turner v. State (Ga. 1997) 486 S.E.2d 839 ..... 294
United States ex rel. Free v. Peters (1994) 806 F. Supp. 705 ..... 383
United States v. Agurs (1976) 472 U.S. 97 ..... 166
United States v. Artus (9th Cir. 1979) 591 F.2d 526 ..... 127
United States v. Auerbach (8th Cir. 1984) 745 F.2d 1157 ..... 42
United States v. Aulicino (2d Cir. 1995) 44 F.3d 1102 ..... 38
United States v. Bagley (1985) 473 U.S. 667 ..... 173
United States v. Brady (9th Cir. 1978) 579 F.2d 1121 ..... 39
United States v. Brown (D.C. Cir. 1987) 823 Fd.2d 591 ..... 163
United States v. Cheely (9th Cir. 1994) 36 F.3d 1439 ..... 338
United States v. Crawford (5th Cir. 1978) 581 F.2d 489 ..... 40
United States v. Davis (E.D.LA 2001) 132 F.Supp.2d 455 ..... 233
United States v. Duarte-Acero (11th Cir. 2000) 208 F.3d 1282 ..... 393
United States v. Ebens (6th Cir. 1986) 800 F.2d 1422 ..... 52
United States v. Eubanks (9th Cir. 1979) 591 F.2d 513 ..... 208
United States v. Gaudin (1995) 515 U.S. 506 ..... 59
United States v. Gonzalez (9th Cir. 2000) 214 F.3d 1109 ..... 208
United States v. Johnson (5th Cir. 1973) 478 F.2d 1129 ..... 41
United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315 ..... 127
United States v. Lane (1986) 474 U.S. 438 ..... 37
United States v. LaPage (9th Cir. 2001) 231 F.3d 488 ..... 149
United States v. Layton (9th Cir. 1985) 767 F.2d 549 ..... 127
United States v. Manning (1st Cir. 1994) 23 F.3d 570 ..... 267
United States v. Marques (9th Cir. 1979) 600 F.2d 742 ..... 164

United States v. Martinez-Salazar (2000) 528 U.S. 304 ..... 209
United States v. Mayfield (9th Cir. 1999) 189 F.3d 895 ..... 38
United States v. Mendoza (9th Cir. 2001) 244 F.3d 1037 ..... 272
United States v. Nelson (2d Cir. 2002) 277 F.3d 164 ..... 214
United States v. Newcomb (6th Cir 1993) 6 F.3d 1129 ..... 127
United States v. Padilla-Mendoza (9th Cir. 1998) 157 F.3d 730 ..... 195
United States v. Quintero-Barraza (9th Cir. 1995) 78 F.3d 1344 ..... 208
United States v. Rodrigues (9th Cir. 1999) 170 F.3d 881 ..... 127
United States v. Romanello (5th Cir. 1984) 726 F.2d 173 ..... 39
United States v. Rose (1st Cir. 1997) 104 F.3d 1408 ..... 40
United States v. Rucker (11th Cir. 1990) 915 F.2d 1511 ..... 39
United States v. Sampol (D.C. Cir. 1980) 636 F.2d 621 ..... 42
United States v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405 ..... 62, 126
United States v. Sherlock (9th Cir. 1989) 962 F.2d 1349 ..... 40
United States v. Span (9thCir. 1996) 75 F.3d 1383 ..... 269
United States v. Symington (9th Cir. 1999) 195 F.3d 1080 ..... 164
United States v. Throckmorton (9th Cir. 1996) 87 F.3d 1069 ..... 40
United States v. Tootick (9th Cir. 1991) 952 F.2d 1078 ..... 38
United States v. Unruh (9th Cir. 1987) 855 F.2d 1363 ..... 62
United States v. Waggoner (9th Cir. 2003) 339 F.3d 915 ..... 44
United States v. Ziperstein (7th Cir. 1979) 601 F.2d 281 ..... 37
Vasquez v. Hillery (1986) 474 U.S. 254 ..... 210
Vicars v. Ricketts (9th Cir. 1986) 798 F.2d 369 ..... 62
Vujosevic v. Rafferty (3d Cir. 1988) 844 F.2d 1023 ..... 60
Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312 ..... 340
Wainwright v. Witt (1985) 469 U.S. 412 ..... 180
Walton v. Arizona (1990) 497 U.S. 639 ..... 353
Wardius v. Oregon (1973) 412 U.S. 470 ..... 320
Washington v. Texas (1967) 388 U.S. 14 ..... 334

Westbrook v. Milahy (1970) 2 Cal.3d 765 ..... 385
Wiggins v. Smith (2003) 539 U.S. 510 ..... 259
Williams v. State (Fla. 1998) 707 So.2d 683 ..... 311
Williams v. State (Fla. Sup. Ct. 1998) 707 So.2d 683 ..... 312
Williams v. Superior Court (1984) 36 Cal.3d 441 ..... 37
Williams v. Taylor (2000) 529 U.S. 362 ..... 259
Williams v. Woodford (9th Cir. 2002) 306 F.3d 665 ..... 234
Witherspoon v. Illinois (1968) 391 U.S. 510 ..... 179
Woldt v. People (Colo. 2003) 64 P.3d 256 ..... 359
Wolfe v. Brigano (6th Cir. 2000) 232 F.3d 499 ..... 181
Woodson v. North Carolina (1976) 428 U.S. 280 ..... 62
Yates v. Evatt (1991) 500 U.S. 391 ..... 107
Young v. Bowersox (8th Cir. 1998) 161 F.3d 1159 ..... 279
Zafiro v. United States (1993) 506 U.S. 534 ..... 37
Zant v. Stephens (1983) 462 U.S. 862 ..... 251
Zemina v. Solem (D.S.D. 1977) 438 F.Supp. 455 ..... 336

**Statutes**

18 Pa. C.S. § 2503 ..... 70
42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) ..... 354
A.S. 11.41.115(f)(2) ..... 74
Ala. Code, § 13A-5-45(e) ..... 354
Ariz. Rev. Stat. Ann. § 13-703 ..... 354
Ark. Code Ann., § 5-4-603 ..... 354
C. R.S. 18-3-103 ..... 74
CCR Title 15, section 3177 ..... 170, 278
Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) ..... 354
Conn. Gen. Stat. Ann. § 53a-46a(c) ..... 354
Del. Code Ann. tit. 11, § 4209(c)(3)a.1 ..... 354
Evidence Code section 1150 ..... 164

Evidence Code section 1250 ..... 287
Evidence Code section 1252 ..... 288
Evidence Code section 520 ..... 373
Ga. Code Ann., §17-10-30(c) ..... 354
Government Code section 13967 ..... 408
Idaho Code, § 19-2515(3)(b) (2003) ..... 354
Ill. Ann.Stat. ch. 38, para. 9-1(f) ..... 354
Ind. Code Ann., §§ 35-50-2-9(a), (e) ..... 354
Ky. Rev. Stat. Ann., § 532.025(3) ..... 354
La.Code Crim. Proc. Ann. art. 905.3 ..... 354
Md. Ann. Code art. 27, §§413(d), (f), (g) ..... 354
Miss. Code Ann., § 99-19-103 (1993) ..... 354
N.J.S.A. 2C:11-3c(2)(a) ..... 354
N.M. Stat. Ann., § 31-20A-3 ..... 354
Neb. Rev.Stat., § 29-2520(4)(f) ..... 354
Nev. Rev. Stat. Ann., § 175.554(3) ..... 354
Ohio Rev. Code, § 2929.04 ..... 354
Okla. Stat. Ann. tit. 21, §701.11 ..... 354
Penal Code section 1098 ..... 36
Penal Code section 1202.4 ..... 407
Penal Code section 12022.5 ..... 2
**Penal Code section 1239, subdivision (b).** ..... 1
Penal Code section 1259 ..... 161
Penal Code section 187 ..... 1
Penal Code section 190.2, subdivision (a)(3) ..... 2, 31, 337, 339
Penal Code section 190.3 ..... passim
Penal Code section 190.4, subdivision (e) ..... 2
Penal Code section 190.5 ..... 309
Penal Code section 192 ..... 56, 62, 69, 71

Penal Code section 2601 ..... 170, 278
Penal Code sections 664/187 ..... 1
People v. Steele (2002) 27 Cal.4th 1230 ..... 63
S.C.Code Ann., §§ 16-3-20(A), (C) ..... 354
S.D. Codified LawsAnn., § 23A-27A-5 (1988) ..... 354
sections 190.2(a)(4) and (a)(18) ..... 312
Tenn. Code Ann. §, 39-13-204(f) ..... 354
Tex.Crim. Proc. Code Ann., § 37.071(c) ..... 354
Tx. Pen. Code § 19.02 ..... 74
Va. Code Ann., § 19.2-264.4(C) ..... 354
Wash. Rev.Code Ann. § 10.95.060(4) ..... 354
Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) ..... 354

**Other Authorities**

2 Wharton's Criminal Law (15th ed. 1994) ..... 65
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Logan, W. Proportionality And Punishment: Imposing Life Without Parole On Juveniles (1998) 33 Wake Forest L. Rev. 681 ..... 310
Note, Public Disclosures of Jury Deliberations, 98 Harv. L. Rev. 886 ..... 164
Note, The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351 ..... 384

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Perkins & Boyce, Criminal Law (3d ed. 1982) ..... 66
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Taylor, L., Comment: Provoked Reason In Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense (1986) 33 U.C.L.A. L. Rev. 1679 .. 73

**Constitutional Provisions**

Calif. Const., Art. 1, § 17 ..... 301
Calif. Const., Art. I, § 15 ..... 59
U.S. Const., Amend. IV ..... 35, 290
U.S. Const., Amend. V ..... passim
U.S. Const., Amend. VI ..... passim
U.S. Const., Amend. VIII ..... passim
U.S. Const., Amend. XIV ..... passim

## STATEMENT OF APPEAL

This appeal is from a final judgment of death following a trial, and is authorized by Penal Code section 1239, subdivision (b).

## STATEMENT OF THE CASE

On November 7, 1994, the Alameda County District Attorney filed a five-count information against defendant and appellant, Matthew Aric Souza, and his codefendant and brother, Michael Anthony Souza, charging the following:

1) Count one charged a December 19, 1993 violation of Penal Code section 187 (first-degree murder of Regina Watchman)
2) Count two charged a second December 19, 1993 violation of Penal Code section 187 (first-degree murder of Dewayne Arnold);
3) Count three charged a third December 19, 1993 violation of Penal Code section 187 (first-degree murder of Leslie K. Trudell);
4) Count four charged a December 9, 1993 violation of Penal Code sections 664/187 (attempted premeditated murder of Rodney James);
5) Count five charged a second December 19, 1993 violation of Penal Code sections 664/187 (attempted premeditated murder of Beulah John). (CT 484-487.)[1]

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[1] "CT" refers to the Clerk's Transcript on appeal. "RT" refers to the Reporter's Transcript. Portions of the Reporter's Transcript are contained in

As to all of the counts, the information added allegations that Matthew Souza personally used a shotgun and Michael Souza personally used a rifle in the commission of the offenses within the meaning of Penal Code sections 1203.06 and 12022.5. (CT 484-488.) Finally, the information added a multiple murder special circumstance allegation pursuant to Penal Code section 190.2, subdivision (a)(3). (CT 486.)

On March 21, 1995, both men pleaded not guilty to all counts and denied all of the special allegations. (CT 498.) On March 29, 1996, the information was amended to strike reference to specific firearms in the firearm use allegations under sections 1203.06 and 12022.5. (CT 503-507.) On the same date, both men pleaded not guilty and denied the special allegations of the amended information. (RT 1-2.)

On July 6, 1998, the guilt phase of trial commenced with jury selection. (CT 547.) On October 20, 1998, the jury found both brothers guilty as charged in all counts and found the firearm use allegations to be true. (CT 739-751.) As to Matthew Souza only, the jury found true the multiple murder special circumstance allegation. (CT 749.)

On October 28, 1998, the penalty phase of trial commenced. (CT 759-760.) On November 18, 1998, the jury returned a verdict fixing the penalty at death. (CT 791.)

On February 17, 1999, Mr. Souza applied for modification of the death verdict pursuant to Penal Code section 190.4, subdivision (e). (CT 794-797.) On February 19, 1999, the court denied the application and imposed the judgment of death. (CT 794-797.) The court further imposed consecutive terms of 25 years to

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separate volumes that are not sequentially paginated with the main volumes. Citations to those volumes are preceded by the date on which the proceedings were held.

All statutory references are to the Penal Code unless otherwise noted.

life each on the three murder convictions plus 10 years for the firearm use, as well as concurrent life terms on both attempted murder convictions, all of which it ordered stayed pending imposition of the judgment of death. (CT 798-799.)

This appeal is automatic.

## STATEMENT OF FACTS

## THE GUILT PHASE

### A. The Prosecution's Case

In December of 1993, appellant, Matthew Aric Souza, was 18 years old. (RT 2180.) His brother and codefendant, Michael Souza, was 19.[2] (RT 2180.) Their Native American mother, Rebecca Souza, was living in a room of her cousin's Oakland apartment.[3] (RT 2068-2070, 2115.) The boys did not have a home, but rather divided their time between relatives, family friends, and sleeping on a mattress on the floor of their mother's room. (RT 2070-2072, 2091-2092, 2120, 2123.) December 18, 1993 was one of the nights they stayed with their mother. (RT 2096.)

#### 1. The Regina Watchman party and the assault upon Rebecca Souza.

On the evening of December 18, 1993, the Hilltop Tavern in Oakland, a popular gathering place for Native Americans, hosted a Native American fund-raiser. (RT 2026-2027, 2073-2074.) Ms. Souza, who frequented the bar, attended the event with a co-worker, Esther Dale. (RT 2074-2075, 2118, 2617, 2620, 2627.) Among the other guests that evening were Regina Watchman, her cousin,

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[2] As both defendants had the same last name, appellant will be referred to by his first name, Matthew and his brother will be referred to as Michael.

[3] Sometime after the charged crimes, Ms. Souza remarried and changed her name to Miller. (RT 2067-2068.) However, as her name was Rebecca Souza at the time of the events, and as the witnesses referred to her by that name, that is the name by which she will be referred in the briefing.

Dewayne Arnold, his sister, Victoria Joyce Arnold Gonzalez[4], their cousin, Ed Arnold, Martin Jones, Beulah John, Leslie Trudell, Rodney James, his brother, Casey James, Lea Coss, and Hillary Leonesio. (RT 2026-2027, 2029-2030, 2511-2512, 2530, 2622, 2682, 2687, 2723, 2924.) Most of the other guests were part of a close-knit local Native American community. (RT 2027, 2031-2032, 2650, 2683, 2723, 2756.) Many were related to each other. (RT 2128, 2146-2147, 2240, 2650, 2683, 2687.) However, Ms. Souza was something of an outsider, who did not know, or was only slightly acquainted with, most of the other guests. (RT 2034-2035, 2125-2128, 2133-2134, 2517, 2685, 2724.) No one other than Esther Dale knew or had ever met her sons. (RT 2612-2613.)

Other than Ed Arnold, who had been sober since 1987, everyone consumed alcohol at the event. (RT 2075, 2515, 2619-2620, 2651, 2916.) Ms. Souza eventually became intoxicated. (RT 2035, 2082.) Near the end of the event, Martin Jones noticed a "distressed" Ms. Souza looking for her purse. (RT 2501-2502.)

When the tavern closed at 2:00 a.m., the guests went to the Lake Merritt-area apartment of Regina Watchman in order to continue the party. (RT 2030, 2032-2033, 2076, 2131, 2240-2244, 2516-2518, 2623, 2725, 2914-2916.) Ms. Souza was invited to the party, but did not know Ms. Watchman. (RT 2076-2077, 2085, 2133-2134, 2656-2657.) Joyce Arnold, with whom she was slightly acquainted, drove Ms. Souza and Beulah John to the party. (RT 2126, 2134, 2516-2517, 2684-2686.) Esther Dale left her car at the tavern and drove to the party with her boyfriend, Ed Arnold, and his sister, Jeri Davis. (RT 2074-2075, 2078, 2619, 2626, 2649, 2925.)

Watchman's boyfriend, Raymond Douglas, had been at Watchman's apartment all evening with her mother and children while Watchman attended the fund-raiser. (RT 2234-2235.) According to Douglas, guests began arriving at the

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[4] As the other witnesses generally referred to Ms. Gonzalez as "Joyce

apartment at around 2:00 a.m. (RT 2239, 2349.) Many of the guests appeared as if they had "been drinking quite a while." (RT 2245.) More alcohol was consumed at the party and some of the guests became "pretty drunk." (RT 2033-2034, 2040-2041, 2245, 2306, 2349, 2755.)

By all accounts, the two-story apartment was very small and crowded with furniture. (RT 2035, 2235, 2304-2305; see also People's Exhibits 33 A-L [photographs of room after shooting].) The bedrooms were on the upstairs level, where Watchman's children and mother slept all evening. (RT 2236, 2244, 2438.) The downstairs level, where the party was held, had an open floor plan; it was essentially one room with the kitchen area in one small nook and the laundry area and stairwell in another. (RT 2035, 2236, 2551; see also People's Ex. 31; Deft. A's Ex. A[5].) By most estimates, approximately 12 to 16 guests attended the party. (RT 2035, 2138, 2240, 2305, 2519, 2688, 2727.) Given the size and contents of the room, it was very crowded. (RT 2305.)

Anywhere from one to two hours after the party moved to Watchman's apartment, Watchman confronted Ms. Souza. (RT 2034-2038, 2041-2042, 2085, 2138, 2732, 2758.) According to Ms. Souza, she did not know Watchman, had never spoken to her before, did not know why she confronted her, and could not even recall what Watchman had said to her. (RT 2085-2087, 2133-2134, 2141.)

According to Lea Coss, Watchman's close friend since childhood, Ms. Souza was talking to Hillary Leonesio when Watchman walked by and accidentally bumped into her. (RT 2765-2767.) A few minutes later, Watchman sat down near them and twice asked Ms. Souza and Ms. Leonesio if anything was

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Arnold," that is the name by which she will be referred in the briefing.

[5] The defense exhibits were marked separately for each defendant, denoted as "Deft. A" and "Deft. B." (See CT 734-738.)

Several hand drawn diagrams of the downstairs level of the apartment were utilized during the trial and admitted into evidence, although none were to scale. (See People's Trial Exhibit 31 and RT 2250-2254; Deft. A's Ex. A and RT 2295,

wrong. (RT 2767-2768.) Each time, the women replied that nothing was wrong. (RT 2768-2769.) Watchman got up, walked over to the women and asked them a third time if something was wrong. (RT 2769-2770.) Although the women again responded that nothing was wrong, Watchman ordered Ms. Souza to leave. (RT 2770.)

According to Ed Arnold, when Watchman approached Ms. Souza and Ms. Leonesio, Ms. Souza asked Watchman who she was; Watchman told her that she lived in the apartment. (RT 2918.) Ms. Souza nonsensically replied by asking who lived in the apartment and Watchman again told her that she lived there. (RT 2918.) The exchange was repeated a few times before Watchman ordered Ms. Souza to leave. (RT 2918.)

By this time, the commotion drew the attention of the other guests. (RT 2040, 2246-2247, 2519-2520.) According to some witnesses, both women appeared to be intoxicated. (RT 2040, 2249-2250.) Most of the guests heard Watchman ordering Ms. Souza out of the apartment. (RT 2036, 2686, 2730, 2770.) By all accounts, when Ms. Souza did not leave immediately (see RT 2037, 2247-2248, 2308, 2686-2687, 2770-2771, 2918) Watchman – a very large woman – attacked her. (People's Trial Exhibit 26.)

According to Ms. Souza, Watchman hit her in the back of the head and knocked her to the floor. (RT 2086-2087, 2141-2142.) Once Ms. Souza was down, Watchman began kicking her in the ribs and calling her a whore. (RT 2087-2088. 2142-2143.) The other guests did not see Watchman strike Ms. Souza. (RT 2390, 2919-2920.)

However, by all other accounts, Watchman grabbed Ms. Souza by the hair, pulled or knocked her down, and dragged her by the hair across the room. (RT 2038-2039, 2144, 2248-2250, 2310-2311, 2451, 2519-2520, 2628, 2687, 2731, 2771-2772, 2919-2920.) According to some witnesses, Watchman dragged her to

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2527-2529, 2760-2764; Deft. A's Ex. D and RT 2783-2784; Deft. A's Ex. 1 and

the front door (RT 2038-2039, 2250-2251, 2731, 2772, 2920); according to others, she dragged her out the front door (RT 2314, 2520-2521); according to Ms. Souza, she dragged her out the front door and down several cement steps outside (RT 2089, 2144, 2250; see also People's Exibit 33.)

Also according to Ms. Souza "everyone just stood around" while Watchman assaulted her. (RT 2090.) Indeed, by all accounts, no one attempted to physically intervene in Watchman's attack on Ms. Souza. (RT 2628, 2377-2378.) By most accounts, no one attempted to intervene at all. Only Raymond Douglas testified that "a couple of people" told Watchman to stop. (RT 2316.)

After witnessing the assault, Ed Arnold, Jeri Davis, and Esther Dale decided that they should leave. (RT 2628, 2687, 2920.) When they walked outside, Ms. Souza asked them to give her a ride home. (RT 2629, 2920-2921.) They agreed. (RT 2146-2147, 2629, 2920-2921.)

### 2. Ms. Souza's conduct and emotional state following the assault.

According to Ms. Souza, she was drunk, in pain and shock, and sobbing after being assaulted. (RT 2145, 2149.) Ed Arnold and Esther Dale confirmed that she was crying, very upset, and complaining of pain on the 20 to 25 minute drive to her home. (RT 2629-2630, 2655.)[6] Dale, who had been drinking throughout the evening, could not recall most of what Ms. Souza said on the drive home. (RT 2630-2633, 2651.)

However, Ed Arnold, who was sober that night and had been for seven years, clearly recalled that on the drive home, Ms. Souza "constantly" referred to "those people" who had "beaten her up" and wanting to "get even" with them. (RT 2921-2922.) As Arnold explained, Ms. Souza was not making any sense

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RT 2970; Deft. B's Exs. G and F and RT 2357-2359.)

[6] Jeri Davis did not testify.

because he knew that a group of people had not beaten her, but rather that Watchman alone had dragged her out of the apartment by the hair. (RT 2921-2922.) Nevertheless, although Arnold told her calm down, she continued her refrain about "those people" who had "beaten" her up all the way home. (RT 2631-2632, 2655, 2922.)

Ms. Souza herself claimed to recall little of what she had said on the drive home. (RT 2090, 2112.) At the preliminary hearing, Ms. Souza testified only that she had said that she would not put up with what had happened to her and that she would tell her sons about it. (RT 2111.)

At some point, Ms. Souza realized that she did not have her coat and purse. (RT 2097-2098, 2129.) While she could not recall what she had done with them, she decided that she must have left them at Watchman's when she was ejected. (RT 2080, 2097-2098, 2129, 2134-2135, 2137, 2222.) It was important to her to retrieve her purse because it contained her asthma medication and identification. (RT 2097-2098, 2175, 2214.) She "may have" asked Jeri Davis to call the apartment and inquire into the whereabouts of her purse and coat, but could not recall for certain. (RT 2149.)

After the others dropped her off at home, Ms. Souza realized that she was or had been bleeding. (RT 2145, 2193, 2216-2217.) The front of her light colored shirt was obviously stained with blood. (RT 2181-2182, 2217-2218.) While Esther Dale could not recall seeing blood on Ms. Souza on the drive home, she explained that it was possible that she had simply been unable to see it in the darkness. (RT 2634.)

Ms. Souza was "hysterical," crying, in pain, angry, drunk, and bloody when she woke her young sons. (RT 2096, 2099, 2107, 2155-2156, 2193-2194, 2203-2204.) Once again, she claimed to recall very little about what she actually told them. She did recall telling them that she had been "beaten" and she was certain that they saw the blood on her. (RT 2098, 2188, 2193.) However, she could not

recall the details she had given them about the beating or whether she told them that "one woman" or that "a whole bunch of people" had beaten her. (RT 2211.) She was not certain, but "thought" that she "probably" said "something along the lines" of a woman having attacked her. (RT 2211-2212.) At the preliminary hearing, she testified that she told her sons that she wanted to "get even with her," but could not recall making that statement at trial. (RT 2199-2201, 2206.) While she "thought" that the boys became upset when they saw their mother and heard her story, she claimed to recall little else about the boys' reaction. However, she told police that they became very upset and said that they were going to "read the people up," a term with which she was unfamiliar. (RT 2203-2204.) Finally, she was certain that she told the boys that her purse and coat were still at the party and that they had to take her back in order to retrieve them. (RT 2097, 2101, 2108, 2150, 2156, 2214, 2219.) They agreed to drive her to the Lake Merritt area to look for the apartment. (RT 2077, 2102.)

Although a rifle that Michael had received as a gift from his grandparents was stored at Ms. Souza's apartment, the boys left unarmed. (RT 2092-2094, 2102, 2109, 2165-2166.) The trio drove around Lake Merritt in Michael's blue Mustang for some time in a futile search for the apartment. (RT 2101-2103, 2158-2160.) Although somewhat less so than she had been, Ms. Souza remained "hysterical" as they drove around. (RT 2106, 2160-2161.) Eventually, she directed the boys to drive to the Hilltop Tavern so that she could look for her purse and coat in Esther Dale's car. (RT 2161-2162.) Finding no one at the tavern and Dale's car locked, they returned to Ms. Souza's home. (RT 2164.) The boys dropped her off and left. (RT 2103.) They did not tell their mother where they were going. (RT 2104.) She assumed that they were going to a relative's home where they frequently stayed. (RT 2104.)

### 3. The shooting at the Watchman apartment.

The party at Watchman's apartment continued after Ms. Souza's assault. (RT 2041, 2521-2522.) About an hour or so later, or about 5:00 a.m., guests heard knocking or banging at the front door. (RT 2041, 2253, 2317-2318, 2747, 2758.) According to witnesses, three Native American men entered the apartment armed with guns. (RT 2042-2043, 2256, 2261, 2263-2265.) None of the witnesses knew the men, describing them only as the first, second, and third gunman. (RT 2043, 2240, 2261, 440-2441, 2690, 2739.) It was undisputed by all of the parties that Michael Souza was the first gunman. (RT 1897-1898, 2338-2342, 2442-2553, 2689, 2734-2735, 3011-3013.)

As Michael entered the apartment, he furiously demanded to know who had beaten his mother and the return of her purse. (RT 2044-2045, 2054-2056, 2260, 2454-2455.) Although none of the witnesses knew Michael, they surmised from his statements that he must have been Rebecca Souza's son. (RT 2057, 2273, 2440-2441.) The main living room area was separated from the eastern entry area by a couch that faced away from the front door and toward the middle of the room to the west. (RT 2299-2301, 2758-2764; Deft. A's Exhibit A.) Michael walked around the couch and stopped directly in front of it, in the middle of the living room. (RT 2052, 2054-2056, 2262, 2330, 2786-2787.) The second gunman walked to the southern side of the living room area, in front of a doorway leading to the laundry area and the interior stairs, about six to seven feet away from the couch. (RT 2052, 2056, 2264, 2735-2736.) The third gunman remained next to the front door. (RT 2052, 2264.)

Dewayne Arnold and Regina Watchman were seated on the couch facing Michael. (RT 2052-20533, 2330, 2786-2787.) Standing in front of the couch, Michael repeated his angry demand to know who had beaten his mother and for the return of her purse. (RT 2055-2056, 2734, 2737, 2786-2787.) Michael's angry shouting awakened Lea Coss, who had sleeping on a love seat next to the back door. (RT 2733-2734, 2737, 2784-2785.) Joyce Arnold, who had been upstairs using the bathroom, returned downstairs at this point. (RT 2688-2689.)

According to Martin Jones, Michael kept demanding something like, "who jumped my mother?" (RT 2044-2045, 2454.) According to Raymond Douglas's trial testimony and police statements immediately after the shooting, Michael repeatedly demanded, "which one of you motherfuckers beat up my mom," and "which one of you fucking guys beat up my mother." (RT 2322-2326.) For the first time at the preliminary hearing, and later at trial, Douglas claimed that Michael also said, "who's the bitch who beat up my mom." (RT 2260, 2262, 2327.) According to Joyce Arnold, Michael repeatedly demanded something to the effect of, "who did that to our mom." (RT 2688-2689, 2692-2693.) According to Lea Coss, Michael angrily yelled something like, "who kicked my mother's ass, just show me who did it." (RT 2733-2734, 2778.) He might also have said, "Show me which one is the bitch that kicked my mother's ass and stole her purse." (RT 2733-2734; compare RT 2778.)

Dewayne Arnold weighed 230 pounds and stood five feet, eight inches tall. (RT 1944.) He had consumed an inordinate amount of alcohol, as well as methamphetamine, during the course of the evening. (RT 1944-1947.) He stood up from the couch, said something about knowing Michael's mother and demanded, "what the fuck is going on" or "what the hell's going on here." (RT 2057, 2332, 2454-2456, 2505.) According to Coss, Arnold tried to grab Michael's gun; in response, Michael hit him twice with the gun. (RT 2738-2740, 2789.)

The other witnesses did not see Michael actually hit Arnold with the gun. According to Jones, Michael swung the gun at Arnold and, in response, Arnold tried to grab Michael. (RT 2058-2059, 2457.) At that point, Jones noticed the second gunman step forward and aim his gun at Arnold. (RT 2059, 2341.) Jones grabbed the refrigerator, pulled it away from the wall, and hid behind it. (RT 2060, 2341.) According to Raymond Douglas, after Arnold stood up, his attention was focused on the third gunman next to the front door when he heard the sounds of Arnold and Michael "scuffling." (RT 2333, 2381.) During the scuffle, Michael hit a lamp sitting on an adjacent table, which everyone heard land on the floor with

a crash. (RT 2058-2059, 2301, 2332, 2381, 2457, 2833, 2835.) Immediately thereafter, shots rang out. (RT 2060, 2332-2333.)

Remarkably, all of the prosecution's witnesses claimed that they could not recall seeing any of the men actually fire a gun. (RT 2266-2267, 2368, 2430, 2525-2526, 2700, 2743.) However, according to Lea Coss, as she stood up to run out the back door, she heard a loud "pop" and saw a flash from Michael's position. (RT 2811-2812.) At the preliminary hearing, when her memory was better than it was at trial, she testified that although she did not actually see Michael pull the trigger, she believed that he had shot Arnold. (RT 2809-2810.) Coss ran outside to the back patio and hid there with Hillary Leonesio, from which she heard several shots fired inside and in rapid succession. (RT 2742-2743, 2795, 2799.)

Similarly, Raymond Douglas was standing only a few feet from Michael when he simultaneously heard the first shot and saw a flash from Michael's position. (RT 2266, 2362-2366.) The second gunman was still standing some distance away from Michael, in front of the doorway to the laundry nook. (RT 2363.) Douglas never saw the second gunman fire his weapon. (RT 2363, 2368.) After the first shot was fired, Douglas fell to the ground and covered his head. (RT 2266.) He estimated that he heard a total of four to six shots, all sounding as if they came from Michael's position in the middle of the living room. (RT 2266-2267, 2334, 2365-2366, 2379.) It also sounded as if the first shot was fired from a different gun than the other shots. (RT 2379.)

From his location behind the refrigerator, Martin Jones heard one shot, a brief pause, then several more shots fired in rapid succession without any pauses between them. (RT 2060, 2432.)[7] As Douglas had testified, Jones testified that one of the shots sounded as if it came from a different weapon than the other shots. (RT 2430, 2433, 2478.) At trial, he testified that he could not tell what kind

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[7] At trial, he testified that he heard at least 14 of the rapidly fired shots. At the preliminary hearing, he testified that he heard more than two but less than five. (RT 2480.)

of guns fired the shots. (RT 2430, 2478.) At the same time, he testified that although the louder shots were in continuous, rapid succession, to his untrained ear they sounded more as if they were fired from a semi-automatic weapon than an automatic weapon. (RT 2061, 2430.) Finally, while he testified at trial that the duration of the shooting was 10-11 seconds, he testified at the preliminary hearing, when his memory was admittedly better, that the duration was "around" four seconds. (RT 2481-2482.) When the shooting stopped, the men ran out the front door, followed by the sound of a car "screeching" away. (RT 2267, 2433, 2744.)

Beulah John could not recall anything about the armed men entering the apartment or the shooting itself. (RT 2522, 2524-2526, 2534.) She could recall only that she had been sitting at the kitchen table directly behind the couch with her son and Rodney James when someone shouted, "hit the floor." (RT 2524, 2529-2530; Deft. A's Ex. A.) After dropping to the floor, she realized that she had been shot in the leg. (RT 2523-2525.) The next thing she remembered was being driven to the hospital by ambulance. (RT 2526.)

Apparently, Joyce Arnold also suffered some memory loss of the shooting. (RT 2700, 2715.) She testified that she did not witness the shooting itself or even hear any shots because she believed that it had occurred while she was still upstairs. (RT 2693, 2700.) However, she did not notice that anyone had been shot when she came downstairs. (RT 2693.) Further, the statements she testified that heard Michael making as she came downstairs actually occurred before the shooting. (RT 2692-2693.) In other words, she apparently had no memory of what occurred between hearing Michael's heated words and seeing that people, including her brother, Dewayne Arnold, had been shot. (RT 2693-2694.)

According to the witnesses, Dewayne Arnold had been shot several times and lay dead or dying on the floor immediately in front of the couch where he had been sitting. (RT 2268-2269, 2273, 2435, 2746.) Regina Watchman had also been shot several times and remained seated on the couch, apparently dead or dying. (RT 2268, 2399, 2436, 2745.) Leslie Trudell had also been shot and lay

dead immediately behind the couch. (RT 2269, 2434, 2745; People's Ex. 33; Deft. A's Ex. A.) Rodney James appeared to have been shot once in the shoulder, although he remained conscious and seated in a chair next to the kitchen table immediately behind the couch. (RT 2270, 2437, 2744-2745; People's Exs. 33; Deft. A's Ex. A.) Although Beulah John had been shot in the leg while seated at the kitchen table immediately behind the couch, she apparently took a few steps into the kitchen area, where she lay on the floor. (RT 2438, 2529-2530, 2745, 2693-2694.) Emergency personnel and police arrived within minutes after the shooting stopped. (RT 2271, 2288, 2439, 2747, 2553-2554.)

### 4. Evidence gathered after the shooting.

Numerous police officers and emergency personnel arrived on the scene and immediately began tending to the victims. (RT 2273, 2553, 2556-2557, 2589, 2591-2592.) In their haste to do so, they shoved aside virtually all of the furniture in the small, crowded room. (RT 2273, 2555-2556; compare People's Ex. 31 to Deft. A's Ex. A.) By the time the police evidence technician, Monica Russo, arrived on the scene at about 5:20 a.m., all of the victims had been removed, except the body of Leslie Trudell. (RT 2253-2256.) However, she did note the locations of five large bloodstains presumably left by the shooting victims before they were removed. (RT 2258-2259; People's Ex. 31.)

Russo also recovered, and noted the locations of, 14 .223 caliber rifle casings, one .25 automatic casing, and two slugs or bullets. (RT 2557, 2568-2569.) The casings and slugs were scattered all around the room. (RT 2563-2566, 2571-2573.) While she noted the locations of the casings and slugs when she arrived on the scene, she readily acknowledged that they could have been kicked or moved by the many police and emergency personnel on the scene before her arrival. (RT 2556-2557; see also RT 3001-3002; People's Ex. 31.)

Russo also found two bullet holes to two walls. (RT 2574.) One was to the north wall, about three feet above the floor. (RT 2576.) Although it went completely through the wall and into the parking lot outside, she was unable to locate that bullet. (RT 2574, 2576.) The second was to the south wall in the kitchen area, near the eastern corner. The bullet was lodged inside of the wall in such a way as to preclude recovery. (RT 2575-2576.) She found no evidence to suggest that a shotgun had been fired in the room. (RT 2587-2588, 2590-2591.)

Regina Watchman, Dewayne Arnold, and Leslie Trudell all died from their gunshot wounds. According to the state's pathologist, Arnold had been shot a total of seven times, three times to the chest, once to the abdomen, once to the upper thigh, once to the back, and once to the back forearm. (RT 1939-1941.) Depending on the kind of gun used, the pathologist testified that stippling is generally found when someone is shot within close range, usually within about 20 inches. (RT 1948-1950.) Stippling can be absorbed in the clothing without reaching the skin. (RT 2013.) While there was no stippling to Arnold's skin, the pathologist was never given his shirt to examine. (RRT 2012-2013.) Toxicology testing revealed that his blood alcohol level was .54, "a very high," frequently fatal, level. (RT 1945-1947.) Testing also revealed the presence of a "fairly high level" of methamphetamine in his system. (RT 1945-1946.)

Watchman had been shot three times, once in the right shoulder, once in the right arm, and once in the upper chest. (RT 1924-1925.) From the location of her wounds, the pathologist could only determine that gun had been fired from her right. (RT 2003.)[8] The pathologist found some black material on the right sleeve of Regina Watchman's shirt consistent with stippling, but none on her skin. (RT 1950, 1996.) Toxicology testing revealed that her blood alcohol level was .12. (RT 1948.)

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[8] The second gunman's position in front of the laundry area was to her left. (Deft. A's Ex. A.)

Leslie Trudell had been shot twice, once to the left side of the back of the head and once to the left side of the upper back. (RT 1956-1957.) There was no evidence of stippling, so the pathologist concluded that he had been shot from a distance of "three feet or so." (RT 1959.) The pathologist found no evidence that the victims had been shot with a shotgun. (RT 1980-1987, 2014-2015, 2021-2022.) She removed bullets and bullet fragments from Watchman's, Arnold's, and Trudell's bodies and gave them to police for analysis. (RT 1933-1938, 1969-1976.)

According to Beulah John, a bullet entered and exited her leg, leaving two wounds. (RT 2523.) No direct evidence was presented as to how many times Rodney James, who died of other causes about two years after the shooting, had been shot. (People's Ex. 35.) However, witnesses testified that he appeared to have been shot once in the arm or shoulder. (RT 2270, 2437.) Furthermore, according to the prosecution, all of the victims had been shot with the same rifle firing the .223 bullets. (RT 3292, 3441.) Only 14 .223 caliber casings were recovered, which corresponds to James having been shot only once. (RT 2557, 2568-2569.)

A police firearm examiner analyzed the ballistics evidence. (RT 2839-2842.) He was never provided any guns against which to compare the evidence. (RT 2862.) However, he was able to determine that all 14 of the .223 caliber casings recovered from the scene were fired from the same weapon. (RT 2857-2858.) One of the slugs or bullets recovered from the scene was a .223 caliber and the other was a .25 caliber automatic. (RT 2859.) One bullet removed from Regina Watchman, four bullets removed from Arnold, and one of the fragments removed from Leslie Trudell were all definitely .223 caliber. (RT 2859-2863; People's Exs. 3-4, 7, 9-10, 13, 15-16.) Of the six .223 caliber bullets the examiner was provided, he was able to determine that five were fired from the same gun. (RT 2863-2864.) A fragment recovered from Trudell and one of the fragments recovered from Watchman were also "likely" fired from that gun. (RT 2861-

2862.) The remaining fragments were too small to identify and/or compare. (RT 2860-2863, 2878-2879; Exs. 1, 8, 11, 12, 14, 17.)

Rifles that fire .223 caliber ammunition can be automatic or semi-automatic. (RT 2851-2852.) One significant difference between an automatic and a semi-automatic is that the former will continuously fire bullets with one trigger pull while the latter fires only one round with each pull of the trigger. (RT 2852.) Both automatically eject their casings as they are fired. (RT 2874.) Their magazines can hold anywhere from five to 50 or more rounds. (RT 2865-2866.)

Based upon the foregoing evidence, it was eventually undisputed that all of the victims had been shot with an automatic or semi-automatic rifle firing .223 ammunition, which had been fired 14 times in the apartment; a .25 automatic had been fired at least once; and a shotgun had not been fired. However, the witnesses' accounts of which man carried which gun, as well as the kinds of guns they carried, varied significantly.

According to Martin Jones's trial testimony and police statements, he was certain that Michael carried a 12 gauge, sawed off or short barreled shotgun; the second gunman carried an assault rifle with a clip; and the third gunman carried a silver, .25 semi-automatic handgun. (RT 2044, 2046-2047, 2049, 2477, 2500, 2508.) However, according to his preliminary hearing testimony, he was not certain that Michael's gun was a shotgun; rather, he testified only that Michael's gun was "something that looked like a shotgun," "something sawed off" or short barreled. (RT 2475-2477, 2500.)[9]

According to Raymond Douglas's initial trial testimony, Michael carried a shotgun; the second gunman carried a smaller, silver gun with a clip that appeared to be an automatic; and the third gunman carried a revolver. (RT 2256-2258, 2263-2265, 2346.) According to Douglas's prior police statements and

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[9] While it was undisputed that a shotgun was never fired, Martin Jones told police that he was certain that the shotgun was fired more than once because he was familiar with the sound and smell. (RT 2478.)

preliminary hearing testimony, the second gunman carried a handgun or pistol and not a rifle. (RT 2342-2343, 2347-2348, 2375-2376.) Having his recollection refreshed with those prior statements, Douglas testified that the second gunman in fact carried a handgun or pistol, not a rifle. (RT 2348-2349.) Lea Coss could only describe Michael's and the second gunman's weapons as large guns – shotguns or riles – about 22 to 24 inches long. (RT 2734-2736, 2806.)[10]

Police canvassed Watchman's neighborhood after the shooting. Charles Hokes lived in the same building, next door to Watchman. (RT 2603.) According to Hokes, he had been asleep when he was awakened by the sound of gunfire. (RT 2603-2604.) He heard at least two shots fired in rapid succession, without any pauses or intervals between them. (RT 2603-2604.) Shortly thereafter, someone knocked at his door. (RT 2605.) He opened it to a woman who said that her friend had been shot and needed to use his phone to call police. (RT 2605-2606.)

Page Nelson lived about 80 yards from Watchman's apartment building. (RT 2424.) According to Nelson, he was bathing at about 5:00 a.m. when he heard one loud shot. (RT 2405, 2424.) That shot was followed by a series of shots fired in rapid succession, followed by a pause of two to five seconds, followed by several more shots fired in rapid succession. (RT 2405-2408, 2420-2423.) After the shooting stopped, Nelson looked out of his window. (2410.) About a minute later, he saw a dark colored sedan, perhaps a Mustang, driving carefully and within the speed limit from the direction of the parking lot of Watchman's building. (RT 2411-2413, 2415-2416.) That car looked "very similar" to Michael Souza's car. (RT 2418-2419.)

Police took statements from the party guests who had witnessed the shooting both at the scene at about 5:40 a.m. and later that morning at the police

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[10] Upon cross-examination by Michael's counsel, Coss agreed that Michael's gun looked like a shotgun and the second gunman's gun looked like a rifle. (RT 2777, 2788-2789.) However, upon cross-examination by Matthew's counsel, Coss

station. (RT 2271, 2288-2289, 2357, 2439-2440, 2469, 2485-2486, 2714-2716, 2752-2753, 2803-2804.) In Martin Jones's first statement, he told police that he could not describe and would not be able to identify the second gunman. (RT 2485-2487.) However, he thought that he would be able to identify the first and third gunmen. (RT 2487-2490.) Similarly, Raymond Douglas told police that he could not identify either the second of third gunman. (RT 2357.)

On December 21, two days after the shooting, police displayed a photographic lineup containing photographs of both Michael and Matthew to several witnesses, including Raymond Douglas, Martin Jones, and Lea Coss. (RT 2274-2275, 2353, 2441-2442, 2484, 2747-2748, 2818-2819.) All of the witnesses identified Michael as the first gunman. (RT 2275-2276, 2285, 2318, 2320-2321, 2442-2443, 2748-2749.) None identified Matthew's photograph as one of the gunmen. (RT 2353-2355, 2484, 2818-2819.) In fact, both Raymond Douglas and Martin Jones were certain that the lineup did not contain the other gunmen's photographs. (RT 2354-2355, 2482-2484.)

A week later, on December 28, police conducted a physical lineup in which Matthew was the only Native American and the only person who had appeared in the earlier photographic lineup. (RT 2356; People's Exs. 25-27.) All of the witnesses viewed the lineup together. (RT 2282, 2494, 2751, 2820.) Raymond Douglas and Lea Coss both identified Matthew as the second gunman. (RT 2279, 2286, 2351, 2355, 2750, 2822.) Martin Jones also identified Matthew, but was not sure if he was the second gunman or the third gunman. (RT 2444-2445.)

After the shooting, police recovered Michael's car, which was parked on 9th Avenue in Oakland. (RT 2539-2541.) Inside of the trunk, they found three shotgun shells. (RT 2895-2896, 2898-2900.)

In the five years between their arrests and the time of trial, Ms. Souza made

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admitted that she did not know the difference between a rifle and a shotgun. (RT 2805-2806.)

no effort to visit her sons. (RT 2166, 2168.) Indeed, she only saw them when she testified for the prosecution at the preliminary hearing and at trial. (RT 2168, 2196-2198.) While they were awaiting trial, she moved to Idaho and remarried. (RT 2115-2116, 2196-2198.)

**B. The Defense Case.**

Regina Watchman's friend, Hillary Leonesio, attended the Hilltop Tavern fund-raiser with her boyfriend, Darrin. (RT 3078-3079.) According to Leonesio, Watchman approached her during the party and told her that she should confront Ms. Souza because she was "flirting" with and "rubbing up on" Darrin. (RT 3079.) Leonesio did confront Ms. Souza, who denied that she was doing anything inappropriate. (RT 3079-3080.) Since Darrin did not dispute Ms. Souza's explanation and Leonesio had not seen anything untoward herself, she accepted it and the matter ended. (RT 3079-3080.) When the fund-raiser ended, Leonesio and Darrin drove to Regina Watchman's apartment along with the others. (RT 3081.)

Because Darrin was drunk, Leonesio left him sleeping in the car in front of Watchman's apartment while she joined the party inside. (RT 3081.) Although everyone else was drinking, Leonesio consumed only about three beers over the course of the entire evening and early morning because she was the designated driver. (RT 3080, 3142-3146.)

Sometime that morning, Ms. Souza and Leonesio were talking when Watchman walked by and, apparently inadvertently, bumped Ms. Souza. (RT 3084.) As Watchman walked upstairs, Ms. Souza asked Leonesio who Watchman was and Leonesio told her that Watchman lived there. (RT 3084-3085.) When Watchman came back downstairs, she approached Ms. Souza and said, "What do you mean, who is that woman? I'm Gina Watchman and this is my house." (RT

3085.) Leonesio could not recall what else Watchman said, but she grabbed Ms. Souza by the hair and dragged her across the room, out the front door, and onto the front porch. (RT 3086, 3123.) Watchman stepped over Ms. Souza's body, walked back into the apartment, and closed the front door behind her. (RT 3087.) Shortly thereafter, Ed Arnold, Esther Dale, and Jeri Davis left. (RT 3087-3088.)

About 30 minutes later, Jeri Davis called Leonesio at Watchman's apartment and asked her to look for Ms. Souza's purse and coat. (RT 3088, 3090.) Leonesio looked for the items, but could not find them. (RT 3090.)

About 20 to 30 minutes after the telephone call, Leonesio went outside to check on Darrin. (RT 3091-3092.) A blue Mustang with two or three occupants backed up and parked in front of the apartment. (RT 3093-3094, 3126-3127.) Leonesio walked back into the apartment, then out the backdoor to the patio. (RT 3094-3096.) She looked through a gate, saw the car still parked out front and one man, later identified as Michael Souza, running up the front steps. (RT 3097-3098, 3129.) She walked back inside and sat down next to Lea Coss on the loveseat adjacent to the backdoor. (RT 3098, 3013.)

Michael Souza and two other armed Native American men then entered the apartment through the front door. (RT 3103, 3115, 3124.) Leonesio testified and told police that Michael carried what looked like an "Uzi." (RT 3116-3118, 3152, 3157.) She also told police that his gun looked like a machine gun and that all three men's guns looked "very similar." (RT 3164-3166.) Michael walked to the middle of the living room, in front of the couch where Regina Watchman and Dewayne Arnold were seated. (RT 3103-3104.) The second gunman walked to toward the stairwell and the third gunman remained at the front door. (RT 3104-3105.)

Michael demanded to know "who beat up" his mother and wanted her purse. (RT 3105, 3121.) Regina Watchman replied by ordering him out. (RT 3105-3106.) At the preliminary hearing, when Leonesio's memory was admittedly better, she testified that Watchman replied, "we don't need that in here.

Get the hell out of my house." (RT 3131.) When Watchman started to get up, Michael moved closer to her with his gun. (RT 3106-3107.) As she sat back down, Dewayne Arnold stood up, as if to "try to help her or to try to do something." (RT 3107, 3132.) He was clearly "mad" and "upset." (RT 3158.) Michael hit him with his gun, knocking both Arnold and a lamp over. (RT 3108, 3132, 3161.) As Arnold started to get up, Michael shot at him, firing his gun about three times (RT 3109-3110, 3139-3140, 3160-3161.) Leonesio could not tell if the bullets actually struck Arnold. (RT 3109-3110.)

When Lea Coss jumped up and ran out the back door, Leonesio followed her. (RT 3110.) As she ran out, Leonesio heard at least three to 10 more shots fired continuously and in rapid succession. (RT 3110-3113, 3136, 3138.) The shots all sounded as if they came from the same gun, like an "army machine gun." (RT 3112.) She estimated that the duration of the shooting was 20-30 seconds. (RT 3113.)

When the shooting ceased, Leonesio and Coss went back into the apartment. (RT 3113-3114.) Leonesio saw the injured victims in roughly the same locations described by the other witnesses. (RT 3114-3115.)

According to police records, the first phone call relating to the shooting was logged at 5:04 a.m. (RT 3072.) The first police vehicle arrived at the scene only two minutes later, at 5:06 a.m. (RT 3072.)

Leonesio also viewed the photographic lineup on December 21. (RT 3116.) Like the other witnesses, she identified Michael as the first gunman but did not identify Matthew. (RT 3115-3116.) In fact, Leonesio never identified Matthew as one of the gunmen. (RT 3118.) After his arrest, she attended a number of court proceedings at which he appeared. (RT 3118-3119.) When she testified at the preliminary hearing, she recognized him, but only because she had seen him in court on the earlier occasions. (RT 3118.)

The state's ballistics expert explained that the ejection patterns for rifles firing .223 ammunition vary depending on the gun and the position in which it is

held when fired. (RT 3020.) Furthermore, since casings are ejected with force, they often ricochet or bounce off of objects. (RT 3032-3033.)

Sergeant Thomas Swisher was the primary investigator in this case and arrived on the scene at about 6:30 a.m. (RT 3038-3039.) From information gathered from various witnesses, he learned of Regina Watchman's assault upon Rebecca Souza and the names of her sons. (RT 3042.) Based upon that information, he attempted to obtain photographs of Matthew and Michael Souza to include in a photographic lineup. Unable to locate any through the criminal justice system, he eventually obtained DMV photographs of the boys, which he included with "filler" mug shots of other men, in the photographic lineup that he displayed to the witnesses. (RT 3043-3047, 3051-3053.) Although Swisher was aware that many of the witnesses were Native American and that the suspects had been described as Native, the filler photographs were not of Native American men. (RT 3049-3050.) None of the witnesses selected Matthew's photograph as one of the gunmen. (RT 3053.)

The boys voluntarily surrendered to police on December 27, 1993. (RT 3053-3054.) On the following day, only Matthew participated in the physical lineup that six of the witnesses attended. (RT 3056.) As noted above, Matthew was the only Native American and the only person who had appeared in the earlier photographic lineup. (RT 2356; People's Exs. 25-27.) Martin Jones, Raymond Douglas, and Lea Coss all identified Matthew as one of the gunmen. However, Coss also identified another "filler" participant as definitely being one of the gunmen and another as possibly being one of the gunmen. (RT 3060.) Similarly, Rodney James and Martin Jones identified other "filler" participants as possibly being gunmen. (RT 3060-3061.) Finally, neither Casey James nor another party guest-witness, Mark Dabalos, identified Matthew as one of the gunmen. (RT 3061.) Police were never able to identify the third gunman. (RT 3061.)

Based upon the foregoing evidence, the jurors convicted both boys as charged of three counts of first-degree premeditated murder and two counts of

attempted murder with premeditation. As to the "multiple-murder" special circumstance allegation, however, they only found it true as to Matthew and not true as to Michael. (CT 739-751; Pen. Code § 190.2, subd. (a)(3).) For the actual killer, the multiple murder special circumstance allegation required no findings other than liability for the underlying murder charges. For the aider and abettor, the jury had to additionally find that he intended to kill (Pen. Code § 190.2, subd. (c)). Indeed, during deliberations, the jurors specifically inquired into this requirement. (CT 659.) The court answered their inquiry by explaining that the aider and abettor must have an intent to kill and such intent exists where "the purpose, plan, or goal, includes killing." (CT 659.1) Hence, it is clear from the verdicts that the jurors determined that Matthew was the actual killer, that Michael was the aider and abettor, that the aider and abettor did not intend to kill, but that the aider and abettor was guilty of the murder and attempted murder charges under the "natural and probable consequences" doctrine, on which they were instructed. (See CT 697.)

## THE PENALTY PHASE

### A. The Prosecution's Case.

The only evidence offered in aggravation related to the circumstances of the crimes and their impact on the victims and their families. Leslie Miller, chairman of his tribe and a relative of both Watchman's and Arnold's, testified to their good nature. (RT 3518, 3526.) Watchman had four small children at the time of her death, who had been asleep upstairs at the time of the shooting. (RT 3424.) Two of her children were babies; one of the older children seemed to have adjusted to her death, but the other remained disturbed by it. (RT 3524-3525.)

Dewayne Arnold's daughter, Angel, testified that he had four children when he died. (RT 3529.) She was the oldest, at 18, while the youngest was 11. (RT 3529.) Her father was a great man and she and her family were deeply affected by his death. (RT 3530, 3534,3537.)

After the shooting, Joyce Arnold received therapy for five years. (RT 3545.) While she tried to forget the shooting, she did have some flashbacks. (RT 3545.)

Patricia Gordon, Leslie Trudell's sister, testified that he was a Vietnam veteran who had been damaged by his war experience. (RT 3549.) He worked for a nonprofit organization called Indian Youth of America and did a lot of volunteer work with children. (RT 3548, 3552.)

**B. The Defense Case.**

Matthew's father, Harry Souza, as well as his two other siblings – his older brother, Mark, and his younger sister, Marcie – all testified on his behalf. Also testifying on his behalf were several other family members, such as aunts, uncles, and his maternal grandmother, neighbors, family friends – many of whom had known him since childhood and some of whom lived with the Souzas for a period of time – and several former and current teachers. The catalyst of the tragedy, Matthew's mother, did not testify on her son's behalf.

According to virtually all of the witnesses, Michael and Matthew were extremely close, "like twins." (RT 3612, 3650, 3679, 3755.) Michael, who was older, was the leader and Matthew was his "shadow." (RT 3612-3613, 3650, 3755, 3779.) Matthew never wanted to be separated from Michael. (RT 3613, 3755.)

Shortly after the first grade, Matthew was diagnosed with a learning disability. (RT 3607.) He had a "visual processing deficit" and weakness in his visual motor skills, which manifested in reading and writing difficulty." (RT

3726.) As a result, Matthew was placed in special education classes throughout elementary school and high school. (RT 3607, 3707-3709, 3711-3712, 3722-3724, 3817-3819.)

At some point during their childhood, Rebecca Souza took all of the children except Matthew and moved in with her parents in Idaho for a period of time. (RT 3613-3614.) Matthew was deeply affected by being left behind and called Michael every other night. (RT 3614.)

Matthew's paternal uncle witnessed Rebecca become intoxicated in front of the children on a number of occasions. (RT 3836-3837.) She frequently became belligerent and emotional when drunk. (RT 3837-3838.) Nevertheless, Matthew seemed particularly attached to his mother. (RT 3673, 3770.) Both he and Michael were very protective of her. (RT 3673, 3758.)

When Matthew was about nine years old, the family hit hard financial times. (RT 3610.) They were evicted and moved in with friends, the Eaves family. (RT 3610, 3766-3767, 3776, 3785.) All of the Eaves described Matthew as an extremely polite and well-behaved child. (RT 3768, 3778, 3785-3786.)

The Souzas divorced when Matthew was about 13 years old. (RT 3616.) Sometime thereafter, Mr. Souza remarried. (RT 3616.) The children initially lived with their mother. (RT 3616.) According to May Ruth Underwood, a friend and neighbor who witnessed the family dynamics, there were serious problems in the family after the divorce. (RT 3686.) Ms. Souza began drinking "excessive[ly]," a problem that persisted up to the time of the shooting. (RT 3686-3687.) The boys also stopped going to school. (RT 3686-3687.) One of Matthew's former teachers confirmed that he stopped attending school regularly during the seventh grade, prompting her to contact Child Welfare. (RT 3717.)

Sometime after the divorce, Ms. Souza took all of the children and "disappeared" with them. (RT 3616, 3756.) It was a year before their father was able to locate them. (RT 3616, 3756.)

Sometime after finding his children, Mr. Souza took them for a weekend visit. (RT 3616.) On the night before he was to return them to his ex-wife, she telephoned him and told him to "just keep them, I don't want them." (RT 3616-3617.) The children were very upset by their mother's abandonment. (RT 3617.) According to Mr. Souza, they were "going out of their heads" and "begg[ed] her" to let them come home, to no avail. (RT 3617.)

Mr. Souza took custody of Matthew, Michael, and Marcie and enrolled them in school. (RT 3617.) He never received any reports of behavioral or discipline problems with Matthew. (RT 3619.)

Mark, the oldest of the Souza children, and his paternal grandparents lived in and managed an apartment complex in Berkeley. (RT 3611, 3619, 3636-3637, 3656.) Matthew and Michael eventually moved in with Mark in order to help their grandparents, whose health was deteriorating. (RT 3619-3620.)[11]

David Bard was the president of the company that owned the apartment complex and knew the family well. (RT 3656-3657.) When Matthew lived at the complex and assisted with its management, he was "at all times" well behaved, polite, and respectful. (RT 3657-3658.) Mr. Bard never received any complaints about him. (RT 3658.)

While living with Mark and his grandparents, Matthew and Michael often helped his grandmother with a regular volunteer bingo game for seniors, which benefited the Berkeley Symphony. (RT 3760-3761.) He was very helpful with the seniors and always polite and respectful. (RT 3762.)

According to Mark, he often took the boys camping. (RT 3634-36365.) Mark owned a shotgun and a .45, which he sometimes took on their camping trips. (RT 3642.) He allowed the boys to shoot the guns at large pieces of dumped garbage, like an old refrigerator. (RT 3642, 3644.) Matthew was an "okay" shot.

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[11] By the time of trial, Matthew's paternal grandmother had died and his paternal grandfather was in a convalescent home. (RT 3754.)

(RT 3645.) Matthew's father was not aware that Matthew had ever operated any guns. (RT 3621-3623.)

While Matthew was awaiting trial in the Santa Rita jail, he enrolled in the Amador Adult School. (RT 3789.) He obtained his G.E.D. in 1997. (RT 3791, 3797-3798.) At the time of trial, he was taking classes toward earning his high school diploma. (RT 3791.) Although he was transferred from the Santa Rita County Jail to the North County Jail, he continued his studies through the mail. (RT 3798.) According to his teacher, he was a good student who completed his assignments well and on time, was willing to learn, and seemed to enjoy the learning process. (RT 3797-3798.)

Virtually all of the witnesses testified to Matthew's shyness, as well as his loving and gentle nature. (RT 3620, 3638-3639, 3650, 3662-3663, 3665, 3685, 3710, 3716, 3768-3769, 3777-3778, 3780, 3785, 3821, 3828-3829, 3835, 3838.) He "always" wanted or needed to be held. (RT 3620, 3639.) Jerry Eaves, who had children of his own, described Matthew as "extra-special" and "one of my favorites." (RT 3785-3787.) Matthew had a particular fondness for animals, to which he would become very attached and protective. (RT 3615-3616, 3631-3632, 3769, 3780, 3787.) He was also a talented artist. (RT 3633-3634, 3651, 3664, 3709.)

At the same time, Matthew was unusually passive and withdrawn. None of the witnesses had ever seen or heard of Matthew behaving violently or aggressively. (RT 3620, 3639, 3651-3652, 3665, 3672-3673, 3685, 3688, 3835.) Indeed, none had even seen him argue or fight with his siblings or talk back to his parents or grandparents. (RT 3672-3673, 3679, 3757-3758, 3770, 3835.) May Underwood had never even seen him get angry. (RT 3688.) According to Robert Eaves, who was around Matthew's age when the Souzas lived with his family, Matthew would not even fight back when other boys bullied him. (RT 3778.) According to Jerry Eaves, he had "never seen kids as polite" as the Souza children. (RT 3786.) Matthew's former teachers, from elementary school through high

school, reported that while he was a good student who never presented any discipline problems, he was also extremely shy or withdrawn, even "lethargic." (RT 3710, 3714-3716, 3719-3720, 3732, 3734, 3745-3746, 3749-3750, 3819, 3821-3822.)

On the fourth day of the penalty phase deliberations, the jurors inquired into the results of jury deadlock on the question of penalty. (CT 770-775; RT 3933.) Two days later, on the sixth day of deliberations, they reached their verdict affixing the penalty at death. (CT 777-778; RT 3940-3943.)

## ARGUMENT

### *ERRORS UNDERLYING THE GUILT PHASE*

### I. THE JOINDER OF THE SOUZA BROTHERS' TRIALS VIOLATED MATTHEW SOUZA'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, PROOF BEYOND A REASONABLE DOUBT ON THE TRUTH OF THE SPECIAL CIRCUMSTANCE ALLEGATION, AND A RELIABLE JURY DETERMINATION ON THE ELEMENTS RENDERING HIM DEATH ELIGIBLE.

#### A. Introduction.

Given the ballistics evidence, it was undisputed that only one actual shooter killed or injured all of the victims with a rifle. Witnesses identified both brothers as being present and armed with guns, but their testimony was sharply conflicting as to which brother was the actual shooter. As to their guilt of the substantive charges, it was conceded that all of the principals were equally guilty of the same crimes and hence the identity of the actual shooter was irrelevant. (CT 694, 696; RT 3290-3291, 3298, 3308-3309, 3312-3313, 3338, 3402, 3404, 3457.) It was not irrelevant, however, to the special circumstance allegation.

The sole special circumstance alleged was under Penal Code section 190.2, subdivision (a)(3), the so-called "multiple murder" special circumstance. (CT 486.) Under the statute and as the jurors were instructed, a finding of guilt of two murders, at least one of which is first-degree murder, conclusively establishes the truth of the special circumstance for the actual killer and renders him eligible for death. (Pen. Code § 190.2, subd. (a)(3); CT 714-715.) As to the non-killing aider and abettor, however, the special circumstance requires an additional finding that he harbored an intent to kill. (Pen. Code § 190.2, subd. (c); CT 714-715.) During deliberations, the jurors specifically inquired into this requirement and the court

reiterated that the aider and abettor must have an intent to kill and such intent exists where "the purpose, plan, or goal, includes killing." (CT 659-659.1) Hence, as the jurors were informed through the instructions and arguments of all counsel, once they jurors determined that both brothers were guilty of the underlying and attempted murder charges, the identity of the actual shooter became critical to determining death eligibility. (RT 3342-3343, 3345-3346, 3403, 3457; 3470-3474.)

The significance of the jurors' resolution of this issue is plainly demonstrated by the verdicts. The jurors found both brothers equally guilty of the charged murders and attempted murders. However, apparently having found that Matthew was the actual shooter, the jury found the special circumstance to be true only as to him and eventually fixed his punishment at death. (CT 749.) Apparently concluding that *only* the actual shooter, and not his accomplices, intended to kill, and that Michael was the non-shooting aider and abettor, the jurors found the special circumstance allegation *not* true as to Michael. (RT 3477-3480.) As the non-shooting accomplice, Michael ultimately was sentenced to a single term of 25 years to life in prison, plus four years for use of a firearm, with the terms on all of the other murder and attempted murder convictions to run concurrently. (Reporter's Transcript of Michael Souza's February 5, 1999 sentencing hearing ["2/5/99 RT"] at p. 5.) Obviously, Matthew's very life depended on a fair and reliable resolution of whether the evidence established beyond a reasonable doubt that he was the actual shooter.

With respect to that evidence, it was undisputed that Michael was the first gunman through the front door. Although Matthew's counsel fleetingly suggested that there was reasonable doubt he was there at all (RT 3382, 3423), it was undisputed that if he was there, he was the second gunman. (RT 3385-3386,

3394-3395.)[12] As neither the evidence nor the parties suggested that the third gunman was the shooter, the question became whether the first gunman, Michael, or the second gunman, Matthew, was the actual shooter. The evidence regarding this critical question was breathtakingly close.

From the evidence as a whole, it was absolutely clear that the witnesses were simply incorrect regarding critical, fundamental facts underlying the determination of the shooter's identity. Hillary Leonesio actually saw Michael fire his gun about three times and shoot Dewayne Arnold. (RT 3109-3110, 3139-3140, 3160-3161.) Lea Coss simultaneously saw a flash and heard a shot from Michael's position in the living room, while Matthew was still standing several feet away. (RT 2811-2812.) Indeed, she testified at the preliminary hearing that she believed that Michael had shot Dewayne Arnold. (RT 2809-2810.) Similarly, Raymond Douglas was standing only a few feet from Michael when he heard a shot and saw a flash from his position, while Matthew was still standing several feet away. (RT 2266, 2362-2366.) Significantly, *none* of the witnesses claimed to have seen the second gunman, later identified as Matthew, fire his weapon or to have seen flashes or heard shots from his position. Indeed, as Matthew's counsel pointed out, the only people who "identified" Matthew as the shooter were the prosecutor and Michael's counsel. (RT 3382.) Obviously, this evidence strongly suggested that Michael was the actual shooter.

At the same time, Martin Jones and Raymond Douglas testified that Michael was carrying a shotgun. (RT 2043, 2285, 2318.) Given the ballistics evidence, it was undisputed at trial that all of the victims had been shot with a rifle and that a shotgun was never even fired. Viewing the testimony as a whole, it is clear that the witnesses were either correct that Michael had fired his weapon but

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[12] The suggestion was fleeting due largely to the trial court's denial of counsel's motion to suppress the suggestive pre-trial identifications of Matthew as one of the gunmen. (CT 536.8-536.12; RT 1808.)

incorrect that it was a shotgun, or they were correct that he carried a shotgun but incorrect that he had fired it.

Certainly, the closeness of the evidence regarding the actual shooter's identity is starkly illustrated by the fact that the District Attorney's position prior to trial – from the filing of the complaint, through the preliminary hearing, and to the filing of the first information – was that Michael was the actual shooter. (CT 36-38, 134-135, 480-488, 813-818.) Yet, the prosecutor later changed tack and contended at trial that Matthew was the actual shooter. (RT 1876-1877, 3292-3293, 3298, 3436-3437, 3444-3445, 3454, 3457.) Hence, while the evidence tended to show that one of the boys was the actual shooter, there was a dearth of evidence to prove the identity of *either* boy as the actual shooter beyond a reasonable doubt. Had they been tried separately, it is highly likely that their juries would have such doubts, convicted both as aiders and abettors, and found – as the jury found in this case – that the aider and abettor did not intend to kill, and therefore found the special circumstance allegation not true as to both boys. In other words, it is highly likely that separate trials would have saved Matthew's life.

Recognizing the very possibility that was eventually realized, Matthew's counsel moved to sever the boys' trials on the ground, *inter alia*, that their defenses to the special circumstance allegation would be antagonistic and irreconcilable. (CT 536.23-536.35.) He explained that the identity of the actual killer was critical to the special circumstance allegation. (CT 536.33) Based on the evidence, one of the brothers had to be the actual killer and each would defend against the special circumstance by implicating the other. (CT 536.33-536.34.) The potential prejudice (which was, in fact, realized) from presenting these irreconcilable defenses included, *inter alia*, that Michael's attorneys would act as additional prosecutors, that the jury would choose between the brothers based not on the prosecution's case but rather on the defendants' cases, and, because they were brothers, the jurors would likely view them as a pair and be unable to

distinguish the evidence offered as to each. (CT 536.34-536.35.) Hence, because "acceptance of one party's defense will preclude the acquittal of the other" on the *capital* murder charge, counsel argued that due process mandated severance. (CT 536.365.) Without discussion other that citing People v. Pinholster (1992) 1 Cal.4th 865, 932, People v. Turner (1984) 37 Cal.3d 302, 312, and "Howard" (*sic* – Hardy?) for the rule that mere "blame shifting" is insufficient to warrant severance, the court denied the motion. (RT 242-243.)[13]

Hence, the boys were tried together and before the same jury. From the beginning through the end of their joint trial, *both* the prosecutor and Michael's counsel argued that Matthew, not Michael, was the actual shooter. (RT 1874-1876-1877, 1882, 1895-1896, 1899-1901, 3292-3293, 3298, 3321, 3334-3336, 3347, 3355-3363, 3366-3370, 3436-3437, 3444-3445, 3454, 3457.) Of course, this strategy proved enormously successful for Michael.

Given the manner in which the case was tried, the jurors' verdicts reveal more than that they merely had reasonable doubt that Michael was the shooter, which – as a technical matter – would still have left room for reasonable doubt that Matthew was the shooter. Rather, the verdicts reveal that they accepted Michael's defense and were affirmatively convinced that he was *not* the shooter. Having been so convinced, and given the state of the evidence, they had to conclude that the second gunman, Matthew, was the shooter. In other words, accepting the theory of both the prosecutor and Michael effectively precluded any finding that

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[13] Counsel's motion was initially heard by Judge Golde, but denied solely on the ground that joinder would not implicate People v. Aranda (1965) 63 Cal.2d 518. (RT 15-16.) When the matter was transferred to Judge Hurley, counsel renewed the motion and sought a ruling on the additional grounds raised, including mutually antagonistic defenses. (RT 106.)

Furthermore, Judge Hurley granted counsel's pre-trial motion to "federalize" all trial objections and motions under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. (CT 535.23-535.24; RT 126.)

Matthew was not the shooter and thus effectively precluded his acquittal on the special circumstance allegation automatically rendering him eligible for death.

As fully set forth below, under well settled federal and California authority, given that the brothers had irreconcilable defenses to the special circumstance allegation (i.e., the capital murder charge), that both the prosecutor and Michael's counsel implicated Matthew as the actual shooter, that Michael's counsel in fact used every opportunity to so implicate Matthew, and that the evidence actually pointing to Matthew as the actual shooter was weak, the joinder of the boys' trials violated Matthew's rights to a fair trial and a reliable jury finding on the truth of special circumstance allegation beyond a reasonable doubt, as guaranteed by state law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The judgment must be reversed.

## B. The Applicable Legal Principles.

### 1. Standard of review.

Penal Code section 1098 provides:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial.

Under this statute, a decision concerning severance of codefendants' trials is generally a matter within the trial court's discretion. (People v. Cummings (1993) 4 Cal.4th 1233, 1286.) The purpose of the statute's preference for joint

trials is to prevent repetition of evidence and save time and expense to the state as well as to the defendant. (People v. Scott (1944) 24 Cal.2d 774, 778-779.) However, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (Williams v. Superior Court (1984) 36 Cal.3d 441, 451-452; accord Calderon v. Superior Court (2001) 87 Cal.App.4th 933, 939.)

"Severance motions in capital cases should receive heightened scrutiny for potential prejudice." (People v. Keenan (1988) 46 Cal.3d 478, 500 [and authorities cited therein].) "Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." (People v. Turner, supra, 37 Cal.3d at p. 312.)

Importantly, however, even if a motion to sever was properly denied at the time it was made, if the effect of joinder deprived the defendant of a fair trial or due process of law, reversal is required. (See, e.g., People v. Mendoza (2000) 24 Cal.4th 130, 162; People v. Arias (1996) 13 Cal.4th 92, 127; People v. Johnson (1988) 47 Cal.3d 576, 590; People v. Boyde (1988) 46 Cal.3d 212, 232; People v. Turner, supra, 37 Cal.3d 302, 313; People v. Grant (2003) 113 Cal.App.4th 579, 587; see also, e.g., United States v. Ziperstein (7th Cir. 1979) 601 F.2d 281, 286, cert. denied (1980) 444 U.S. 1031) In this regard, "error involving misjoinder 'affects substantial rights' and requires reversal. . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" (United States v. Lane (1986) 474 U.S. 438, 449; accord Zafiro v. United States (1993) 506 U.S. 534, 539; People v. Grant, supra, 113 Cal.App.4th at p. 587.) "In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts." (People v. Grant, supra, at p. 587.)

### 2. Mutually antagonistic or irreconcilable defenses.

This Court has recognized that conflicting defenses and likely juror confusion may require separate trials for codefendants. (See, e.g., People v. Hardy (1992) 2 Cal.4th 86, 167; People v. Massie (1967) 66 Cal.2d 899, 917.) As to the circumstances under which severance is required due to conflicting defenses, the Court has turned to federal authority for guidance. (People v. Hardy, supra, 2 Cal.4th at pp. 168-170.)

The essential consideration in determining whether defendants who are jointly charged should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (Zafiro v. United States, supra, at p. 539, cited in People v. Cummings, supra, 4 Cal.4th at pp. 1286-1287; accord United States v. Tootick (9th Cir. 1991) 952 F.2d 1078, 1082 ["The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict"]; United States v. Aulicino (2d Cir. 1995) 44 F.3d 1102, 1116 [if a "joint trial would compromise a trial right of the moving defendant or prevent the jury from making a reliable judgment about guilt or innocence," the trial must be severed].) Under federal law, in order to challenge the failure to sever on appeal, the defendant must demonstrate that the effect of joinder compromised a specific trial right, prevented a reliable adjudication of guilt or innocence, or otherwise deprived him of a fair trial. This showing establishes both error and prejudice and requires reversal. (See, e.g., United States v. Tootick, supra, 952 F.2d at pp. 1082-1083 ["in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur," such as to deny the defendant "a fair trial;" if he does so, both error and prejudice are established and reversal is required]; accord United States v. Mayfield (9th Cir. 1999) 189 F.3d 895, 906 [where reviewing court finds abuse of discretion in failing to sever trials of codefendants with

inconsistent defenses based on "manifest prejudice" that resulted, there is no need for separate harmless error analysis]; United States v. Rucker (11th Cir. 1990) 915 F.2d 1511, 1512 [in order to establish abuse of discretion, appellant must demonstrate that he "suffered compelling prejudice" from joinder, which deprived him of fair trial]; United States v. Romanello (5th Cir. 1984) 726 F.2d 173, 177 [same].) Thus, similar to the line of California authority recognizing that gross unfairness from joinder requires reversal even if the motion to sever was properly denied at the time it was made, this analysis necessarily turns on events that occurred at trial and subsequent to the court's denial of severance.

In light of these principles and under both federal and California law, mere inconsistent or blame shifting defenses alone do not alone require severance. (People v. Cummings, supra, 4 Cal.4th at p. 1287; People v. Hardy, supra, 2 Cal.4th at p. 170; People v. Pinholster, supra, 1 Cal.4th at p. 932, People v. Turner, supra, 37 Cal.3d at p. 312, Zafiro v. United States, supra, 506 U.S. at p. 538 [declining to "adopt a bright-line rule" regarding severance based on "conflicting defenses" or to hold that nature of conflicting defenses, without more, causes prejudice]; United States v. Mayfield, supra, 189 F.3d at pp. 899, 903-904; United States v. Tootick, supra, 952 F.2d at p. 1081 [same].) For instance, where more than one participant was involved in the crime, one defendant attempts to absolve himself and cast blame on the other participants, but another defendant presents an alibi defense, their defenses are merely inconsistent because the jury's acceptance of one defense will not necessarily preclude acquittal of the other defendant. (See, e.g., People v. Hardy, supra, 2 Cal.4th at pp. 167-168.) Or, where defendants charged with the same murder admit their participation but attempt to shift blame to the other for landing the fatal blow, their defenses to the charge of murder are merely inconsistent because both are equally guilty of the charged crime under aiding and abetting principles, regardless of who inflicted the fatal blow. (United States v. Brady (9th Cir. 1978) 579 F.2d 1121.)

However, as the Ninth Circuit Court of Appeals has explained and this Court has recognized, defenses may prevent a reliable judgment of guilt or innocence, and therefore require separate trials, when they "'move beyond the merely inconsistent to the antagonistic'" to the point of being "mutually exclusive." (United States v. Mayfield, supra, 189 F.3d at p. 899, quoting United States v. Tootick, supra, 952 F.2d at p. 1081, cited with approval in United States v. Zafiro, supra, 506 U.S. at pp. 542-543, conc. opn. of Stevens, J.; accord United States v. Sherlock (9th Cir. 1989) 962 F.2d 1349, 1362.) Mutually exclusive defenses exist where "'the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" (United States v. Mayfield, supra, at pp. 899-900, quoting United States v. Throckmorton (9th Cir. 1996) 87 F.3d 1069, 1072; accord People v. Hardy, supra, 2 Cal.4th 86, 168 [where "defenses are irreconcilable" or "acceptance of one party's defense will preclude the acquittal of the other"]; United States v. Tootick, supra, 952 F.2d at p. 1086 ["mutually exclusive defenses are said to exist when acquittal of a codefendant would necessarily call for conviction of the other"]; United States v. Rose (1st Cir. 1997) 104 F.3d 1408, 1415, cert. denied 520 U.s. 1258 (1997) [mutually antagonistic defenses exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; United States v. Rucker, supra, 915 F.2d at p. 1512; United States v. Romanello, supra, 726 F.2d at pp. 178-181; United States v. Ziperstein, supra, 601 F.2d at p. 286.) A classic case is when the evidence demonstrates that one of the defendants must be guilty, one defendant can only deny his guilt by attributing it to the other, and consequently the jury cannot reasonably believe both defenses. (See, e.g., United States v. Tootick, supra, 952 F.2d at p. 1082; United States v. Rucker, supra, 915 F.2d at p. 1513; United States v. Crawford (5th Cir. 1978) 581 F.2d 489, 490-491.)

In assessing the effect of joinder in such cases, a reviewing court should be guided by several fundamental principles. First, "[j]oinder is problematic in cases

involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor .... Joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary." (United States v. Tootick, supra, 952 F.2d at p. 1082, quoted with approval in Zafiro v. United States, supra, 506 U.S. at pp. 543-544, conc. opn. of Stevens J.; accord United States v. Mayfield, supra, 189 F.3d at pp. 899-900; United States v. Sherlock, supra, 962 F.2d at p.1363; United States v. Romanello, supra, 726 F.2d at p. 179.) "[C]ross examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant" and "closing arguments allow a final opening for codefendant's counsel to portray the other defendant" as the perpetrator. (United States v. Tootick, supra, 952 F.2d at p. 1082; accord United States v. Mayfield, supra, at p. 900.) "The existence of this extra prosecutor is particularly troublesome because defense counsel are not always held to the limitations and standards imposed on the government prosecutor." (United States v. Tootick, supra, 952 F.2d at p. 1082.) Hence, the manner in which the codefendant conducts his defense may demonstrate prejudice and fundamental unfairness from joinder. (See, e.g., United States v. Mayfield, supra. 189 F.3d at pp. 900-902 [where codefendant's defense was that defendant was perpetrator and his counsel used "every opportunity" to implicate defendant, defenses were antagonistic and joinder was prejudicial and deprived defendant of fair trial]; accord United States v. Tootick, supra, 952 Fd.2d at pp. 1084; United States v. Romanello, supra, 726 F.2d at pp. 178-181; United States v. Johnson (5th Cir. 1973) 478 F.2d 1129, 1133.) Similarly, the prosecutor's argument is an important factor to consider in assessing the effect of joinder. (See, e.g., United States v. Tootick, supra, 952 F.2d at p. 1085 [finding reversible error in joinder of trials of codefendants with antagonistic defenses based in part on prosecutor's closing argument mocking defendants for placing the blame on each other and the logical impossibility of accepting both defenses]; United States v. Sherlock, supra, 962 F.3d at p. 162 [finding reversible error in joinder of defendants with

inconsistent defenses based on prosecutor's prejudicial argument utilizing evidence admitted against one defendant against them both].)

Moreover, joining trials of codefendants with mutually antagonistic defenses may "invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant." (Zafiro v. United States, supra, 506 U.S. at p. 544, conc. opn. of Stevens, J.) This risk decreases the prosecution's burden of proof and is significant in assessing whether joinder affected the defendant's rights. (Ibid.)

Moreover, the inherent risks in joint trials are often much greater when the codefendants are related, thus making motions for severance "far more compelling" than for other codefendants. (United States v. Auerbach (8th Cir. 1984) 745 F.2d 1157, 1161; see, also, e.g., United States v. Rucker, supra, 915 F.2d at p. 1512-1513 [reviewing court considered fact that codefendants with inconsistent defenses were related in concluding trial court committed prejudicial error in denying motion for severance]; Hernandez v. State (Fla. App.1990) 570 So.2d 404, 406.) Among other things, joint trials of related codefendants increase the danger of jury confusion. (See, e.g., United States v. Sampol (D.C. Cir. 1980) 636 F.2d 621, 647 [conviction reversed for failure to grant severance motion grounded in part on argument that jury would confuse evidence admissible against two codefendant brothers, emphasizing that at least one witness misidentified the brothers and "[p]erhaps this misidentification symbolized the inevitable failure of this particular joint trial"].) Further, joining the trials of codefendant brothers with irreconcilable defenses aggravates the harm already inherent in one defendant implicating another. (See, e.g., People v. Wilson (Ill. App. Ct. 1987) 515 N.E.2d 812, 819 [recognizing "the devastating effects of a fraternal accusation" in holding that court erred in refusing to sever trials of codefendant brothers with antagonistic defenses].) Indeed, a jointly tried defendant with a mutually antagonistic defense

faces a particularly unenviable Hobson's choice when his codefendant is his own brother: defend himself by exploiting the evidence pointing to his brother and thus simultaneously risk convicting a loved one and alienating the jurors, or forgo that defense and risk his own conviction and possible death. (Cf. United States v. Sampol, supra, 636 F.2d at p. 650, n. 16 [joint trial of codefendant brothers may "inhibit" presentation of defense because defendant might choose to forego a beneficial blame shifting defense strategy due to the "prejudice that would have inured to his codefendant and brother"].)

Finally, the relative weight of the evidence against the defendants is an important factor to consider in assessing the harm from joinder. (See, e.g., United States v. Mayfield, supra, 189 F.3d at p. 907 [reversible error in denying motion to sever trials of codefendants with mutually antagonistic defenses in light of conduct of codefendant counsel and fact evidence against defendant was not "overwhelming"].) With these principles in mind, Matthew now turns to the effect of the joinder of his trial with that of his codefendant brother.

### C. The Joinder Of The Souza Brothers' Trials Was Erroneous And Deprived Matthew Of His Rights To A Fair Trial And A Reliable Jury Determination Of His Guilt Or Innocence Of Capital Murder Based On Proof Beyond A Reasonable Doubt As Guaranteed By The Fifth, Sixth, Eighth and Fourteenth Amendments.

At the outset, it is true that Matthew and Michael's defenses to the underlying murder charges were merely inconsistent or blame shifting, not mutually antagonistic. While the brothers implicated each other as the actual shooter, their attorneys acknowledged that the actual shooter and aider and abettor were equally guilty of the same crimes and their joint defense was that they were guilty of lesser offenses than first degree murder. (RT 3338, 3402, 3404; see Argument II, below.) In other words, the jurors could accept one brother's

defense to the underlying charges without having to reject the other brother's defense.

However, as discussed in the Introduction and pointed out by trial counsel, once the jurors convicted the boys of at least two murders, they had to further determine whether the "multiple murder" special circumstance allegation had been proved beyond a reasonable doubt. (See § Pen. Code § 190.4.) As further discussed, for the actual shooter, the special circumstance was conclusively established without the need for any additional findings. (Pen. Code § 190.2, subd. (a)(3); see also RT 3470-3474; CT 659, 659.1.) For the aider and abettor, however, the jury had to make an additional finding that he intended to kill, an element the parties hotly disputed. (Pen. Code § 190.2, subd. (c); see also RT 3470-3474; CT 659, 659.1, 714.)

Of course, special circumstances rendering a defendant eligible for the death penalty operate as "'the functional equivalent of an element of a greater offense'." (Ring v. Arizona (2002) 536 U.S. 584, 609, quoting Apprendi v. New Jersey (2000) 530 U.S. 466, 494; see also Sattazahn v. Pennsulvania (2003) 537 U.S. 101, 111 ["Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the state label it – constitutes an element, and must be found by a jury beyond a reasonable doubt"].) As the Ninth Circuit has put it, special circumstances "can only be understood as substantive elements of capital murder as opposed to mere penalty enhancements." (United States v. Waggoner (9th Cir. 2003) 339 F.3d 915, 918, cert. denied (11/29/04) __ U.S. __, 2004 U.S. Lexis 7766.) Hence, capital defendants have specific trial rights to reliable jury findings on the truth of special circumstance allegations creating death eligibility beyond a reasonable doubt, as guaranteed by state law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Ring v. Arizona, supra, at pp. 603-609; Beck v. Alabama (1980) 447 U.S. 625, 637-638 [Eighth Amendment requires heightened reliability of

verdicts in capital cases].) It is with respect to the charge of *capital* murder, then, that the Souza brothers' defenses were antagonistic and irreconcilable.

Once again, based on the evidence, either the first gunman – Michael – or the second gunman – identified as Matthew – was the actual shooter. Each boy's defense to the capital murder charge was that he was not the actual shooter, did not intend to kill, and therefore the special circumstance was not true as to him. (RT 3321, 3338-3342, 3344-3346, 3382, 3385-3386, 3390, 3395, 3402-3403.) Given the evidence, their defenses necessarily required each brother to implicate the other as the actual shooter. Indeed, this is just what they did. (RT 3334-3336, 3347-3348, 3362-3363, 3384-3390, 3392, 3400, 3405, 3406, 3422.)

Hence, while the court was correct that mere blame shifting defenses do not mandate severance (RT 242-243, citing People v. Pinholster, supra, 1 Cal.4th at p. 932, People v. Turner, supra, 37 Cal.3d at p. 312, and "Howard" [*sic* – Hardy?]), and that this rule would apply to the brothers' defenses to the *underlying* murder charges, since the identity of the actual shooter was irrelevant to their liability for the crimes, the court was incorrect in applying that rule to the brothers' defenses to the *capital* murder charge incorporating the special circumstance. Their defenses to *capital* murder went beyond mere blame shifting to the irreconcilable because the jury could not accept one brother's defense without rejecting the other's. (See, e.g., People v. Hardy, supra, 2 Cal.4th 86, 168; United States v. Mayfield, supra, 189 F.3d at p. 899-900, United States v. Tootick, supra, 952 F.2d at pp. 1081-1082, 1086, United States v. Sherlock, supra, 962 F.2d at p. 1362; United States v. Throckmorton, supra, 87 F.3d 1069, 1072; United States v. Rose, supra, 104 F.3d at p. 1415; United States v. Rucker, supra, 915 F.2d at p. 1512; United States v. Romanello, supra, 726 F.2d at pp. 178-181; United States v. Ziperstein, supra, 601 F.2d at p. 286.) In other words, once the jurors found both boys guilty of the underlying murder and attempted murder charges, "the core of [Michael's] defense" to *capital* murder was "so irreconcilable with the core of [Matthew's] defense that the acceptance of [Michael's] theory by the jury preclude[d]

[Matthew's] acquittal" of capital murder. (United States v. Mayfield, supra, at pp. 899-900.)

Furthermore, these codefendants with irreconcilable defenses were brothers with identical last names and similar sounding first names; they were nearly the same age; and they bore a striking resemblance to each other. (See Ex. 25, photographs 3 [Matthew] and 5 [Michael]; see also RT 1757, 2238, 2253, 2442-2443, 2044.) Under the circumstances, joining their trials carried a substantial danger that the jurors would confuse the evidence offered against each brother and thereby placed undue emphasis on the arguments and tactics of their counsel rather than on the evidence.

The potential for confusion is amply demonstrated by Raymond Douglas's testimony. Shortly following the shooting, Douglas (like other witnesses) had identified a photograph of Michael from a lineup as the first gunman who did all the talking. (RT 2275-2276.) However, at trial and on direct examination, he identified *Matthew* as that man. (RT 2260-2263.) Michael's counsel attempted to clarify the confusion on cross-examination by displaying the photograph he identified as the first gunman and having him identify the man in that photograph as Michael. (RT 2320-2321.) However, upon cross-examination by Matthew's counsel, Douglas again *positively* identified *Matthew* as the first gunman. (RT 2335-23376.) In another effort to clarify the matter, Matthew's counsel again had Douglas review the photograph he had identified and asked him if it depicted Matthew or Michael. (RT 2338.) Douglas simply responded, "they look different now." (RT 2338.) It was only after Matthew's counsel pressed him, asking him, "isn't the photograph you have in your hand . . . a photograph of this man I'm standing behind . . . Michael Souza," that Douglas finally realized that he had misidentified Matthew, corrected his previous testimony, and clarified that he had identified a photograph of Michael as the first gunman. (RT 2338-2240.) "Perhaps this misidentification symbolized the inevitable failure of this particular joint trial." (United States v. Sampol, supra, 636 F.2d at p. 647 [conviction

reversed for failure to sever trial of codefendant brothers carrying risk of jury confusion].)

Given the manner in which the case was tried, it is no surprise that the potential for confusion and inconsistent defenses inured to Michael's substantial benefit, resulting in the jury's acceptance of Michael's defense that Matthew was the actual killer despite the weakness in the *evidence* to prove that critical fact beyond a reasonable doubt. While both boys defended against the capital murder charge by implicating the other as the actual shooter, unlike Michael, Matthew faced two prosecutors. (See, e.g., Zafiro v. United States, supra, 506 U.S. at pp. 543-544, conc. opn. of Stevens J.; United States v. Mayfield, supra, 189 F.3d at pp. 899-900; United States v. Tootick, supra, 952 F.2d at p. 1082, United States v. Romanello, supra, 726 F.2d at p. 179.) In other words, both the deputy district attorney and Michael's trial theories were that Matthew was the actual shooter. (RT 1874-1876-1877, 1882, 1895-1896, 1899-1901, 3292-3293, 3298, 3321, 3334-3336, 3347, 3355-3363, 3366-3370, 3436-3437, 3444-3445, 3454, 3457.) Following the prosecutor's opening statement in which he identified Matthew as the actual shooter, Michael's counsel commenced his own opening statement by agreeing that the prosecutor was "correct" (RT 1882) and that "Matthew" was the shooter (RT 1900-1901). Indeed, as the trial progressed, Michael's counsel proved to be a far more formidable prosecutor than the deputy district attorney himself.

While the deputy district attorney's trial theory was that Matthew was the actual shooter, he also contended that the identity of the shooter was irrelevant since both the shooter and non-shooting aider and abettor intended to kill and thus both were equally liable for the underlying murders *and* the special circumstance allegation. (RT 3290-3291, 3298, 3308-3309, 3312-3313, 3457.) Hence, he did not particularly press the conflicting evidence regarding the actual shooter's identity.

Michael's counsel, however, took every opportunity to implicate Matthew as the actual shooter. As noted in the above Introduction, the evidence in this regard was sharply conflicting. Three witnesses directly or indirectly testified that Michael fired his weapon; two directly or indirectly testified that Michael actually shot Dewayne Arnold. (RT 2266, 2362-2366, 2809-2812, 3109-3110, 3139-3140, 3160-3161.) Given the ballistics evidence, if this testimony was correct, then Michael had to be the actual killer of all of the victims. On the other hand, two witnesses described Michael's gun as a shotgun. (RT 2043, 2285, 2318.) Again, given the ballistics and other evidence, it this testimony was correct, then the second gunman, Matthew, had to be the actual shooter. Hence, Michael's defense hinged on persuading the jury that he carried the shotgun. (See, e.g., RT 3334-3336.)

In this regard, although only two witnesses had described Michael's gun as a shotgun, in his examination of *all* of the witnesses, Michael's counsel never missed an opportunity to describe his client as "the man with the shotgun." (RT 2301, 2322, 2326-2328, 2330, 2331, 2392-2398, 2454, 2458, 2508, 2779, 2789-2791, 2794, 2801) Further solidifying in the minds of the jurors that Michael was carrying the shotgun, his counsel repeatedly questioned the expert witnesses at length as to whether the victims had been shot with a shotgun and whether a shotgun had been fired in the apartment, a non-issue since all of the parties conceded that a shotgun had never been fired. (RT 1981-1985, 2021-2022, 2462, 2590-2591, 2884-2889, 2905-2910, 2986.) This tactic of disputing at length the undisputed served to confuse the issues and enforce the idea that Michael carried the shotgun.

Furthermore, Lea Coss specifically testified on direct examination that she could not tell what kind of gun Michael or Matthew had been carrying. (RT 2734-2736.) She could only describe Michael's gun as large, about 22 inches to two feet long. (RT 2734-2735.) She similarly could describe Matthew's gun only as "another large gun," agreeing that it was "about as long as the gun that" Michael

carried. (RT 2736.) As discussed in the Introduction, Coss also testified that she simultaneously saw a flash and heard a shot from Michael's position in the living room, while Matthew was still standing several feet away, and in fact had believed that Michael shot Dewayne Arnold. (RT 2809-2812.)

Michael's counsel cross-examined Coss first and undermined this testimony by confusing her and the jurors regarding her description of Michael's weapon. He opened his cross-examination by having Coss read her police statement to herself, but not aloud. (RT 2752-2754.) That statement was marked Defendant A's Exhibit C and lodged with the court, but was not admitted at trial. (RT 2753; CT 737; CT 855.) According to that statement, Coss had described Michael's gun as "a rifle or a shotgun" and explained that she did not "know the difference." (Deft. A's Ex. C; CT 855.) Despite this statement and despite her direct examination testimony that she could not identify the kind of gun Michael carried, Michael's counsel purported to "review" her direct examination testimony and in so doing, stated: "Okay. And at that point, he's [Michael's] got a shotgun in his hand." (RT 2779.) Coss replied, "yes, what it looked like to me at the time." (RT 2779.) Michael's counsel responded, "It looked to you like a shotgun at the time?" and she replied, "yes." (RT 2779) Thereafter, throughout his examination of Coss, Michael's counsel repeatedly referred to Michael as "the man with the shotgun." (RT 2789-2794, 2800-2801.)

On his own cross-examination of Coss, Matthew's counsel immediately attempted to clarify the matter. (RT 2805.) He asked her if she knew the difference between a rifle and a shotgun and she replied that she did not. (RT 2805-2806.) She also told police that she did not know the difference and could only say that Michael was carrying a rifle or a shotgun. (RT 2806.) Finally, she agreed that her trial testimony was the same: she could not tell if Michael's gun was a shotgun or a rifle because she did not know the difference. (RT 2806.) On redirect, the prosecutor accepted that she could not tell what kind of gun Michael carried. (RT 2830.)

However, whatever gains Matthew's counsel may have made in clarifying the evidence were lost by Michael's counsel summation, in which he turned Coss's testimony on its head. Michael's counsel acknowledged that she had initially told police that Michael was carrying a rifle or a shotgun, but argued that her trial testimony was consistent in describing his gun as a shotgun (RT 3359-3362) and Matthew's gun as a rifle (RT 3366). Indeed, exploiting the potential for confusion that otherwise inhered in this joint trial, Michael's counsel went so far as to falsely argue that Coss was one of "at least four" witnesses who identified Michael's gun as a shotgun, when in truth only two witnesses had done so. (RT 3336; see, e.g., United States v. Mayfield, supra. 189 F.3d at pp. 900-902 [finding reversible error from joinder of trials of codefendants with antagonistic defense where codefendant's counsel used "every opportunity" to implicate defendant]; United States v. Tootick, supra, 952 Fd.2d at pp. 1082-1084 [finding reversible error from joinder of trials of codefendants with antagonistic defenses based in large part on conduct of codefendant's counsel, which included repeatedly and directly accusing the defendant and misstating the evidence in argument].)

Moreover, it cannot be overemphasized that these codefendants with mutually antagonistic defenses were *brothers*. Again, based on the evidence, it was impossible for either boy to admit him complicity but deny his role as the actual killer without at least implicitly implicating his brother. Had the boys' trials been severed and different juries decided their fate, the success of one brother's defense would not inevitably have resulted in the other brother's conviction of capital murder and possible death. However, by joining their trials, Matthew was forced to choose between: 1) saving his own life and risking his brother's by relying on the substantial evidence pointing to Michael as the actual killer; and 2) risking his own life and saving his brother's by ignoring that evidence and admitting his role as the actual killer. Choosing the former option not only risked the life of a loved one; but because the jurors knew that it risked the life of a loved one; but it also carried an acute danger of alienating the jurors. True, this risk cut

both ways and, without more, could be said to apply equally to both brothers. However, having forced this grotesque choice upon the boys, the prosecutor used Matthew's decision to choose the former option, and exploited its potential for prejudice, against Matthew and Matthew alone. In his guilt phase summation, the prosecutor argued:

> [T]here's no honor among thieves and these two brothers pointing the finger at each other both saying through their lawyers that the other person did the shooting -- you know it's bad enough, it is horrible that Matthew Souza did these shootings. But to do them then, through his defense, blame his brother as being the one who actually pulled the trigger, I think that gives you the insight into what type of person, number one, Matthew Souza is, and number two, what type of person might be involved in these killings. (RT 3437.)

Indeed, the prosecutor continued this theme in the penalty phase, emphatically arguing that Matthew's attempt to "blame [his] brother" revealed the absence of even "a shred of remorse" and a young man undeserving of the jury's mercy. (RT 3889, 3926-3928; see, e.g., United States v. Tootick, supra, 952 F.2d at p. 1085 [finding reversible error in joinder of trials of codefendants with antagonistic defenses based in part on prosecutor's closing argument mocking defendants for placing the blame on each other and the logical impossibility of accepting both defenses].) The prosecutor's remarks not only exploited and compounded the risk of prejudice otherwise inherent in this joint trial; they were plainly inconsistent with basic notions of fundamental fairness, which prohibit the state from taking undue advantage of a situation it has forced or created. (See, e.g., Payne v. Arkansas (1958) 356 U.S. 560, 567 [coerced confessions inadmissible for any purpose in part because it would be fundamentally unfair for state to force defendant to confess and then be able to use forced statement against him at trial]; People v. Daggett (1990) 225 Cal.App.3d 751, 758 [improper for state to fault defendant for not presenting evidence that was excluded upon state's own motion];

People v. Varona (1983) 143 Cal.App.3d 566, 570 [same]; United States v. Ebens (6th Cir. 1986) 800 F.2d 1422, 1440-1441 [prosecutor took unfair advantage of court's ruling restricting admission of evidence by inviting jury to draw adverse inference from its absence]; People v. Wilkes (1955) 44 Cal.2d 679, 687-88 [when state confers on witness privilege against testifying that defendant has no power to override, it is improper for prosecutor to invite jury to draw adverse inferences from absence of witness's testimony]; People v. Frohner (1976) 65 Cal.App.3d 94, 109 [same; such conduct is "grossly improper"].)

Finally, as discussed in the Introduction, while either the first gunman, Michael, or the second gunman, identified as Matthew, had to be the actual shooter, the *evidence* to prove beyond a reasonable doubt that one was a better candidate than the other was extraordinarily close. (See, e.g., United States v. Mayfield, supra, 189 F.3d at p. 907 [finding reversible error from joinder in part because the evidence pointing to defendant as the perpetrator rather than his codefendant was not overwhelming].) Indeed, the closeness of the evidence is underscored by the procedural history of the case. The complaint originally alleged that Michael used the rifle *and* personally inflicted great bodily injury on all of the victims in the commission of the crimes. (CT 813-818.) It alleged that Matthew used a pistol and did not allege that he personally inflicted great bodily injury. (CT 813-818.) At the preliminary hearing, which was based largely on the same evidence that was presented at trial, the District Attorney proceeded on the theory that Michael was the actual shooter. (CT 36-38, 134-135, 480-483.) Consistent with that theory, the information originally alleged that *Matthew* used the shotgun and *Michael* used the rifle. (CT 484-488.) Ultimately, the prosecutor avoided the conflicts in the evidence by successfully moving to amend the information to delete references to specific firearms in the firearm use allegations. (CT 502.1, 503-508.) By the time of trial, the prosecutor inexplicably shifted gears and contended that Matthew was the actual shooter. (RT 1876-1877, 3292-3293, 3298, 3436-3437, 3444-3445, 3454, 3457.) At the same time, in apparent

recognition of the conflicts in the evidence, he repeatedly emphasized that ultimately the jury did not have to determine the identity of the actual shooter because both brothers intended to kill and therefore the special circumstance allegation was true as to both of them. (RT 3290-3291, 3298, 3308-3309, 3312-3313.)

If the evidence was so closely balanced that the District Attorney himself had such patent doubts regarding the identity of the actual shooter, then it is highly likely that the jurors would have had similar doubts in separate trials and therefore convicted each boy as an aider and abettor. Given this jury's conclusion that the prosecution had failed to prove beyond a reasonable doubt that the non-shooting aider and abettor intended to kill, it is highly likely that separate juries would have reached the same conclusion. However, because the evidence overwhelmingly showed that one of them was the actual shooter and their irreconcilable defenses hinged upon pointing the finger at each other, their joint trial invited the jury "to convict the defendant who appear[ed] the more guilty of the two regardless of whether the prosecutor ha[d] proven guilt beyond a reasonable doubt." (Zafiro v. United States, supra, 506 U.S. at p. 544, conc. opn. of Stevens, J.) Matthew appeared to be the "more guilty of the two" not due to the strength of the *evidence,* but rather due to the tandem accusations of Michael and the prosecution and their exploitation of the risk of prejudice presented by joining their trials. For all of these reasons, the joint trial seriously compromised Matthew's rights to a reliable jury verdict on the capital murder charge beyond a reasonable doubt and to a fair trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Therefore, pursuant to the authorities discussed in part B, above, the true finding on the special circumstance allegation must be set aside, which in turn requires that the penalty judgment be reversed.

## II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER AND ATTEMPTED VOLUNTARY MANSLAUGHTER IN A REASONABLE HEAT OF PASSION VIOLATED MATTHEW'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND TO PRESENT A DEFENSE AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

### A. Introduction.

As discussed in the preceding argument, Matthew's trial counsel briefly argued that there was reasonable doubt that Matthew was even present during the shooting. (RT 3382, 3423.) In the alternative, each brother contended that he was not the actual shooter, an issue critical to the "multiple murder" special circumstance allegation. (RT 3321, 3342-3346, 3382, 3384-3392, 3395, 3403; Pen. Code § 190.2, subd. (c).) At the same time, counsel for both brothers expressly conceded to the jurors that regardless of the identity of the actual shooter, he and his accomplices were equally guilty of whatever substantive crimes the shooter committed. (RT 3338, 3402, 3404.) Hence, as all of the parties recognized, the critical question with respect to the boys' guilt of the substantive charges was the degree of their guilt. (RT 3320, 3324-3331, 3400-3404, 3418-3422, 3457.)

As discussed in detail below, there was compelling evidence that the shooting was the direct result of the boys' having been provoked to a state of intense emotion or passion. Based upon this evidence, counsel requested instructions on the lesser-included offenses of voluntary manslaughter and attempted voluntary manslaughter in a reasonable heat of passion. (CT 587-591; see Pen. Code § 192, subd. (a).) Citing People v. Spurlin (1984) 156 Cal.App.3d 119, the prosecutor argued that reasonable heat of passion requires actual

provocation from the victim killed. (CT 640; RT 2947.) The trial court agreed. (RT 2947-2948.) Therefore, the court refused the instructions as to all counts other than that relating to Regina Watchman, the only victim who had *actually* assaulted the boys' mother. (RT 2947-2948.) Matthew's counsel acquiesced in the court's understanding of the law and its application to this case to limit the instruction to the Watchman murder charge, but expressed no tactical basis for doing so. (RT 2947.)

Counsel also requested instructions on unpremeditated second-degree murder and on the relevance of provocation evidence to the element of premeditation. (RT 2954-2957, 2959-2962, 3184-3185.) The court granted the request. The court agreed that provocation which is otherwise inadequate to reduce murder to manslaughter is nevertheless relevant to whether the perpetrator premeditated and deliberated and therefore agreed to instruct the jury on the relevance of such evidence with CALJIC No. 8.73, without limitation to any particular count. (RT 2954-2958, 3172, 3185, 3235.)[14]

In light of these rulings, counsel subsequently withdrew his request for, and objected to, instructing the jury on voluntary manslaughter in the heat of passion as to the Watchman murder charge. (RT 3230-3231.) Counsel explained that, since the court ruled that it would limit the instruction to that charge, he feared that the jury would become confused about the application of the evidence of

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[14] CALJIC No. 8.73, as modified, provided as follows:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation. (CT 712; RT 3268.)

As discussed in Argument III, below, when considered in conjunction with the prosecutor's repeated misstatements of the law, this instruction was inadequate to explain the critical relationship between provocation, heat of passion, and premeditation in any case.

provocation as it related to the element of premeditation in the charges involving the other victims. (RT 3230-3231.) In other words, he feared that it would undermine the only viable defense left by the court's ruling. Consequently, no voluntary manslaughter instructions were provided, leaving the jury with only two options as to the degree of guilt on the substantive charges: premeditated murder of the first-degree and second-degree murder. (CT 704-706; RT 3260-3264.)

As fully explained below, the court erred in refusing to instruct the jury on voluntary manslaughter and attempted voluntary manslaughter in the heat of passion as to all of the charges. California law has *never* imposed a rigid requirement that the victim killed must actually engage in provocation in order to demonstrate a reasonable heat of passion. Certainly, there is no such requirement under Penal Code section 192. As further explained below, substantial evidence supported findings that the shooting was committed in the heat of passion and in response to events which would provoke a reasonable person into acting passionately against all of the victims. The court's refusal to provide the instructions violated not only state law, but also Matthew's federal constitutional rights to due process, to present a defense, and to trial by jury. Because the state cannot carry its burden of proving the errors harmless beyond a reasonable doubt, reversal is required.

### B. Where Supported By Substantial Evidence, State Law And The Federal Constitution Mandate Instructions On Voluntary Manslaughter And Attempted Voluntary Manslaughter In The Heat Of Passion As Lesser-Included Offenses To Charges Of Murder And Attempted Murder.

Matthew was charged with premeditated first-degree murder and attempted murder with premeditation. (CT 484-487; RT 3262-3263, 3265-3267; Pen. Code §§ 187, 189, 664.) Both crimes require proof beyond a reasonable doubt of express malice. Reasonable heat of passion negates malice (both express and implied) as a matter of law. (People v. Lasko (2000) 23 Cal.4th 101, 109; People

v. Breverman (1998) 19 Cal.4th 142, 149.) Hence, voluntary manslaughter and attempted voluntary manslaughter in the heat of passion are lesser-included offenses to charges of murder and attempted murder. (Ibid.; People v. Barton (1995) 12 Cal.4th 186, 196; People v. Williams (1988) 199 Cal.App.3d 469, 475; People v. Van Ronk (1985) 171 Cal.App.3d 818, 824-825.)[15]

It is well settled that trial courts have a broad *sua sponte* duty to 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." [Citation.]'" (People v. Wickersham (1982) 32 Cal.3d 307, 323, overruled on another ground in People v. Barton, supra, at pp. 200-201; accord People v. Marks (1988) 45 Cal.3d 1335, 1345.) This instructional obligation includes the duty to instruct on all lesser offenses necessarily included within a charged offense that are supported by the evidence. (See, e.g., People v. Breverman, supra, 19 Cal.4th at p. 149; People v. Barton, supra, 12 Cal.4th at p. 196.) As this Court has explained, "this rule demands that when the evidence suggests that the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to 'consider the full range of possible verdicts – limited not by the strategy, ignorance, or mistake of the parties,' so as to 'ensure that the verdict is no harsher or more lenient than the evidence merits.'" (People v. Breverman, supra, at p. 159, quoting from People v. Wickersham, supra, at p. 324.) Hence, the court has a *sua sponte* duty to instruct on all lesser-included offenses, including "all theories of a lesser included offense which find substantial support in the evidence," even over the defendant's objection absent an expressed tactical

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[15] For ease of reference, the following discussion regarding murder and its necessarily included offense of voluntary manslaughter applies equally to attempted murder and its necessarily included offense of attempted voluntary

purpose for the objection. (Id. at p. 162, emphasis supplied; accord People v. Lee (1999) 20 Cal.4th 47, 60; People v. Barton, supra, 12 Cal.4th 196.)

The evidence triggers these instructional obligations whenever it is "'substantial enough to merit consideration' by the jury." (People v. Breverman, supra, 19 Cal.4th at p. 162.) "Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed" or "evidence that a reasonable jury could find persuasive." (Ibid., internal quotations, citations, ellipses, and parenthesis excluded; accord People v. Flannel (1979) 25 Cal.3d 668, 684-685.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the trial court to instruct" on a lesser-included offense. (People v. Lewis (2001) 25 Cal.4th 610, 646.)

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manslaughter. (See, e.g., People v. Williams, supra, 199 Cal.App.3d at p. 475; People v. Van Ronk, supra, 171 Cal.App.3d at pp. 824-825.)

Importantly, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved *in favor of the accused.*" (People v. Ratliff (1986) 41 Cal.3d 675, 694, emphasis supplied; accord People v. Flannel, supra, 25 Cal.3d. at p. 685; People v. Wilson (1967) 66 Cal.2d 749, 763.)

Furthermore, the due process and jury trial guarantees of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution require the prosecution in a criminal jury trial to prove every element of a crime beyond a reasonable doubt and demand complete and accurate instructions thereon. (See, e.g., United States v. Gaudin (1995) 515 U.S. 506, 509-511, 522-523; Sullivan v. Louisiana (1993) 508 U.S. 275; Osborne v. Ohio (1990) 495 U.S. 103, 123-124; Carella v. California (1989) 491 U.S. 263, 265; Mullaney v. Wilbur (1975) 421 U.S. 684, 698.) In this regard, voluntary manslaughter in the heat of passion has a "unique legal function" under California law. (People v. Rios (2000) 23 Cal.4th 450, 459.) It is unlike other lesser-included offenses in that heat of passion operates to legally negate an element of the greater offense – malice – despite the existence of a mental state that otherwise amounts to malice as a matter of fact (i.e., an intent to kill or intent to do an act dangerous to human life with conscious disregard of its danger). (Ibid.; People v. Lasko, supra, 23 Cal.4th at p. 109; People v. Blakeley (2000) 23 Cal.4th 82, 96, dis. opn. of Mosk, J. [mental state for voluntary manslaughter "is the state of mind that amounts *in fact* to malice aforethought, but is deemed *in law* not to because of provocation" and heat of passion]; People v. Brubaker (1959) 53 Cal.2d 37, 44 [same]; People v. Breverman, supra, 19 Cal.4th at p. 188, dis. opn. of Kennard, J..) Thus, "if the issue of heat of passion . . . is 'properly presented' in a murder case (Mullaney v. Wilbur (1975) 421 U.S. 684, 704), the People must prove beyond a reasonable doubt that these circumstances were lacking in order to establish the murder element of malice." (People v. Rios, supra, 23 Cal.4th 450, 462; see also Mullaney v. Wilbur, supra, 421 U.S. at pp. 698-699 ["the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the

absence of the heat of passion upon sudden provocation when the issue is properly presented in a homicide case"].) Put another way, as Justice Kennard has explained, where there is evidence of heat of passion, "the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of . . . heat of passion . . .*" (People v. Breverman, supra, at p. 189, dis. opn. of Kennard, J, emphasis supplied.) Consequently, where supported by the evidence, the federal constitutional due process and jury trial guarantees to instructions on every element of the charge mandate complete and accurate instructions on voluntary manslaughter in the heat of passion. (Id. at pp. 189-191; see also Mullaney v. Wilbur, supra, at pp. 698-699; Osborne v. Ohio, supra, 495 U.S. 103, 122-124 and n. 17; see also Everette v. Roth (7th Cir. 1994) 37 F.3d 257, 261 [omission of lesser-included voluntary manslaughter instructions violates federal due process where it results in "fundamental miscarriage of justice"]; Vujosevic v. Rafferty (3d Cir. 1988) 844 F.2d 1023 [failure to instruct on lesser-included offense supported by the evidence violates federal due process].)[16]

Moreover, where instructions on factually supported lesser-included offense are actually requested by the defense and refused, the error also violates defendant's Fifth, Sixth and Fourteenth Amendment rights to due process and to

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16 The majority in People v. Breverman, supra, held that, as a general matter, instructional error in the lesser-included offense context does not does not implicate the federal constitution in a non-capital case. (People v. Breverman, supra, 19 Cal.4th at pp. 169-170, 178.) However, finding that the appellant in that case had *not* raised the specific federal constitutional violation addressed in Justice Kennard's dissenting opinion discussed above, the majority in Breverman specifically declined to resolve that issue. (People v. Breverman, supra, 19 Cal.4th at p. 170, n. 19; see also People v. Lasko, supra, 23 Cal.4th at p. 113 [Justice Kennard, writing for the majority, distinguishing federal constitutional violation she identified in Breverman on ground that jury in Lasko, unlike jury in Breverman, was provided instruction on lesser-included offense of voluntary manslaughter].) "It is axiomatic that cases are not authority for propositions not

present a full and meaningful defense. (See, e.g., Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 734-739-740 [trial court's refusal to instruct on factually supported lesser-included offense violated Sixth and Fourteenth Amendment rights to instructions on defense theory of case]; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [refusal to instruct on entrapment defense violated defendant's right to due process], cert. denied 540 U.S. 963 (2003); United States v. Sayetsitty (9th Cir.

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considered." (People v. Gilbert (1969) 1 Cal.3d 475, 482, n. 7; accord People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 198.)

1997) 107 F.3d 1405, 1414 ["a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; Bashor v. Riley (9th Cir. 1984) 730 F.2d 1228, 1240 [same].)

Finally, the death penalty is a different kind of punishment from any other. (See, e.g., Woodson v. North Carolina (1976) 428 U.S. 280, 305; Gardner v. Florida (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (Caldwell v. Mississippi (1985) 472 U.S. 320, 340; accord Lockett v. Ohio (1978) 438 U.S. 586, 604 ["the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"].) Consequently, in capital cases, federal due process and the Eighth Amendment also guarantee the right to instructions on lesser-included offenses supported by the evidence. (Beck v. Alabama, supra, 447 U.S. at pp. 637-638; Cordova v. Lynaugh (5th Cir. 1988) 838 F.2d 764, cert. denied 525 U.S. 1131 (1999);United States v. Unruh (9th Cir. 1987) 855 F.2d 1363; Vicars v. Ricketts (9th Cir. 1986) 798 F.2d 369.)

**1. The general legal principles applicable to, and evidence supporting instruction on, voluntary manslaughter in a reasonable heat of passion.**

Penal Code section 192, subdivision (a) provides that a killing committed without malice and "upon a sudden quarrel or heat of passion" is voluntary manslaughter. Heat of passion operates to negate malice if the actor's "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause 'an ordinary person of average disposition . . . to act rashly, without due deliberation and reflection, and from this passion rather than from judgment.'" (People v. Breverman, supra, 19 Cal.4th at p. 163; accord People v. Lasko, supra, 23 Cal.4th at pp. 108-111.) Thus, heat of passion manslaughter has

both subjective and objective components: 1) the defendant must actually, subjectively have killed in the heat of a reason-obscuring passion; and 2) the heat of passion must be "reasonable," meaning that a reasonable person would also be provoked to a state of passion under the circumstances. (People v. Gutierrez (2002) 28 Cal.4th 1083, 1044; People v. Steele (2002) 27 Cal.4th 1230, 1252; People v. Wickersham, supra, 32 Cal.3d at pp. 326-327.) Importantly, it is a question of fact for the jury to resolve whether both prongs of the test have been satisfied. (See, e.g., People v. Valentine (1946) 28 Cal.2d 121, 139.)

As to the subjective component, the defendant must in fact have acted under a heat of passion. (People v. Breverman, supra, 19 Cal.4th at p. 163.) "The passion aroused need not be anger or rage, but can be any other "'violent, intense, high-wrought, or enthusiastic emotion' [Citation], other than revenge. [Citation]." (Ibid.; see, e.g., People v. Barton, supra, 12 Cal.4th at p. 202 [evidence that defendant confronted victim after an "upset[ting] traffic accident" between victim and defendant's daughter and killing committed in midst of heated argument held sufficient]; People v. Brooks (1986) 185 Cal.App.3d 687, 694 [evidence that defendant was "very upset" and "extremely upset" sufficient]; People v. Logan (1917) 175 Cal. 45, 49 ["heat of passion may result from terror as well as anger or jealousy"].) In assessing his mental state at the time of a charged crime, "a defendant is entitled to have the jury take into consideration all the elements in the case which might be expected to operate on his mind." (People v. Smith (1907) 151 Cal. 619, 628; accord People v. Minifie (1996) 13 Cal.4th 1055, 1064; People v. Bridgehouse (1946) 47 Cal.2d 406, 410.)

Like any other mental state, the subjective component of heat of passion may be shown through circumstantial evidence. (See People v. Barton, supra, 12 Cal.4th at p. 202 [jury free to reject defendant's direct testimony that killing was accidental and to infer from circumstantial evidence that killing intentional and committed in a reasonable heat of passion]; People v. Bridgehouse, supra, 47 Cal.2d at p. 409 [killing preceded by "provocative" conduct which began with

wife's revelation of infidelity and culminated in defendant's unexpected encounter of wife's paramour several months later; although defendant testified that he could only recall encountering paramour and nothing else that preceded killing, evidence that he was "white" and shaking" before killing, exhausted, and series of provocative events itself sufficient circumstantial evidence to establish heat of passion as a matter of law]; People v. Brooks, supra, 185 Cal.App.3d at p. 696 [heat of passion can be inferred from circumstantial evidence and without defendant's testimony; indeed such circumstantial evidence may be even stronger than defendant's direct, yet "self-serving," testimony]; see also People v. Mickey (1991) 54 Cal.3d 612 [error to fail to give diminished capacity instructions based upon circumstantial evidence of such]; People v. Boyd (1985) 38 Cal.3d 762 [same]; People v. Geiger (1985) 35 Cal.3d 510, overruled on another ground in People v. Birks (1998) 19 Cal.4th 108, 136 [error in refusing instruction on lesser offense based upon circumstantial evidence that defendant did not harbor intent for greater offense]; People v. Viramontes (2001) 93 Cal.App.4th 1256, 1262 [subjective fear element of self defense and imperfect self-defense may be proved circumstantially]; People v. DeLeon (1992) 10 Cal.App.4th 815, 824 [same]; People v. Hoskins (1978 Mich. Sup. Ct.) 267 N.W.2d 417, 419 [defendant may prove state of mind circumstantially; any contrary rule violates constitutional privilege against self-incrimination]; cf. People v. Iniguez (1994) 7 Cal.4th 847, 857 [element of "'fear' may be inferred from the circumstances despite even superficially contrary testimony of the" person alleged to be in fear]; People v. Renteria (1964) 61 Cal.2d 497, 499.) Indeed, evidence of provocation itself is circumstantial evidence from which the jury can infer that the defendant killed in an intense emotion, or a heat of passion. (People v. Wickersham, supra, 32 Cal.3d at pp. 323, 329; People v. Bridgehouse, supra, 47 Cal.2d at pp. 409-414; cf. People v. Viramontes, supra, at p. 1263 [evidence that defendant was shot at alone sufficient circumstantial evidence for jury to find actual and reasonable fear element of self-defense claim]; People v. Brown (1989) 212 Cal.App.3d 1409,

1418 disapproved on another ground in People v. Hayes (1991) 52 Cal.3d 577, 628 [threat alone sufficient circumstantial evidence to prove victim's fear element of robbery].)

As to the objective component, "no specific type of provocation [is] required under section 192 . . .." (People v. Berry (1976) 18 Cal.3d 509, 515; accord People v. Lasko, supra, 23 Cal.4th at p. 108; People v. Breverman, supra, 19 Cal.4th at pp. 162-163; People v. Valentine, supra, at pp. 141-144.) Provocation "may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation or reflection." (People v. Lee, supra, 20 Cal.4th at p. 59.) In this regard, it is well settled that "the killing or harming of defendant's relative" is sufficient for a jury to find that a reasonable man would be provoked to a state of passion. (2 Wharton's Criminal Law (15th ed. 1994) § 163, p. 63; accord People v. Barton, supra, 12 Cal.4th at p. 202; People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694 [and cases cited therein]; LaFave, Criminal Law (4th ed. 2003), § 15.2(b) at pp. 777, 782 [hereinafter "LaFave"].)

Furthermore, a reasonable person may be provoked into passion by a series of events which occur over a period of time. (People v. Wharton (1991) 53 Cal.3d 522, 571-572; People v. Berry, supra, 18 Cal.3d at pp. 513-516; People v. Borchers (1958) 50 Cal.2d 321, 328-329; People v. Bridgehouse, supra, 47 Cal.2d at p. 414, overruled in part on another ground in People v. Blakeley, supra, 23 Cal.4th at p. 89.) While each event might be insufficient alone to provoke passion in the reasonable person, their cumulative effect may be sufficient. (See, e.g., People v. Wharton, supra, at pp. 571-572 [court erred in refusing to instruct that legally adequate provocation can occur over period of time based on defendant's theory that "no single action on the part of the victim provoked the fatal blow, but that the (final) incident was merely the culmination of his pent-up frustration and anger emanating" from series of prior incidents]; People v. Berry, supra, 18 Cal.3d at pp. 514-516 [while wife's screams in response to husband's expression of intent

to kill her would not amount to adequate provocation in a vacuum, when considered in conjunction with her prior provocative acts over two-week period, jurors could reasonably find it did]; see also Lafave, supra, § 15.2(d) at p. 787 and n. 96 [citing Berry for proposition that "an event which, standing alone, would not suffice to act as such a trigger may nonetheless suffice to rekindle an earlier passion"]; Perkins & Boyce, Criminal Law (3d ed. 1982) at pp. 97 ["many factors, possibly not sufficient independently to constitute adequate provocation, may join together and be sufficient to raise an issue of provocation"].) Similarly, passion which is actually and reasonably aroused by one provocative event can smolder, during which time the defendant's reason returns, only to be suddenly, violently, and reasonably re-ignited by a later provocative event. (See, e.g., People v. Berry, supra, 18 Cal.3d at pp. 513-516; People v. Bridgehouse, supra, 47 Cal.2d at pp. 408-414; see also People v. Wharton, supra, 53 Cal.3d at p. 571; People v. Spurlin, supra, 156 Cal.App.3d at p. 126 [heat of passion manslaughter instruction properly provided where wife's most recent act "can be said to have ignited" the defendant's "long smoldering resentment of her sexual conduct bringing about an intense, high-wrought reaction leading to her death"]; Perkins & Boyce, supra, at p. 100 ["passion may be suddenly revived by circumstances that bring the provocation vividly to mind"]; LaFave, supra, § 15.2(d) at p. 787.)

"[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (People v. Wickersham, supra, 32 Cal.3d at p. 327.) However, "[n]o particular period of time need elapse between a passion-producing quarrel and the subsequent killing . . . " (People v. Edgmon (1968) 267 Cal.App.2d 759, 765.) Rather, "what constitutes a reasonable cooling time in a particular case depends upon the nature of the provocation and the circumstances surrounding its occurrence -- a matter to be determined by the jury as a question of fact." (LaFave, supra, § 15.2(d) at pp. 786-787; see, e.g., People v. Berry, supra, 18 Cal.3d at p. 515; People v. Edgmon, supra, 276 Cal.App.2d at pp. 762-766 [jury

could reasonably find killing in heat of passion where defendant and father argued, resulting in physical fight; defendant left the scene, went to his own home and retrieved a gun, and returned 15 to 30 minutes later, at which point he shot his bleeding and incapacitated father five times]; People v. Brooks, supra, 185 Cal.App.3d at p. 695 [jury could reasonably find killing in heat of passion where two hours had elapsed between provocative revelation and killing]; People v. Birreuta (1984) 162 Cal.App.3d 454, 462, n. 6 [jury reasonably found killings in sudden quarrel or heat of passion where defendant argued with wife and a second woman in the latter's home, struggled with the second woman, then went to his own home, returned to the woman's house, broke in, and shot his wife six times and the second woman four times]; see also Perkins & Boyce, supra, at p. 100.) "Not infrequently, there is a considerable time interval between the victim's act of provocation and the defendant's fatal conduct – time enough for passion to subside. In the meantime, however, some event occurs which rekindles the defendant's passion. If this new occurrence is such as to trigger the passion of a reasonable man, the cooling-off period should start with the new occurrence . . . ." (LaFave, supra, §15.2(d) at p. 787 and n. 96, citing People v. Berry, supra, 18 Cal.3d 509; accord Perkins & Boyce, supra, at p. 100 [where series of events are provocative, cooling time should be measured "from 'the last straw'"].) The Court's decision in People v. Berry, supra, well illustrates many of these principles.

In People v. Berry, supra, 18 Cal.3d 509, the defendant's wife revealed to him that she had engaged in an affair with another man and that she wanted a divorce in order to be with her paramour. (Id. at pp. 512-513.) The defendant became enraged and choked her. (Id. at p. 513.) Several days later, the defendant and his wife "engaged in heavy petting," after which she informed him that she would not make love with him because she was saving herself for her paramour. (Ibid.) As the defendant prepared to leave, his wife screamed at him. He responded by choking her into unconsciousness. (Ibid.) The wife was taken to

hospital and the defendant left the family home for three days. (People v. Berry, supra, at p. 514.) When he returned on the third day, his wife was not home. He waited there for 20 hours, until his wife returned home. (Id. at pp. 514, 516.) Upon encountering the defendant, his wife asked him if he was there to kill her. He first replied, "yes," but eventually said that he was there to talk to her. His wife began screaming. (Id. at p. 514.) In a fit of rage, he strangled her to death. (Id. at pp. 514, 516.) The jury convicted the defendant of first-degree murder. (Id. at p. 511.) He appealed, arguing, *inter alia*, that the trial court committed prejudicial error in failing to instruct the jury on voluntary manslaughter in the heat of passion. (Id. at p. 512.)

The Court agreed. (People v. Berry, supra, at pp. 513-516.) In so doing, the Court rejected on two grounds the Attorney General's argument that the 20-hour period between the defendant's return home and his wife's killing amounted to sufficient "cooling" time to negate heat of passion as a matter of law. First, the Court emphasized the extreme nature of the provocation – a two-week period of provocatory conduct, which had resulted in intermittent outbreaks of rage. Second, the Court emphasized that, contrary to the Attorney General's position, "provocation" did, in fact, immediately precede the killing. Given the nature of the past provocation, the Court reasoned, its final culmination was achieved when the defendant's wife "began screaming" immediately before he killed her. (Id. at p. 515; accord People v. Borchers, supra, 50 Cal.2d at pp. 528-529 [series of provocative acts, including paramour's admissions of infidelity, taunts, and threats of suicide amounted to adequate provocation]; People v. Bridgehouse, supra, 47 Cal.3d at pp. 408-414 [series of provocative acts, beginning with wife's revelation of infidelity and ending in defendant's unexpected encounter of her paramour several months later sufficient as a matter of law to establish killing committed in reasonable heat of passion].)

**2. "Provocation" does not necessarily have to come from the victim killed so long as an act or event would provoke a**

**reasonable person into a heat of passion directed at the victim.**

Here, the critical issue underlying the trial court's refusal to provide voluntary manslaughter instructions as to any charge other than that relating to Regina Watchman was whether the provocation required under Penal Code section 192 must necessarily come from the victim killed. Determining the correctness of the court's ruling requires an examination of the history of the heat of passion doctrine.

### a. The common law, its initial adoption in California, and its eventual repeal.

California's heat of passion doctrine has its roots in the common law. (See, e.g., People v. Valentine, supra, 28 Cal.2d at pp. 136-144.) Similar to the modern rule, at common law, the defendant must actually have killed in a heat of passion and upon adequate provocation. (See, e.g., Regina v. Welsh (1868) 11 Cox Crim. C. 336, 338; Mullaney v. Wilbur, supra, 461 U.S. at p. 693 [recounting development of heat of passion doctrine].) However, unlike the modern rule, the common law strictly limited or "pigeon-holed" the categories of adequate provocative conduct. (Brown v. United States (D.C. App. Ct. 1990) 584 A.2d 537, 540; see also, e.g., Regina v. Mawgridge (Q.B. 1707) 84 Eng. Rep. 1107, 1114-1115; LaFave, supra, § 15.2(b) at pp. 777-778; Perkins & Boyce, supra, at pp. 86-87.) For instance, "provocative words [were] not ... adequate provocation, [no matter how] abusive, aggravating, contemptuous, false, grievous, indecent, insulting, opprobrious, provoking, or scurrilous they [might] be." (Perkins & Boyce, supra, at p. 93; Mawgridge, supra, at pp. 1114-1115.) Similarly, the common law actually required the defendant to observe or see the provocative act; hearsay or informational reports of provocative conduct were insufficient. (See LaFave, supra, § 15.2(b) at pp. 780-781.)

With respect to the source of the provocation, as a general rule, the victim had to be the provoker; or one reasonably believed to be the provoker; or among a group committing the provocation, or one killed by accident while the defendant was intending to kill one of the above categories of persons. (See, e.g., People v. Spurlin, supra, 156 Cal.Ap.3d at pp. 126-127 [and cases cited therein]; R. v. Scriva (1951) Vict. L. R. 298, 301; Howell v. State (Alask. Ct. App. 1996) 917 P.2d 1202, 1209 [even under statute explicitly requiring that victim be provoker, intended to adopt traditional common law doctrine, defendant's reasonable but mistaken belief that victim was provoker suffices, just as it did at common law]; 18 Pa. C.S. § 2503 and Commonwealth v. Bell (PA 1986) 516 A.2d 1172, 1176 [Pennsylvania statute, which codifies the common law, explicitly requires "provocation by the individual killed *or* another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed"]; State v. Michael (W.Va. 1914) 82 S.E. 611, 614, 621 [if defendant believed victim, man standing near provoker, was acting in concert with provoker, it was only manslaughter]; but see Regina v. Davies (1975) Q.B. 691, 1 All E.R. 890 [observing that it was not clear even at common law that provocation was limited to that from victim].) Clearly, these principles were grounded in other common law doctrines of transferred intent and mistake of fact. (See, e.g., People v. Levitt (1984) 156 Cal.App.3d 500, 507-509 [under transferred intent doctrine, "just as one's criminal intent follows the corresponding act to its unintended consequences," so too does one's lack of intent follow the act to its unintended consequences; hence, if bystander accidentally killed in commission of voluntary manslaughter of intended victim, accidental killing would be no more than manslaughter]; People v. Bland (2002) 28 Cal.4$^{th}$ 313, 320 [transferred intent is common law doctrine]; People v. Vogel (1956) 46 Cal.2d 798, 805 [reasonable mistake of fact common law doctrine]; Pen. Code § 26, subd. (4).)

Section 23 of California's Crimes and Punishment Act of 1850 followed the common law by strictly limiting the categories of conduct that could amount to adequate provocation. It provided that:

> In cases of voluntary manslaughter there must be a serious and highly-provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

(See People v. Valentine, supra, 28 Cal.2d at pp. 138-139 [section 23 of Crimes and Punishment Acts of 1850 codified common law rules on heat of passion and provocation].)

However, in 1872, the Legislature repealed Section 23 of the Crimes and Punishment Act of 1850 by enacting Penal Code section 192. Section 192 provides in relevant part as follows:

> Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
>
> (a) Voluntary – upon a sudden quarrel or heat of passion. . . .

Section 192 omits any language defining or limiting the conduct which can provoke a heat of passion. Hence, as the Court explained nearly 50 years ago, in interpreting section 192 in this regard:

> We are not bound to consider the principle written into the repealed Crimes and Punishment Act of 1850 (§ 23) as being still the law of this state merely because such principle was recognized in the common law. . . . A code section is presumed to be a continuation of the common law only when it and the common law are substantially the same. Section 23 of the Crimes and Punishment Act of 1850 was substantially the same as the common law on the subject but section 192 of the Penal Code, which superseded it, it not substantially the same. It is obviously substantially different. . . . [T]he fact that the common law limitation on the types of circumstances which could be regarded as furnishing adequate

> provocation to reduce a homicide to manslaughter is ***not*** a proper basis for holding that it is still the law. On the contrary such fact, in light of the repeal of the statute which incorporated it, together with enactment of a new law on the same subject with the important limitation deleted, strongly suggests that the Legislature intended a more liberal rule. (People v. Valentine, supra, 28 Cal.2d at pp. 141-143.)

Because section 192 omits the language qualifying or limiting adequate "provocation" to particular categories of injury or conduct, it modified the common law to broaden or "liberalize" the standard for adequate provocation. (People v. Valentine, supra, 28 Cal.2d at pp. 139-143; accord People v. Logan, supra, 175 Cal. at p. 48.)

Of course, on its face, section 192 does not explicitly require *any* "provocation." Nevertheless, voluntary manslaughter under section 192, subdivision (a) does require that the heat of passion be *reasonable* under an objective, reasonable person standard. (People v. Valentine, supra, 28 Cal.2d at pp. 136-144; People v. Logan, supra, 175 Cal. at p. 48.) In other words, there must be substantial evidence that a reasonable person would be "provoked" into a heat of passion under like circumstances. (Ibid.; see also People v. Steele, supra, 27 Cal.4th at p. 1252.) Thus, "provocation" – understood as a shorthand reference to this reasonable person requirement – is still necessary under section 192. (See People v. Valentine, supra, 28 Cal.2d at pp. 136-144; People v. Logan, supra, 175 Cal. at p. 48; accord People v. Guitierrez, supra, 28 Cal.4th at p. 1142; People v. Steele, supra, 8 Cal.4th at p. 1252; People v. Wickersham, supra, 32 Cal.3d at p. 326.) At bottom, unlike the rigid categories of provocative conduct recognized at common law, the reasonable person standard is the pivot around which the "provocation" requirement turns under section 192. (See People v. Valentine, supra, 28 Cal.2d at pp. 136-144 [overruling a series of its prior decisions interpreting section 192 to be a continuation of the common law and its limitations on adequate provocation]; People v. Logan, supra, 175 Cal. at pp. 48-49; see also

Perkins & Boyce, supra, at p. 98 ["any effort to classify provocative acts . . . would be to substitute the early view in place of modern law"]; Simpson v. United States (D.C. App. Ct. 1993) 632 A.2d 374, 377 [observing that victim as provoker rule is "ancient tradition," based upon common law, and not part of modern rule based upon reasonable person standard].)

People v. Logan, supra, was one of the earliest Supreme Court decisions to directly consider the scope of provocation as measured by the reasonable person standard incorporated in section 192. In so doing, it adopted the standard set forth in Maher v. People (Mich Sup. Court 1862) 10 Mich. 212, which has been credited as the first United States decision to adopt and apply the reasonable person standard to the requirement of provocation. (People v. Logan, supra, 175 Cal. at p. 49; see, e.g., Taylor, L., Comment: Provoked Reason In Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense (1986) 33 U.C.L.A. L. Rev. 1679, 1694.) As the Court in Logan explained, "the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion – not necessarily fear and never, of course, the passion for revenge – to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than judgment." (People v. Logan, supra, 175 Cal. at p. 49, citing Maher, supra.) In considering what set of circumstances can satisfy this standard, the Maher Court observed "the almost infinite variety of facts presented by the various cases as they arise [citation omitted]," and concluded that "[t]he law can not with justice assume, by the light of past decisions to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation." (Maher v. People, supra, at p. 222-223.) Hence, provocation may be *any* set of circumstances that would naturally arouse passion in and dominate the reason of an ordinary person and which, in the jury's view, did so with regard to the defendant in the case at hand. (Id. at pp. 220-221.)

California adopted this standard and continues to apply it today. (People v. Valentine, supra, 28 Cal.2d at pp. 136-144; People v. Logan, supra, 175 Cal. at pp. 48-49.) Hence, as this Court has consistently recognized, "no specific type of provocation [is] required under section 192 . . .." (People v. Berry, supra, 18 Cal.3d at p. 515; accord People v. Lasko, supra, 23 Cal.4th at p. 108; People v. Breverman, supra, 19 Cal.4th at pp. 162-163; People v. Valentine, supra, 28 Cal.2d at pp. 141-144.) For instance, although words alone were insufficient to amount to adequate provocation under the common law and former section 23 of the Crimes and Punishment Act of 1850, there is no such limitation under section 192. (People v. Valentine, supra, at pp. 41-42.) If words are sufficient to provoke a reason-obscuring passion in a *reasonable person*, then they are adequate "provocation." (Ibid.) Similarly, although information communicated to the defendant was insufficient provocation at common law, it is sufficient under section 192 if it would provoke passion in a *reasonable person*. (See, e.g., People v. Bridgehouse, supra, 47 Cal.4th at pp. 408-414 [wife's revelation of affair]; People v. Brooks, 185Cal. App.3d at pp. 693-694 [revelation that defendant's brother was killed and defendant's belief that it was victim who killed him].)

Significantly, unlike repealed section 23 under the former Crimes and Punishment Act of 1850, which required provocation from the "person killed," and unlike statutes in other jurisdictions which have adopted the common law, section 192 does *not* explicitly impose any requirement that the provocation come from the "person killed." (Compare, e.g., A.S. 11.41.115(f)(2) [Alaska statute explicitly requires "provocation by the intended victim"]; C. R.S. 18-3-103, repealed and reenacted as 18-3-103(3)(b) [Colorado statute explicitly requires "a serious and highly provoking act of the intended victim"]; 18 Pa. C.S. § 2503 [Pennsylvania statute, which codifies the common law, requires "provocation by the individual killed or another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed"]; Tx. Pen. Code § 19.02 [Texas statute requires "provocation by the individual killed or

another acting with the person killed"] and former Tx. Pen. Code § 19.04 [former Texas statute required "provocation by the individual killed"].) Even under section 23, which arguably adopted the common law's general victim-as-provoker rule and its exceptions, the mitigating effect of heat of passion would still be available if the victim was one reasonably believed to have provoked, one aiding in the provocation, or one accidentally killed in an assault on any of these persons. (See, e.g., R. v. Scriva, supra, Vict.L. R. 298; People v. Spurlin, supra, 156 Cal.Ap.3d at pp. 126-127 [and cases cited therein]; Howell v. State, supra, 917 P.2d 1202, 1209 [even under statute explicitly requiring that victim be provoker, which was intended to adopt traditional common law doctrine, defendant's reasonable, even if mistaken, belief that victim was provoker suffices, as it did at common law]; Commonwealth v. Bell, supra, 516 A.2d at p.1176 [Pennsylvania statute adopted common law and requires "provocation by the individual killed *or* another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed"]; Simpson v. United States, supra, 632 A.2d at p. 383, con. opn. [even under "victim-as-provoker" rule, mitigation available where provocation comes from one "associated with" the victim]; see also People v. Bland, supra, 28 Cal.4th at p. 320 [California follows common law doctrine of transferred intent]; Pen. Code § 26 [mistake of fact]; People v. Tufunga (2001) 21 Cal.4th 935, 948 [mistake of fact may negate element of charged crime even if defendant still guilty of some other crime].)

However, given both the omission of any language requiring provocation from the victim in section 192 and the history of the statute, it follows that although these common law categories of provocation would satisfy the reasonable person requirement of section 192, "adequate provocation" is not *limited* to those categories. Once again, the critical question is whether the act or event would "provoke" a *reasonable* person into a state of passion directed toward the victim. In applying the reasonable person test, the focus is not on what *actually* occurred, but rather on how a reasonable person would *perceive* a

particular event and whether it would provoke in him a reason-obscuring passion. (See, e.g., People v. Logan, supra, 175 Cal. at p. 49 [provocation adequate if defendant reasonably, even if mistakenly, believes, victim engaged in provocative conduct]; People v. Brooks, 185 Cal.App.3d at pp. 693-695 [reasonable heat of passion available where information communicated defendant to reasonably, even if mistakenly, believe victim had killed his brother]; People v. Barton, supra, 12 Cal.4th at p. 202 [evidence supported reasonable heat of passion instructions where, *inter alia*, jury could reasonably conclude that although victim was unarmed, defendant, "his judgment clouded by anger," believed victim armed]; LaFave, supra, § 15.2(b) at p. 783 and § 15.2(h) at p. 788 [heat of passion mitigation available in case of reasonable but mistaken belief]; Perkins & Boyce, supra, at p. 102 [same]; see also People v. Minifie, supra, 13 Cal.4th at p. 1068 ["reasonableness is judged by how the situation appeared to the defendant"].)

Consistent with the principle that provocation is measured only by the objectively reasonable person test and not by any particular categories, in 1946 the Court implicitly recognized that a reasonable person can be provoked to passion directed against the victim where the defendant reasonably associates or connects the victim with a third party's passion-provoking conduct. (People v. Bridgehouse, supra, 47 Cal.2d 406, overruled in part on another ground in People v. Blakeley, supra, 23 Cal.4th at p. 89.) In that case, the defendant's wife revealed to him that she had been having an affair with another man for over a year. (Id. at p. 407.) Sometime later, the defendant discovered, among other things, clothing belonging to his wife's paramour in the closets of his home and that his wife had used a family credit card to purchase a gift for him. (Id. at p. 411.) Several months after his wife's revelation, the defendant moved out of the family home, filed for divorce and sought custody of their children. (Id. at p. 408.) At his wife's request, the defendant met with her at their home several days later. She told him that she would fight the divorce and would kill him if he tried to take their children away from her. (Ibid.) The next morning, the defendant, who was

armed, went to the home of his mother-in-law to collect some of his son's clothing. (Id. at p. 409.)

Upon arriving at his mother-in-law's house, the defendant unexpectedly encountered his wife's paramour, who was reading on the porch. (People v. Bridgehouse, supra, 47 Cal.2d at p. 409.) According to his mother-in-law, the defendant was white and shaking. She went into the kitchen to get him a glass of water. When she returned, the defendant was in the act of shooting the paramour. (Ibid.) The defendant himself could only vaguely recall confronting the paramour, but not the details of the shooting or what immediately preceded it. (Id. at pp. 409-411.) He was convicted of second-degree murder. (Id. at p. 407.)

Although it was the defendant's wife who was the primary provocateur, not the victim, and although there was no evidence that the victim actually engaged in any outward act of provocation immediately before the defendant shot him, the Court reversed. Focusing not on the source of each provocative event, but rather on the defendant's impassioned state of mind and whether the series of events would have provoked a reasonable person's passion against the victim, the Court held that "*as a matter of law* . . . under the circumstances here presented there was adequate provocation to provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection." (People v. Bridgehouse, supra, 47 Cal.2d at p. 414.) Consequently, the Court reduced the crime from second-degree murder to voluntary manslaughter. (Ibid.; compare Regina v. Davies, supra, [1975] Q.B. 691, 1 All E.R. 890 [conduct of wife's paramour would be irrelevant under victim-as-provoker rule; however, under rule in which provocation is measured only by reasonable person test, conduct of both paramour and wife could be considered in assessing whether defendant killed wife in reasonable heat of passion].) Thus, consistent with the settled rule that "no specific type of provocation is required" under section 192, Bridgehouse stands for the principle that "provocation" under

that statute is limited by nothing more than the reasonable man requirement.[17]

Thus, application of the heat of passion doctrine to a given set of facts should be a clear and straightforward exercise. Unfortunately, these clear waters have been muddied and the source of the pollution is a 1984 appellate court decision, which turned the clock back to the common law tendency to categorize the conduct which amounts to adequate provocation.

### b. The appellate court's decision in People v. Spurlin and the cases purporting to follow it.

In People v. Spurlin, supra, 156 Cal.App.3d 119, the appellate court was asked to address whether the subjectively impassioned killing of a victim whom

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[17] Significantly, the evolution of the doctrine in other jurisdictions, which have also modified the common law and enacted statutes similar to section 192, is in accord. For instance, in 1957, the English modified and broadened the common law defense by statute. (Homicide Act of 1957, section 3; see also Phillips v. Queen (1968) 2 A.C. 130, 137; D.P.P. v. Camplin (1978) 67 Crim. App. 14, 19.) Section 3 provides:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

This provision, similar to section 192, adopts the reasonable person standard; therefore, even assuming the common law required the provocation come from the victim, there is no such requirement under section 3. (Regina v. Davies, supra, Q.B. 691,1 All E.R. 890; see also, e.g., Brown v. United States (D.C. App. Ct. 1990) 584 A.2d 537, 543 [under D.C. modern statute, provocation" required to negate malice to the extent that the act or event would provoke passion in the objectively reasonable person and is not "pigeon-holed" to any particular categories, as it was at common law].)

the defendant *knew* to be innocent could be reduced to voluntary manslaughter. Although the negative answer to this question was readily apparent by a simple and straightforward application of the reasonable person standard, since no reasonable person would intentionally kill a known innocent, the appellate court instead framed the issue as whether "provocation must be caused by the victim." (Id. at p. 125.)

In Spurlin, there was evidence that the defendant was reasonably provoked into passion during an argument with his wife over their respective acts of infidelity. After killing his wife in an impassioned state, he walked to his sleeping son's bedroom. Although he knew that his young son was completely innocent, he deliberately killed him. The trial court provided instructions on voluntary manslaughter in the heat of passion with respect to the killing of the defendant's wife, but not as to the killing of his son. On appeal from his conviction for the murder of his son, the defendant argued, *inter alia*, that the trial court erred in failing to instruct on voluntary manslaughter in the heat of passion on the theory that the passion reasonably engendered by his wife applied to mitigate the killing of his son. (People v. Spurlin, supra, 156 Cal.App.3d at pp. 122-123.)

As noted above, the appellate court framed the issue presented as whether "provocation must be caused by the victim." (People v. Spurlin, supra, 156 Cal.App.3d at p. 125.) So framed, the court recognized that nothing in section 192 explicitly requires that provocation come from the victim. However, reasoning that "statutory voluntary manslaughter derives from common law principles (citations)," the court turned to the common law in order to answer the question. (People v. Spurlin, supra, at p. 126.) From that examination, the court concluded that common law principles imposed a general rule that the provocation must ordinarily come from the victim. (Id. at p. 126.) The court further observed that the same common law principles imposing the general rule also recognized exceptions to the rule where (as discussed in the preceding section): 1) the victim is accidentally killed by the defendant acting in the heat of passion and in response

to a third party's provocation, as in a faulty aim situation; 2) the victim is killed in the heat of passion and in a reasonable belief, although mistaken, that the victim engaged in provocation; and 3) where the victim "was present aiding and abetting the person causing the provocation." (Id. at pp. 126-127, citing State v. Fowler (1978 Iowa Sup. Ct.) 268 N.W.2d 220, 224; Tripp v. State (1977 Md. App. Ct.) 374 A.2d 384, 389; State v. Russo (1910 Del.) 77 A. 743; State v. Yanz (1901 Conn.) 50 A. 37; Shufflin v. People (1875 N.Y.) 62 N.Y. 229, and 40 C.J.S., Homicide, § 53; see also State v. Michael, supra, 82 S.E. at p. 614 [if defendant believed victim, man standing near provoker, was acting in concert with provoker, it was only manslaughter]; Howell v. State, supra, 917 P.2d 1202, 1209 [even under statute explicitly requiring that victim be provoker, and thus adopting traditional common law doctrine, defendant's reasonable, even if mistaken, belief that victim was provoker suffices, as it did at common law]; Bostick v. United States (D.C. App. Ct. 1992) 605 A.2d 916, 919-920 and n.14 [defendant and victim involved in fistfight; third party intervened and shot at defendant; in returning fire at third party, defendant shot and killed victim; held: evidence sufficient to find that defendant was reasonably provoked to heat of passion by acts of third party and thus sufficient to warrant instruction on voluntary manslaughter in heat of passion]; LaFave, supra, §15(b) at pp. 783, §15.2(h) at p. 788 and n. 106; Perkins & Boyce, supra, at p. 102.) Concluding that the facts did not fall within any of these "exceptions" to the common law victim-as-provoker "rule," the appellate court affirmed the murder conviction as to the defendant's son. (People v. Spurlin, supra, at p. 129.)

Appellant has no quarrel with Spurlin's holding that the evidence was insufficient to warrant instructions on voluntary manslaughter in the heat of passion as to the intentional killing of the defendant's sleeping son, a victim the defendant knew was innocent. His quarrel is with how the court reached this holding. As this Court has explicitly held, provocation under section 192 is broader than the common law definition, and therefore it is inappropriate to

narrowly interpret the "provocation" requirement under section 192 according to the limited categories recognized at common law. (People v. Valentine, supra, 46 Cal.2d at pp. 141-143.) Thus, while the Spurlin court's examination of the common law may have been an appropriate place at which to *begin* its analysis, it was entirely inappropriate place at which to *end* it.

The appropriate analysis should have turned not on identifying and applying an artificial "rule" and its "exceptions," no matter how enticing their easy application. Rather, consistent with the history of section 192 and the heat of passion doctrine in this state, it should have turned on a simple and straightforward application of the reasonable person test. Once again, applying that test, it is abundantly clear that no *reasonable* person would ever be so provoked as to intentionally kill someone he *knows* to be completely innocent. (See, e.g., LaFave, supra, §15(g) at p. 789.) Hence, as a matter of law, such a killing is not committed upon "adequate provocation," or stated more precisely, is not committed in a *reasonable* heat of passion.

Unfortunately, since Spurlin, several published decisions have simply cited that case without independent analysis (or have cited cases which themselves cited Spurlin without independent analysis) in fleeting and unconsidered recognition of a general "rule," subject to limited exceptions, that provocation must ordinarily come from the victim. (In re Thomas C. (1986) 183 Cal.App.3d 786, 798 [citing Spurlin in support of general "rule"]; In re Cordero (1988) 46 Cal.3d 161, 191 and n.4, conc. opn. of Mosk, J. [citing Spurlin and Thomas C.]; People v. Bobo (1990) 229 Cal.App.3d 1417, 1443 [citing Spurlin]; People v. Lee, supra, 20 Cal.4th at p. 59 [citing Thomas C., supra, in support of general rule, but also recognizing exception where defendant reasonably, but mistakenly, believed victim was provoker]; People v. Steele, supra, 27 Cal.4th at p. 1253 [citing Thomas C.]; People v. Lujan (2001) 92 Cal.App.4th 1389, 1411 [citing Lee, Thomas C., and Spurlin, supra, in support of general rule and reasonable belief exception]; People . Kanawyer (2003) 113 Cal.App.4th 1233, 1247 [citing Lee and Thomas C.)

Perhaps even more alarming, considering the number of trials that do not result in published appellate decisions addressing the issue, the Comment to CALJIC No. 8.40, the standard voluntary manslaughter instruction, states: "Provocation can only serve to reduce murder to manslaughter when the victim actually initiated the provocation." Spurlin is the only authority the CALJIC Committee cites for this proposition.

Upon closer examination, however, while the cases following Spurlin have spoken in terms of such a general "rule," they are more properly understood as applying the reasonable person standard to a given set of facts. Thus, as in Spurlin, "a reasonable person" would never be so provoked as to intentionally harm or kill a victim whom he *knows* to be innocent. Perhaps even more obviously, the reasonable person test does not turn on the defendant's *subjective* mental state and characteristics and hence the defendant's own subjective characteristics do not amount to objectively reasonable heat of passion or provocation. (See, e.g., In re Cordero, supra, 46 Cal.3d at pp. 190-191, conc. opn. of Mosk, J. ["exceptional subjective conditions, such as intoxication or mental depression, by definition will not be experienced by the ordinarily reasonable man"]; In re Thomas C., supra, 183 Cal.App.3d at p. 798 [defendant's subjective, depressed mental state did not amount to adequate provocation under reasonable person standard]; People v. Bobo, supra, 229 Cal.App.3d at p. 1443 [defendant's subjective mental disease which caused her to believe that she had to kill her children in order to save them "from unspeakable acts at the hands of others" inadequate provocation under reasonable person standard]; People v. Lee, supra, 20 Cal.4th at p. 60 [defendant's intoxication and emotional instability not adequate provocation under reasonable person standard]; People v. Steele, supra, 27 Cal.4th at p. 1253 [defendant's intoxication, mental deficiencies, and psychological deficiencies were not adequate provocation under reasonable person standard]; People v. Kanawyer, supra, 113 Cal.App.4th at p. 1247 [same].)

Similarly, the so-called "exceptions" the victim-as-provoker "rule" are more properly understood as applying the objective standard to the question of whether an act or event would provoke passion in a reasonable person. (See, e.g., People v. Lee, 20 Cal.4th at p. 59 [recognizing reasonable belief victim provoked will suffice]; People v. Lujan, supra, 92 Cal.App.4th 1411 [same].) Thus, for instance, if a particular act would provoke passion in a reasonable person, that reasonable person would be no less provoked if he reasonably, but mistakenly, believed that the act had occurred. (People v. Logan, supra, 175 Cal. at p. 49; see also, e.g., People v. Rivera (1984) 157 Cal.App.3d 736, 743 [judged by reasonable person standard, reasonable mistake of fact may negate intent element of crime; defendant's liability is determined as if the facts were as he reasonably perceived them].)

**c. Cases before and after Spurlin that have properly applied the reasonable person standard rather than categorical rules regarding the source of provocation.**

The truth of the foregoing observations is born out by other decisions both preceding and succeeding Spurlin in which the victim may not actually have committed a provocative act, but the courts resolved the issue by determining whether the defendant's passion was reasonable under the reasonable person standard, without resorting to any categorical victim-as-provoker "rule" or its "exceptions." (See, e.g., People v. McCoy (2001) 24 Cal.4th 1111, 1121 [turning to a Shakespearean analogy in recognizing that if Iago falsely tells Othello that his wife is having an affair and thus provokes in him a murderous rage, Othello's act of killing his wife is voluntary manslaughter in the heat of passion]; People v. Breverman, supra, 19 Cal.4th at pp. 149, 151, 163 [discussed below]; People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694 [court erred in failing to instruct on voluntary manslaughter in reasonable heat of passion where defendant's

reasonable belief that victim had killed brother was adequate to provoke passion in reasonable person]; People v. Carlson (1974) 37 Cal.App.3d 349, 351 [if defendant accidentally kills innocent third party while attempting to kill another in reasonable heat of passion, the unintentional killing would be voluntary manslaughter under transferred intent doctrine]; see also People v. Padilla (2002) 103 Cal.App.4th 675, 679 [defendant's hallucination that victim engaged in provocation is insufficient under reasonable person test, since "a perception with no objective reality cannot arouse the passions of the ordinarily reasonable person"].) Finally, the fact that there is no rigid requirement that the provocation must come from the victim under section 192 finds compelling support in two recent decisions of this Court – People v. Minifie, supra, 13 Cal.4th 1055 and People v. Breverman, supra, 19 Cal.4th 142.

In People v. Minifie, 13 Cal.4th 1055, the defendant entered a bar where one of the victims, Tino, was sitting at a table with a group of others. Tino had broken a foot and was on crutches. Tino knew who the defendant was and disliked him because he had killed one of Tino's friends, Jackie Knight. The defendant also knew Tino by sight as a friend of Knight's who had been a pallbearer at his funeral. The defendant and Tino approached each other, exchanged words, and Tino punched the defendant in the face, knocking him to the floor. Tino's crutches fell and he turned to grab them. The defendant pulled a gun from his waist area, fired at Tino, and struck both Tino and another patron and bystander, Nordahl. (Id. at p. 1060.)

The defendant claimed that he had acted in self-defense. In support of his claim, he moved to present evidence that after he killed Knight, he had received a number of threats from Knight's family and friends. He knew that Tino was a friend of Knight's, but conceded that Tino had never previously threatened him. (People v. Minifie, supra, 13 Cal.4th at pp. 1062-1063.) Because the defendant conceded that Tino had never previously threatened him, the trial court excluded evidence of the threats from the Knight family and friends. (Id. at p. 1063.) The

defendant was convicted of assaulting both Tino and the unintended victim, Nordahl. (Id. at p. 1064.)

This Court held that the trial court erred. The third party threats were relevant and admissible with respect to *both* assault charges – both upon Tino and upon the unintended victim, Nordahl. (People v. Minifie, supra, 13 Cal.4th at p. 1065.) In so doing, the Court explicitly rejected the Attorney General's position that "'[a]bsent a showing that the defendant has reason to believe the victim has himself adopted the threat, third-party threats should be inadmissible to support the objective reasonableness of self-defense.'" (Id. at p. 1067, quoting from Attorney General's brief.) The Court explained that while the victim's behavior is certainly relevant, the flaw in the Attorney General's argument:

> is that it assumes the law of self-defense centers on the victim's act and intent. To the contrary, the law recognizes the justification of self-defense not because the victim "deserved" what he or she got, but because the defendant acted reasonably under the circumstances. Reasonableness is judged by how the situation appeared to the defendant, not the victim. . . . If the defendant kills an innocent person, but circumstances made it reasonably appear that the killing was necessary in self-defense, that is tragedy, not murder. The test, therefore, is not whether the victim adopted the third party threats, but whether the defendant reasonably associated the victim with those threats. (People v. Minifie, supra, 13 Cal.4th at p. 1068.)

Of course, self-defense, like heat of passion manslaughter, requires some conduct to which the defendant responds – a threat in the case of self-defense and provocation in the case of heat of passion manslaughter. Self-defense, like heat of passion manslaughter, incorporates a reasonable person standard, under which the conduct may ordinarily come from the victim. (See LaFave, supra, § 15.2(b) at p. 784 and n. 76 [noting that legal principles relevant to self-defense are analogous to heat of passion doctrine].) If self-defense, which actually *justifies* the killing of the victim, does not turn on whether the victim "deserved" what he or she got,

certainly the *mitigating* effect of heat of passion does not turn on whether the victim deserved what he or she got. In both cases, application of the doctrines turn on whether the defendant acted "reasonably;" a question "judged by how the situation appeared to the defendant, not the victim." (People v. Minifie, supra, 13 Cal.4th at p. 1068; see, e.g., People v. Valentine, supra, supra, 28 Cal.3d at pp. 136-144.)

Thus, just as in the self-defense context, heat of passion may mitigate the killing of an otherwise innocent victim if the defendant reasonably, though mistakenly, believes that the victim engaged in provocative conduct. (See, e.g., People v. Humphrey (1996) 13 Cal.4th 1073, 1083 [self-defense]; People v. Lee, supra, 20 Cal.4th at p. 59 [heat of passion]; People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694 [heat of passion].) Similarly, just as in the self-defense context, the heat of passion doctrine mitigates the killing of an otherwise innocent victim if the defendant accidentally killed the victim in an assault upon the provocateur. (See, e.g., People v. Minifie, supra, 13 Cal.4th at p. 1065 [self-defense]; People v. Carlson, supra, 37 Cal.App.3d at p. 351 [heat of passion].) Hence, for the same reasons that a claim of self-defense is available where the defendant "reasonably associates" the victim with the threatening conduct of a third party – regardless of whether the victim actually adopted those threats – so too must heat of passion be available as mitigation where the defendant "reasonably associates" the victim with the passion-provoking conduct of a third party.

Indeed, the Court implicitly recognized as much in People v. Breverman, supra, 19 Cal.4th 142. In that case, the evidence showed that several of the defendant's friends engaged in a fight with two passing youths, Kim and Ju, in front of the defendant's residence. (Id. at pp. 149-150.) On the following evening, Kim returned with seven or eight friends, including the victim, Suryastmadja. (Id. at p. 150.) While several of the young men were armed with weapons, including a baseball bat, there was no specific evidence that the victim

was armed. Kim slashed the tire of the defendant's car, which was parked out front. (Ibid.) When the defendant came out of his residence to check on the car, some of Kim's friends challenged the defendant to fight. (Ibid.) Once again, there was no specific evidence that the victim was one of the challengers. (Id. at pp. 150-152.) The defendant went back inside. A few minutes later, Kim and some of his friends approached the defendant's residence, but the victim and another young man hung back. (Ibid.) The first group began hitting the defendant's car with their weapons. According to the prosecution's evidence, which was uncontradicted by the defense evidence, the victim was not in the group that hit the car. (Ibid.) From within his residence, the defendant fired several shots toward the young men. (Id. at pp. 150-151.) The defendant then exited his residence and emptied his gun into group of fleeing men. The victim was shot in the head and killed. (Ibid.) The defendant appealed in part on the ground that the trial court erred in failing to instruct on voluntary manslaughter in the heat of passion. (Id. at p. 152.)

The Court agreed. (People v. Breverman, supra, 19 Cal.4th at p. 163.) Of course, the only evidence of the conduct in which the victim specifically engaged was that he was with other young men who intimidated the defendant and vandalized his car. There was no specific evidence that he was armed or challenged the defendant to fight. Furthermore, the prosecution's uncontroverted evidence showed that he was not among the group that vandalized the defendant's car. Nevertheless, rather than limiting its examination to what the victim actually did, the Court properly examined *all* of the circumstance leading to the shooting – including the acts of the victim's companions – and considered how those circumstances affected the defendant's state of mind and how they would have affected a reasonable person, in concluding that the evidence was sufficient for a jury to find that the defendant killed the victim in a *reasonable* heat of passion. (Ibid.; cf. Perkins & Boyce supra, at pp. 100 [criticizing as "quite unsound" 1915 Washington decision which rejected heat of passion claim where victim

sodomized defendant and third parties later taunted defendant about assault before defendant killed victim because, Washington court reasoned, provocative taunts were not by victim and period between victim's provocative act and killing was sufficient cooling time as matter of law].)

In sum, despite Spurlin and the unconsidered reliance on that decision in subsequent cases, section 192 has never imposed a rigid requirement that provocation must come from the victim killed in order to demonstrate a reasonable heat of passion. As the foregoing clearly demonstrates, if an act or event would provoke a reasonable man into an impassioned state directed toward the victim, then it is sufficient provocation to mitigate the crime to voluntary manslaughter if the defendant was so provoked.[18]

### C. Because There Was Substantial Evidence That The Shooting Of All Of The Victims Was Committed In A Reasonable Heat Of Passion, The Trial Court Violated State Law And The Federal Constitution By Refusing To Instruct On The Lesser-Included Offenses Of Voluntary Manslaughter And Attempted Voluntary Manslaughter.

Although the evidence regarding the identity of the actual shooter was breathtakingly close, it is clear from the jury's verdicts that it determined Matthew was the shooter. Hence, for purposes of this argument only, it shall be assumed that Matthew was the shooter.

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[18] It is worth noting that the confusion in the case law may stem at least in part from the occasionally careless use of the term "provocation." That unadorned term invites focus on the victim's conduct and its blameworthiness. As the foregoing demonstrates, the term "provocation" is properly understood as a shorthand reference to the requirement that a reasonable person's passion would be provoked under like circumstances. This understanding of the term properly shifts the focus back to where it rightfully belongs – on the defendant's state of mind and the reasonableness thereof. Hence, Matthew submits that the better or more precise term encompassing both the objective and subjective components of "heat of passion" under section 192 is "reasonable heat of passion," as opposed to the more archaic term "heat of passion upon adequate provocation."

### 1. The shooting deaths of Dewayne Arnold and Regina Watchman.

It was undisputed at trial that the evidence of both "provocation" and heat of passion was sufficient to warrant instructions on voluntary manslaughter in the heat of passion with respect to the shooting of Regina Watchman. (RT 2847-2948.) Thus, it was undisputed at trial that the boys' discovery of the assault upon their mother amounted to substantial evidence of "provocation." It was also undisputed that there was substantial evidence that the perpetrator acted in the heat of passion when he committed the shooting. (RT 2947-2948.) However, the prosecutor persuaded the court that voluntary manslaughter in the heat of passion requires actual provocation from each victim killed. (RT 2947-2948; CT 640.) Because it was only Watchman who *actually* attacked the boys' mother, the court agreed with the prosecutor that the evidence of "provocation" was lacking as to all of the other victims. (RT 2947-2948.) Of course, as the discussion in part B demonstrates, this analysis was fatally flawed. Applying the reasonable person standard, the question was whether there was sufficient evidence for the jury to find that the events reasonably provoked the defendants' passion, the answer to which turned *not* on what *actually* occurred, but rather on how the situation reasonably appeared to them. Under this standard, the evidence was more than sufficient for the jury to find that the series of events preceding the shooting was sufficient to provoke a reasonable person's passion against both Watchman and Arnold.

Because the boys did not witness the assault on their mother, their perception of the event turned on what she told them had happened to her. (See, e.g., People v. Barton, supra, 2 Cal.4th at p. 202 [revelation by family member that she had been threatened was substantial evidence of adequate provocation, despite fact defendant did not witness the event himself]; People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694 and cases cited therein [revelation that victim harmed

family member, even if incorrect, adequate provocation if defendant reasonably believes it].) Given that she was the architect both of the victims' and of her sons' tragic fate, it was hardly surprising that Ms. Souza was an uncooperative witness with all of the parties, claiming to recall very little of critical events, including what she had actually communicated to her sons. However, the story she told them could readily be gleaned from a substantial amount of compelling circumstantial evidence.

Although by all other accounts, Regina Watchman assaulted Ms. Souza by knocking her down and dragging her by the hair out the front door, Ms. Souza testified that Watchman also kicked her several times. (RT 2087-2088. 2142-2143, 2038-2039, 2144, 2248-2250, 2310-2311, 2451, 2519-2520, 2628, 2687, 2731, 2771-2772, 2919-2920.) After the assault, and according not only to Ms. Souza, but also to Ed Arnold and Esther Dale, Ms. Souza was highly emotional, sobbing, and in pain and shock. (RT 2145, 2149, 2629-2630, 2655, 2921-2922.).

Ms. Souza claimed to recall little of what she said to Arnold and Dale on the drive home. (RT 2090, 2112.) Significantly however, as the prosecutor argued, Ed Arnold – the only witness who had not consumed alcohol that night -- "remember[ed] exactly what happened." (RT 3303.) According to Arnold, Ms. Souza repeatedly and furiously referred to the "beating" she had suffered at the hands of "those people" at Watchman's apartment. (RT 2921-2922.) As Arnold explained, she was not making any sense because he knew that a group of people had not beaten her. (RT 2921-2922.) Nevertheless, although he kept telling her to calm down, she repeated her nonsensical refrain all the way home to her sons. (R 2631-2632, 2655, 2921-2922.)

While Ms. Souza claimed to recall little of what she actually told her young sons, she did recall that she was "hysterical," crying, in pain, angry, and bloodied when she woke them in the dead of night from a sound sleep. (RT 2096, 2099, 2107, 2155-2156, 2193-2194, 2203-2204.) She also recalled telling them that she

had been "beaten." (RT 2098, 2156, 2188, 2193.) She was certain that they saw the blood on her. (RT 2098, 2188, 2193.)

By virtually all accounts, when Michael entered the apartment, he demanded to know who had "beaten," "jumped," and "kicked" his mother's "ass." (RT 2044-2045, 2322-2326, 2454.) According to Raymond Douglas's police statements and trial testimony, he wanted to know which of the "motherfuckers" and which of the "guys" had "beaten up" his mother. (RT 2322-2326.) He later claimed that Michael *also* demanded to know who was the "bitch" who had beaten his mother. (RT 2260, 2262, 2327.) Significantly, however, by *no* account did Michael demand only that the occupants point out Regina Watchman or the woman who lived at the apartment, which might have suggested that they *knew* it was only Watchman who was responsible for the beating. (See RT 2044-2045, 2260, 2262, 2322-2327, 2454, 2688-2689, 2692-2693, 2733-2734, 2778.) Michael also demanded to know who had "stole[n]" his mother's purse and repeatedly ordered them to return it to him. (RT 2044-2045, 2054-2056, 2260, 2454-2455, 2733-2734, 2778.)

From all of this evidence, the jurors could more than reasonably have surmised that their bloodied and "hysterical" mother told the boys that a group of people at the party had brutally beaten her and stolen her purse. They could further have found that the boys believed her account, just as any reasonable children would believe their mother under like circumstances. (See, e.g., People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694 [reasonable but mistaken belief that victim had killed brother, based on information communicated to him, adequate provocation under reasonable person standard]; accord People v. Lee, supra, 20 Cal.4th at p. 59; People v. Logan, supra, 175 Cal. at p. 49.)

Ms. Souza's motive in misleading her sons is unclear. It is entirely possible that Ms. Souza, furious over Watchman's assault and the indifference of the guests who had witnessed it, deliberately misled them. Like Iago who whipped Othello into a murderous rage with lies, Ms. Souza may have decided to exaggerate the

incident in order to provoke a reason-obscuring passion in her young sons and manipulate them into returning to the party so that *she* could avenge her wounded pride. (See People v. McCoy, supra, 24 Cal.4th at p. 1121 [if Iago, with cold-blooded premeditation, falsely tells Othello that his wife is having an affair in order to provoke in him a murderous rage, Othello's act of killing his wife would be voluntary manslaughter in the heat of passion even though Iago would be guilty of murder].) Indeed, the prosecution's evidence strongly suggested that Ms. Souza knew that she had not left her purse at the party, but deliberately misled her sons by telling them that it was at Watchman's apartment, perhaps even stolen, and that they had to retrieve it, as a means to compel them to go there. (See RT 3306.) To be sure, it is difficult to imagine that a mother would play Iago to her own children's Othello. However, the evidence presented at trial revealed that Ms. Souza was no ordinary mother. After setting her children on the disastrous course that led to this tragedy, she astonishingly admitted that she simply abandoned them. (RT 2115-2116, 2166, 2168, 2196-2198.)[19] At the same time, it is entirely possible that in her drunken state, Ms. Souza actually believed at the time that "people" at the party had "beaten" her. (RT 2921-2922.) In any event, whether she was drunk and mistaken or calculating and deceitful is immaterial because the critical question is what her sons *believed* and what reasonable sons would have believed under the same circumstances. And, as all of the foregoing demonstrates, there was substantial evidence from which the jurors could find that they reasonably believed that a group of people at Watchman's apartment had brutally beaten and bloodied their mother.

Just as a brutal assault on one's mother would upset and enrage any reasonable child, these children were "very upset" by their mother's account, demeanor, and appearance. (RT 2203-2204; see, e.g., 2 Wharton's Criminal Law,

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[19] Indeed, this mother did not even know the ages of her own children. (RT 2071.) And this mother, who had set her child on his tragic course, did not testify at all to plead for his life at the penalty phase.

supra, § 163 at p. 63 [harm or threat to family well recognized as adequate to engender passion in reasonable person]; accord People v. Barton, supra, 12 Cal.4th at p. 202; People v. Brooks, supra, 185 Cal.App.3d at pp. 693-694; LaFave, supra, §15.2(b) at pp. 777, 782.) But if that passion alone were not enough to impel the boys to go to Watchman's apartment, their mother went even further. By her own admission, she stoked the flames of their passion by "hysterical[ly]" insisting that her children find the apartment and retrieve her belongings. (RT 2096-2097, 2099, 2101, 2107-2108, 2150, 2155-2156, 2193-2194, 2203-2204, 2214, 2219.) As the boys drove around looking for the apartment with their mother, her "hysteria," and thus the passion-provoking event, continued. (RT 2106, 2160-2161; see, e.g., People v. Berry, supra, 18 Cal.3d at p. 509; LaFave, supra, § 15.2(d) at pp. 786-787; Perkins & Boyce, supra, at p. 100.)

Ms. Souza could not recall what time the boys dropped her back at her cousin's apartment. (RT 2094-2095, 2198.) However, the other witnesses' time estimates provided substantial evidence from which the jury could reasonably conclude that the boys arrived at Watchman's apartment no more than several minutes after dropping their "hysterical" mother off at home. According to all of the witnesses, the tavern closed at 2:00 a.m. and the guests began arriving at Watchman's apartment shortly thereafter. (RT 2030, 2032-2033, 2076, 2131, 2239-2244, 2349, 2516-2518, 2623, 2725, 2914-2916.) According to various accounts, Watchman's assault upon Ms. Souza occurred anywhere from an hour to two hours after the party began and the boys arrived at the apartment about an hour or so later. (RT 2034-2038, 2041-2042, 2085, 2138, 2253, 2317-2318, 2732, 2758.) 2317-2318, 2747, 2758.) Since the shooting was reported at 5:06 a.m., that would place the assault on Ms. Souza at about 4:00 a.m. (RT 3072.) Accounting for the time it took for Ed Arnold to drive Ms. Souza home, for Ms. Souza to relay her story to the boys, and for them to drive around looking for the apartment and drop her back off, the evidence supported a reasonable inference that the boys arrived at the apartment less than half an hour after dropping their still "hysterical"

mother off at home. Indeed, according to the prosecution, she probably led them to the apartment before she had them return her to the safety of her home, which would have meant that it took very little time for them to drive there after dropping her off. (RT 3309-3310.)

Hence, there was no basis on which to conclude as a matter of law that a reasonable person's passion would have cooled, or that the boys' passion did cool, in the interim between dropping their mother at home and arriving at Watchman's apartment. Given all of the circumstances, including the extreme nature of the initial provocative event, their emotional response, the continuing nature of the "provocation" from their mother's unceasing "hysteria" over the "beating" while they looked for the apartment, the relatively short period of time between dropping their mother off and arriving at the apartment, and their angry demeanor when they arrived at the apartment, there was ample evidence from which the jurors could conclude that the boys arrived at the apartment in an actual, reasonable state of passion, believing that a group of people there had just brutally beaten their mother. (See, e.g., People v. Bridgehouse, supra, 47 Cal.2d at p. 409-414 [nature of series of provocative events, fact defendant's passion intermittently provoked over period of days, defendant's exhaustion, and description of defendant as "white" and "shaking" before shooting victim, sufficient circumstantial evidence to establish killing committed in heat of passion as a matter of law]; People v. Brooks, supra, 185 Cal.App.3d at pp. 696-697 [two-hour period between defendant hearing victim killed brother and defendant killing victim was not cooling period as matter of law].)

When Michael entered the apartment and demanded to know who had "beaten" and "jumped" his mother, two people responded directly and aggressively: Regina Watchman and Dewayne Arnold. Watchman got up and ordered the boys to "get the hell out of my house." (RT 3131.) As the prosecutor argued, given the other witnesses' testimony that Watchman had told Ms. Souza that she lived in the apartment and the accounts of some of the witnesses that

Michael referred to the "bitch" who had participated in the attack, the jury could infer that Ms. Souza told her sons that at least one of the people responsible for her assault was the female resident of the apartment. (RT 3304.) Hence, as the prosecutor further argued, once Watchman angrily responded to Michael by ordering them to "get the hell out my house," the jury could infer that the boys reasonably believed that Watchman was that woman. (RT 3313.)

Similarly, when Michael demanded to know the identity of his mother's assailants, Dewayne Arnold stood up. He was a large man who had consumed both methamphetamine and a staggering amount of alcohol that night. (RT 1944-1947.) He was clearly "mad" and "upset," and appeared as if he were going "to try to do something." (RT 3107, 3132, 3158.) He angrily demanded "what the fuck was going on" and grabbed for Michael's gun. (RT 2057, 2332, 2454-2456, 2505, 2738-2740, 2789.)

Of course, Arnold had not actually participated in the assault on their mother and his aggressive response to Michael was not grossly unreasonable, as the prosecutor pointed out. (RT 3447.) Once again, however, the critical inquiry is not on the reasonableness of the victim's conduct, or on whether he "deserved" what he got, but rather on how the situation appeared to the defendant, and how it would appear to a reasonable person, in light of all of the circumstances. (See People v. Minifie, supra, supra, 13 Cal.4th at pp. 1067-1068.) In making that critical assessment, *all* of the provocative events – not simply the conduct that preceded the killing or the conduct that actually occurred or the conduct engaged in by the victim – can and should be considered. (See, e.g., People v. Breverman, supra, 19 Cal.4th at pp. 149-152, 163 [victim was with group, some of whom engaged in conduct which provoked defendant into a *reasonable* state of passion; evidence sufficient to warrant finding that shooting of victim committed in reasonable heat of passion]; People v. Berry, supra, 18 Cal.3d at pp. 514-515 [while wife's screams in response to her husband's expressed intent to kill her would not, considered in a vacuum, amount to adequate "provocation," there was

substantial evidence that it reasonably rekindled defendant's heat of passion given the cumulative effect of prior provocative conduct]; People v. Bridgehouse, supra, supra, 47 Cal.2d at p. 409-414 [while defendant's mere unexpected encounter of wife's paramour would not constitute adequate provocation when considered in vacuum, it reasonably rekindled defendant's passion given prior provocative conduct engaged in by wife].) In making this assessment, it is well settled that one may reasonably infer a person's guilt from his response to an accusation or his conduct following the commission of a crime or act of misconduct. (See, e.g., People v. Edelbacher (1989) 47 Cal.3d 983, 1010-1011 [admission is reasonable inference from failure to deny accusation]; People v. Miranda (1987) 44 Cal.3d 57, 84 [person's conduct may be relevant to show consciousness of guilt]; People v. James (1976) 56 Cal.App.3d 876, 889 [person's conduct following commission of crime, whether flight, evasion of apprehension, attempted suicide, or escape from custody, may be relevant circumstantial evidence tending to show consciousness of guilt and, by further inference, guilt of crime]; Evid. Code § 1221 [adoptive admission exception to hearsay rule].)

Pursuant to these principles, given the boys' apparent belief that more than one person had "beaten" their mother and their already reasonably impassioned state, much like an adoptive admission, the boys could reasonably but mistakenly have concluded from Arnold's response to Michael's accusation that he was one of the "people" who had attacked his mother (see People v. Lee, supra, 20 Cal.4th at p. 59); or they could have reasonably associated Arnold with his mother's attack (People v. Breverman, supra, 19 Cal.4th at pp. 149-152, 163; People v. Minifie, supra, 13 Cal.4th at pp. 1062-1068; People v. Bridgehouse, supra, 47 Cal.2d at p. 409-414). Hence, given all that had preceded that moment and that any reasonable person's judgment would have been clouded by anger under the same circumstances, the jurors could have found that a reasonable person would have been provoked into a state of passion directed against Arnold both because they

believed he was one of their mother's attackers and because he responded to their accusation with more violence.

Furthermore, the jurors could infer that Matthew's reasonably impassioned mental state was further inflamed by the violent confusion that erupted from the confrontation between Arnold and his brother. As the inconsistent accounts of the other witnesses starkly illustrated, no one was entirely certain of what exactly happened between Michael and Dewayne Arnold. However, it seems clear that there were heated words and a physical altercation between the two men. (RT 2058-2059, 2301, 2332-2333, 2381, 2059, 2301, 2332, 2381, 2457, 2833, 2835.) During the confrontation, a lamp fell with a crash and several witnesses heard a shot and saw a flash come from where the two men were struggling. (RT 2266, 2362-2366, 2809-2812.) A number of witnesses testified that a single shot was fired first, and that this first shot sounded different from the series of rapidly fired shots that followed it. (RT 2379, 2405, 2424, 2430, 2433, 2478.) Consistent with this testimony, there was evidence that a .25 semi-automatic was fired once and that an automatic or semi-automatic rifle firing .223 ammunition was discharged 14 times. (RT 2557, 2568-2569, 2851-2852, 2857-2859.)

From all of this evidence, the jury could have inferred that Matthew heard that first shot and saw a flash of gunfire from his brother and Arnold's location and, like the other witnesses, that he reasonably believed that a gun had been fired from that location. (RT 3109-3110, 319-3140, 3160-3161.) Since Arnold had reached for his brother's gun (RT 2738-2740, 2789), Matthew could have believed that it was Arnold who had fired that shot. Or, like other witnesses, he could have heard the sounds of "scuffling" and the crashing lamp and believed that Arnold was attacking his brother, just as he had attacked or aided the attack on his mother. (RT 2333, 2381, 2058-2059, 2301, 2332, 2381, 2457, 2833, 2835.) Having already been whipped into a reasonable state of passion by his mother's horrifying story and appearance, and his belief that Arnold was complicit in the assault, any belief that Arnold would further harm his family by attacking his brother meant

that the "provocation" only gained in its explosive power, which immediately resulted in Matthew's sudden, impulsive, and impassioned firing of his own weapon. (RT 2060, 2332-2333.)

Indeed, the inference that Matthew believed that Watchman and Arnold were two of the people responsible for the attack on his mother, and that the shooting was an impulsive response to the heat of passion engendered both by that realization and the events preceding it, is buttressed by the fact that the shooting commenced immediately after the heated words and confrontation between Arnold and his brother. (See, e.g., People v. Barton, supra, 12 Cal.4th at p. 202 [evidence sufficient to warrant instructions on voluntary manslaughter in the heat of passion where victim and defendant's daughter were involved in an upsetting traffic accident during which the victim spat on the daughter's car, that the daughter was "extremely upset" when she later relayed the altercation to the defendant, that the defendant armed himself and went to confront the victim, at which point a heated argument ensued between the two men before the defendant shot the victim].) Furthermore, Dewayne Arnold was shot a total of *seven times* while Watchman was shot three times. (RT 1924-1925, 1939-1941.) This evidence, combined with the other evidence, supported a finding that the shooting occurred in an "explosion" of passion. (See, e.g., People v. Alcala (1984) 36 Cal.3d 604, 626 [multiple wounds or acts of violence consistent with impassioned "explosion" of violence]; People v. Anderson (1968) 70 Cal.2d 15, 25 [same]; People v. Birreuta, supra, 162 Cal.App.3d at p. 462, n. 6 [evidence supported finding of killings in sudden quarrel or heat of passion where, *inter alia*, defendant shot one victim six times and other four times]; People v. Jiminez (1950) 95 Cal.App.2d 840, 842-843 [stabbing victim eight times consistent with subjective heat of passion].) Thus, all of this evidence was sufficient for the jury to find that the shootings of Arnold and Watchman were committed in a reasonable heat of passion. The court therefore violated state law, as well as Matthew's federal constitutional rights to due process, to present a defense, to trial by jury, and to a reliable guilt phase

determination in refusing to instruct on voluntary manslaughter in a reasonable heat of passion as to both Watchman and Arnold. (See, e.g., People v. Breverman, supra, at pp. 159, 160-162 [maj. opn.] and pp. 188-189 [dis. opn. of Kennard, J.]; Mullaney v. Wilbur, supra, 421 U.S. at pp. 698-699; Osborne v. Ohio, supra, 495 U.S. at pp. 122-124; Beck v. Alabama, supra, 447 U.S. at pp. 637-638; Conde v. Henry, supra, 198 F.3d at pp. 739-740.)

### 2. The shootings of Leslie Trudell, Beulah John and Rodney James.

As to the shootings of Leslie Trudell, Beulah John, and Rodney James, the evidence supported two factual scenarios, both of which supported findings that they were committed in a reasonable heat of passion. First, the evidence strongly suggested that they were shot unintentionally because they were in the line of fire when the perpetrator shot Arnold and Watchman. By all accounts, as well as photographs of the scene, the room in which the shooting occurred was extremely small and crowded. (RT 2035, 2235, 2304-2305; People's Trial Exhibits A-L.) According to all of the witnesses, the gunfire began in front of the couch on which Arnold and Watchman were seated. (RT 2052-2053, 2266, 2330, 2362-2366, 2330, 2786-2787, 2809-2812, 3109-3110, 31903140, 3160-3161.) Trudell, James, and John were located directly behind that couch, at or near the kitchen table, when they were shot. (RT 2269-2270, 2434, 2437, 2523-2525, 2529-2530, 274-2745; People's Exhibit 33; Deft. A's Exhibit A.) In other words, all of the other victims struck by the bullets were sitting or standing behind the targets, Arnold and Watchman. While Arnold was shot seven times and Watchman shot three times, Beulah John and Rodney James were each shot only once and Leslie Trudell, who was closest to the couch, was shot only twice and virtually in the same location on his body. (RT 1956-1957, 2270, 2437, 2523, 2437; People's Exhibit 33.) Significantly, unlike Trudell, John, and James, the several other

people in the apartment who were *not* shot were not in the line of fire directed at Arnold and Watchman.

Moreover, there was no evidence presented at the guilt phase to suggest that Matthew was familiar with guns. To the contrary, the only evidence presented regarding Matthew's familiarity with guns came from his mother, who testified that she had never seen him with, or talk about, firearms. (RT 2092-2093.) The state's firearm expert could not determine whether an automatic or semi-automatic had fired the ammunition in this case. (RT 2867.) However, the ammunition recovered from the scene can be fired from both semi-automatic and fully automatic weapons. (RT 2851-2852.) A fully automatic weapon requires only one trigger pull to continuously fire bullets. (RT 2852.) Several of the witnesses testified to a burst of gunfire, the shots having been fired in rapid succession and without any pauses between them, which would be consistent with an automatic weapon. (RT 2060, 2432, 2603-2604, 3110-3113, 3136, 3138.) Indeed, one of the witnesses said they sounded as if they came from an "army machine gun." (RT 3112.) From this evidence, a reasonable inference could be drawn that the rifle was an automatic and that all of the bullets were discharged with a single pull of the trigger and in a single spray of gunfire. It could further be inferred that when this inexperienced 18-year-old boy – who had been whipped into a state of passion – pulled the trigger of that fully automatic weapon and shot at Arnold and/or Watchman, he did not have control of where the bullets struck. From all of the evidence, the jury could more than reasonably have found that the other victims were hit unintentionally as Matthew shot Arnold and Watchman in a reasonable heat of passion.[20]

Of course, only Trudell died; both John and James survived. Under this factual scenario of an unintentional shooting of the three, Matthew would be liable

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[20] Any argument that the jury necessarily rejected such a factual scenario by convicting the boys of the premeditated attempted murders of Beulah John and Rodney James is answered in part E-3 and Argument IV, below.

for the voluntary manslaughter of Leslie Trudell, either under a transferred intent theory (see, e.g., People v. Bland, supra, 28 Cal.4th at pp. 317, 322; People v. Carlson (1974) 37 Cal.App.3d 349; see also People v. Minifie, supra, 13 Cal.4th at p. 1065), or under a theory that he committed a highly dangerous act with conscious disregard for human life, but without implied malice due to heat of passion (People v. Lasko, supra, 23 Cal.4th at p. 109 [reasonable heat of passion legally negates implied malice). However, if he did not intend to kill them, Matthew would not be liable for the attempted voluntary manslaughter of John and James under any theory. (People v. Bland, supra, at pp. 317, 326-331 [specific intent to kill victim required for attempted murder; transferred intent does not apply to attempted murder]; People v. Gutierrez (2003) 112 Cal.App.4th 704, 710 [attempted voluntary manslaughter requires specific intent to kill victim even though voluntary manslaughter does not].)

The second factual scenario did, however, support instructions on both voluntary manslaughter and attempted voluntary manslaughter as to Trudell, James, and John. Although weak, the evidence was legally sufficient for the jury to find that Trudell, John, and James were shot intentionally. Even under this scenario, there was substantial evidence from which the jurors could conclude that they were intentionally shot in a reasonable heat of passion.

As discussed in part B, because the heat of passion doctrine focuses on the reasonableness of the defendant's passion and not on whether the victim "deserved" what he or she got, the critical question to be answered is whether a reasonable person would have been provoked into a state of passion directed against the victims. Thus, if there is evidence from which to conclude that the defendant reasonably associated the victim with acts that reasonably provoked his passion, then it is sufficient to support a finding of voluntary manslaughter. (See People v. Breverman, supra, 19 Cal.4th at pp. 149-152, 163; People v. Minifie, supra, 13 Cal.4th at pp. 1067-1068.) For instance, in People v. Breverman, although the only specific evidence of the victim's conduct was that he was with a

group of young men who had engaged in provocative acts, the Court recognized that the jury could consider the conduct of *all* of the group members in assessing the reasonableness of the defendant's passion. (People v. Breverman, supra, 19 Cal.4th at pp. 149-152, 163; see also People v. Bridgehouse, supra, 47 Cal.2d at p. 409-414)

Here, as discussed in the preceding section, there was substantial evidence from which the jury could find that Ms. Souza had told her sons that a group of people at Watchman's apartment had brutally beaten her and that they reasonably believed her story. When they went to the apartment at their mother's "hysterical" urging, they did indeed encounter a group of people. And, when they demanded to know the identities of their mothers' attackers, two of the group members responded with aggression. Once the angry confrontation turned into a physical one between Arnold and Michael, Matthew – his judgment already clouded by passion – fired his weapon and struck several members of the group. Just as in Breverman, this evidence was sufficient for the jury to find that all of the circumstances were sufficient to provoke a reasonable person into "act[ing] rashly" against any and *all* of the victims, "without due deliberation and reflection, and from this passion rather than from judgment.'" (People v. Breverman, supra, 19 Cal.4th at p. 163.) Hence, the court's refusal to instruct on voluntary manslaughter and attempted voluntary manslaughter as to all of the victims violated state law and Matthew's federal constitutional rights to due process, to present a defense, to trial by jury, and to a reliable guilt phase determination. (See, e.g., People v. Breverman, supra, at pp. 159, 160-162 [maj. opn.] and pp. 188-189 [dis. opn. of Kennard, J.]; Mullaney v. Wilbur, supra, 421 U.S. at pp. 698-699; Osborne v. Ohio, supra, 495 U.S. at pp. 122-124; Beck v. Alabama, supra, 447 U.S. at pp. 637-638; Conde v. Henry, supra, 198 F.3d at pp. 739-740.)[21]

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[21] Moreover, because the evidence supported a theory of voluntary manslaughter and attempted voluntary manslaughter potentially dependent on a reasonable even if mistaken belief that certain conduct had occurred, or that the

### D. Counsel Did Not Invite The Errors.

Respondent may argue that trial counsel invited the errors by: a) acquiescing in the court's reading of the law that provocation must actually come from the victim killed and its resulting refusal to provide the instructions as to any victim other than Regina Watchman; and/or b) later withdrawing his request for the instruction limited as to Watchman. Any such argument must be rejected.

Because the obligation to instruct on every supportable theory of a lesser-included offense "seeks the most accurate possible judgment by 'ensuring that the jury will consider the full range of possible verdicts' included in the charge, regardless of the parties' wishes or tactics," a trial court must instruct on every supportable theory of a lesser-included offense even over defense objection.

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defendants reasonably associated all of the victims with that conduct, the jurors should have been instructed accordingly. (See People v. Breverman, supra, 19 Cal.4th at pp. 159, 162 [court must instruct not only on all lesser-included offenses supported by the evidence, but also on all theories of lesser-included offenses]; People v. Wilson, supra, 66 Cal.2d at p. 159 [court erred in failing to provide complete and accurate instructions on lesser-included offense where it instructed on lesser-included offense of misdemeanor manslaughter but failed to instruct on underlying misdemeanor of brandishing and its elements]; see also, e.g., People v. Lucero (1988) 203 Cal.App.3d 1011, 1017-1018 [trial court has *sua sponte* duty to instruct on reasonable mistake of fact where supported by substantial evidence].) That is, just as self-defense instructions must advise the jurors that the defendant's reasonable belief in an imminent threat is legally equivalent to the threat actually existing in determining the defendant's liability (See CALJIC Nos. 5.12, 5.14), so too must voluntary manslaughter instructions advise the jurors that the defendant's reasonable belief in provocation is legally equivalent to the provocation actually existing where there is evidence to support it. Similarly, because the evidence supported a theory of voluntary manslaughter in the heat of passion dependent upon the transfer of an *absence* of intent or malice, the court was also under a *sua sponte* obligation to instruct the jurors on that principle. (See, e.g., People v. Cummings (1993) 4 Cal.4th 1233, 1311 [court has *sua sponte* duty to instruct on all principles of law that are closely and openly connected with the evidence and necessary for jury's understanding of the case]; People v. Breverman, supra, 19 Cal.4th at pp. 159, 162; People v. Levitt, supra, 156 Cal.App.3d 507 [instructions

(People v. Breverman, at pp. 154-155, 160, quoting People v. Wickersham, supra, 32 Cal.3d at p. 324; accord People v. Valdez (2004) 32 Cal.4th 73, 115; People v. Barton, supra, 12 Cal.4th at p. 196 ["the doctrine of invited error does not . . . vindicate the decision of a trial court to grant a defendant's request not to give an instruction that is otherwise proper; the error is still error"].) Where the error goes to the trial court's fundamental *sua sponte* instructional obligations, such as the duty to instruct on lesser-included offenses, it may be invited only in a "special situation." (People v. Graham (1969) 71 Cal.2d 303, 319, 331; People v. Marshall (1990) 50 Cal.3d 907, 931)

That is, "if counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do *not* find invited error; *only* if counsel ***expresses a deliberate tactical purpose*** in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the court's obligation to instruct on the cause." (People v. Graham, supra, 71 Cal.2d at pp. 319, 331, emphasis supplied [counsel's explicit agreement that erroneous instruction was proper did not invite error in absence of expression of deliberate tactical purpose]; accord People v. Valdez, supra, 32 Cal.4th at p. 115; People v. Beardslee (1991) 53 Cal.3d 68, 88 [counsel's request for erroneous instruction did not invite error]; People v. Carrera (1989) 49 Cal.3d 291, 311 n.8 [counsel's explicit concession to erroneous omission of instruction did not invite error in absence of expression of deliberate tactical purpose]; In re Mosher (1969) 1 Cal.3d 379, 393 [counsel did not invite error "by merely acceding to erroneous instruction by neglect or mistake" in absence of expression of deliberate tactical purpose].)

The test for invited error is *not* whether the reviewing court can infer from the record as a whole that counsel made a deliberate tactical decision to suggest, resist or accede to erroneous instructions. (People v. Wickersham, supra, 32 Cal.3d at pp. 333, 334.) Invited error cannot be found even if counsel's silence

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on transferred lack of criminal intent in self-defense context are "as appropriate as

was the result of a tactical decision, because the court's duty to instruct is not dependent upon counsel and is not waived by counsel's failure to demand instructions. (Id. at p. 334.) "The issue centers on whether counsel *deliberately* caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result. The error, in other words, must be 'invited.'" (Id. at p. 335; accord, e.g., People v. Lara (2001) 86 Cal.App.4th 139, 164; People v. Tapia (1994) 25 Cal.App.4th 984, 1030.)

Here, the prosecutor convinced the trial court that, in order to negate malice with reasonable heat of passion, the provocation must actually come from the victim killed. (RT 2947-2948; CT 640.) Consequently, the court ruled that it would limit the manslaughter instructions to the count involving Regina Watchman, the only person who actually assaulted the boys' mother. (RT 2947-2948.) Although counsel acquiesced in the court's ruling, he expressed no tactical basis for doing so. (RT 2947.) Hence, pursuant to the foregoing authorities, counsel clearly did not invite the erroneous omission of instructions on voluntary manslaughter and attempted voluntary manslaughter as to all of the counts.[22]

To be sure, following the court's ruling, counsel eventually withdrew his request for the instructions as to the Regina Watchman murder charge. (RT 3230-

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instructions on any other defense"].)

[22] Indeed, although the test for invited error requires an **express** tactical reason which cannot be implied from reviewing the record as a whole, it is nevertheless clear from the record as a whole that counsel's decision was not strategic or tactical. With respect to the shooter and his accomplices' degree of culpability, both counsel contended that they were liable for the deaths, but that their liability was mitigated to second-degree murder due to the existence of provocation. (RT 3320, 3330-3331, 3374, 3402-3404.) Obviously, they were not pursing an all or nothing strategy nor did they have any tactical reason for removing from the jury's consideration an even lesser offense option based upon the same evidence of provocation and heat of passion. (See People v. Graham, supra, 71 Ca.2d at p. 320 [invited error did not apply because counsel did not express a tactical reason for agreeing to error in lesser offense instruction; observing in any event that record did not demonstrate tactical basis for agreement, since counsel did request other lesser offense options].)

3231.) Counsel explained that, **in light of the court's (erroneous) ruling limiting the instruction to the Watchman charge only**, he feared that the jury would become confused about the application of the provocation evidence as it related to the premeditation element in the charges involving the other victims. (RT 3230-3231.) In other words, counsel's request was mere damage control caused by the court's more fundamental, erroneous ruling that it would not provide the instructions as to any other victims. Thus, because counsel's request was itself "invited" or induced by the court's original error, the invited error doctrine is inapplicable. (See, e.g., People v. Watts (1976) 59 Cal.App.3d 80, 85-86 and n. 2, cited with approval in People v. Wickersham, supra, 32 Cal.3d at p. 332 [counsel's request for inappropriate instruction, which was only made out of deference to court's suggestion that it would provide incorrect instruction rather than correct instruction, did not invite the error]; see also People v. Turner (1990) 50 Cal.3d 708, 744 and n. 18 ["defensive acts" to mitigate effect of adverse ruling do not amount to waiver]; accord People v. Venegas (1998) 18 Cal.4th 47, 94.)

### E. The Errors Require Reversal.

#### 1. Respondent bears the burden of proving the errors harmless beyond a reasonable doubt because they violated Matthew's federal constitutional rights.

As demonstrated, the trial court's erroneous refusal to instruct on voluntary manslaughter and attempted voluntary manslaughter in a reasonable heat of passion violated not only state law, but also Matthew's rights to due process, trial by jury, to present a defense, and to a reliable guilt phase determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (People v. Breverman, supra, 19 Cal.4th at pp. 188-189, dis. opn. of Kennard, J.; Mullaney v. Wilbur, supra, 421 U.S. at pp. 698-699; Osborne v. Ohio, supra, 495 U.S. at pp. 122-124 and n. 17; Beck v. Alabama, supra, 447 U.S. at pp. 637-638; Conde v. Henry, supra, 198 F.3d at pp. 739-740; Bashor v. Riley, supra, 730 F.2d at p. 1240; Everette v. Roth,

supra, 37 F.3d at p. 261; Vujosevic v. Rafferty, supra, 844 F.2d 1023.) Consequently, reversal is required unless the state can prove the errors harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24; accord Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt (1991) 500 U.S. 391, 404.) In making this determination, the inquiry is **not** "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (Sullivan v. Louisiana, supra, at p. 279.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (Ibid.) Under these standards, respondent cannot prove the errors harmless beyond a reasonable doubt.

### 2. The jury's verdicts do not prove beyond a reasonable doubt that it resolved the questions omitted by the voluntary manslaughter instructions under a correct application of the law.

The failure to provide a lesser-included offense instruction may be harmless under the Chapman standard if the reviewing court can determine beyond a reasonable doubt that the jury necessarily resolved the issues posed by the erroneously omitted instruction under other, *properly given* instructions or – put another way – a correct understanding of the law. (See, e.g., People v. Marshall (1996) 13 Cal.4th 799, 851.) Respondent will undoubtedly argue that the trial court's errors were harmless under Chapman because the jury necessarily determined that the shooting was not committed in a heat of passion by convicting the boys of premeditated murder and attempted murder and rejecting the second-degree murder and unpremeditated attempted murder options. The Court should reject such an argument.

It is true that in the 67 pages of instructions submitted to the jury, fleeting reference to the phrase "heat of passion" was buried in the instruction on

premeditation and deliberation. (CT 286; see also CT 294.) That instruction provided:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden *heat of passion* or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To prove that a killing was "deliberate and premeditated," it is not necessary to prove that a defendant meaningfully and maturely reflected upon the gravity of his act.
>
> It is not necessary that premeditation and deliberation be directed at a specific individual, it may be directed at a group.

> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill. (CT 704, emphasis supplied; RT 3262-3263; see also CALJIC No. 8.20)[23]

Further, in the limited context of determining whether the crimes were first or second-degree murder (or attempted murder or attempted murder with premeditation), the court provided a modified version of CALJIC No. 8.73, which made brief reference to the term "provocation" and provided as follows:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation. (CT 712; RT 3268.)

These were the only instructions provided on heat of passion and provocation. They did not define or explain the term "heat of passion" as it was used in CALJIC No. 8.20, did not define or explain the term "provocation" as it was used in CALJIC No. 8.73, did not explain or even suggest a *relationship* between "provocation" and "heat of passion," and certainly did not suggest that heat of passion upon adequate provocation operates to negate malice as a matter of law.

As this Court recognized in People v. Berry, 18 Cal.3d 509, the erroneous omission of instructions on voluntary manslaughter in the heat of passion is not rendered harmless by findings of premeditation under such instructions, even under the far less stringent state law test for harmless error. As discussed in part B-1, above, in People v. Berry, supra, 18 Cal.3d 509, the Court held that the trial court committed prejudicial error in failing to provide instructions on voluntary manslaughter in the heat of passion and upon adequate provocation. Although the

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[23] The instruction provided was CALJIC No. 8.20, modified to add the seventh and eighth paragraphs.

jury had convicted the defendant of first-degree, premeditated murder, the Court further held that the instructional error was prejudicial and required reversal. In so doing, the Court emphasized that although the murder instructions:

> made passing reference to heat of passion and provocation for the purpose of distinguishing between murder of the first and second-degrees, such reference was only casually made. There was no clear direction to the jury to consider the evidence of [the] course of provocatory conduct so as to determine whether defendant, as an ordinary man of average disposition [Citation] having been exposed to such conduct, was provoked into committing the homicide under a heat of passion. Therefore, we conclude that the jury's determination that defendant was guilty of murder of the first-degree under the instructions given did not necessarily indicate that . . . the jury had found that defendant had not killed [the victim] under a heat of passion. Since this theory of provocation constituted defendant's entire defense to the [murder] count, we have no difficulty concluding that the failure to give such instruction was prejudicial error [even under the Watson standard for harmless error] and requires us to reverse the conviction of murder in the first degree. (People v. Berry, supra, 18 Cal.3d at p. 518.)

(See also Conde v. Henry, supra, 198 F.3d at p. 740 [court's misinstruction on immediate presence element of robbery violated due process; while correct statement of "immediate presence" requirement was provided to jury in same instruction, it was "buried in the 'background definitions'" of the instruction and did not cure or render harmless the violation].)

Here, as in Berry, brief references to the terms "heat of passion" and "provocation" were buried in 67 pages of instructions submitted to the jury. Also in Berry, "[t]here was no clear direction to the jury to consider the evidence of [the] course of provocatory conduct so as to determine whether defendant, as an ordinary man of average disposition [Citation] having been exposed to such conduct, was provoked into committing the homicide under a heat of passion." (People v. Berry, supra, 18 Cal.3d at p. 518.) If the provision of essentially

identical instructions did not render harmless the omission of voluntary manslaughter instructions under the far less stringent state law standard for harmless error in Berry, *a fortiori* they cannot render harmless the same error under the more stringent Chapman standard.[24]

Nor did the arguments of counsel fill the instructional gap. Remarkably, and as explained in more detail in Argument III, although the legal defense theory was that the boys did not premeditate due to the existence of a heat of passion, counsels' arguments focused almost exclusively on the issue of provocation. Apart from the prosecutor's recitation of CALJIC No. 8.20, *none* of the attorneys ever even used the term "heat of passion," much less made any attempt to explain, define, or apply it to the facts of this case or to explain its critical relationship to the "provocation" referred to in the instructions and arguments or its relationship to the defendants' mental state.

Moreover, as explained in detail in Argument III, below, the prosecutor repeatedly misstated the law on the subject. Although he conceded that the defendants were "upset" over the assault on their mother (RT 3450), his argument also focused almost exclusively on the existence or non-existence of "provocation that *reduces* the crime from a willful, premeditated murder to a second-degree murder" (RT 3450) or that "prevent[s] the person provoked from forming the intent to kill as a process of premeditation and deliberation" (RT 3446). With respect to the kind of provocation "necessary" to "reduce" murder to second-degree murder, he insisted over objection that it must be actual, not perceived, and that it must come from the victim killed. (RT 3308, 3421, 3311, 3446-3449.) Therefore, the prosecutor argued, since the only arguable evidence of provocation was Watchman's act of "hair pulling," that evidence was legally irrelevant to the

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[24] The Court did not address whether, nor was there any indication that the appellant ever argued that, the error violated the federal constitution and therefore whether the Chapman standard applied. (People v. Gilbert (1969) 1 Cal.3d 475,

charges involving all of the other victims. (RT 3311, 3446-3449.) As to Watchman's act, he further argued that it was "insufficient" "provocation" because the question was what actually occurred and, in actuality, Watchman had merely pulled Ms. Souza's hair. (RT 3308, 3421.) The boys' actions in arming themselves, returning to the apartment, and shooting her, the prosecutor argued, was not a "reasonable" response to such a trivial act. (RT 3311, 3452-3453.) The prosecutor's arguments in these regards were misstatements of the law relating to even a reasonable heat of passion; they were certainly gross misstatements of the legal principles applicable to unpremeditated second-degree murder committed in an *un*reasonable heat of passion (as discussed in more detail below). Under all of these circumstances, the jury's verdicts simply do not demonstrate beyond a reasonable doubt that it resolved the questions posed by the erroneously omitted instructions adversely to Matthew under other, properly given instructions or under a correct understanding of the law. (See Sullivan v. Louisiana, supra, 508 U.S. at p. 279.)

### 3. The jury's verdicts do not prove beyond a reasonable doubt that it determined the shootings of Leslie Trudell, Beulah John, and Rodney James were intentional or that the omission of instructions as to those victims was harmless.

As to the killing of Leslie Trudell and the shootings of Beulah John and Rodney James, Matthew recognizes that the jury convicted him on all counts of premeditated murder and attempted premeditated murder. From these verdicts, respondent will likely argue that the jury rejected the factual scenario, discussed in part C-2, above, in which the perpetrator shot those victims unintentionally in the course of his reasonably impassioned shooting of Arnold and Watchman. Consequently, respondent will likely argue that the erroneous omission of

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482, n. 7 ["It is axiomatic that cases are not authority for propositions not

voluntary manslaughter instructions based on the theory that the shooting of Leslie Trudell was unintentional was harmless beyond a reasonable doubt. Any such argument should be rejected.

The standard premeditation instruction was amended to explain that it was "not necessary that premeditation and deliberation be directed at a specific individual, it may be directed at a group." (CT 704; RT 3263.) As explained in greater detail in Argument IV below, this instruction was confusing and ambiguous and permitted the jurors to convict on the murder and attempted murder charges without necessarily finding that the shooter specifically intended to kill the people who were shot.

The phrase that intent to kill (or a premeditated intent to kill) need not be "directed at a specific individual" has been used to refer to very different legal principles, some of which require an intent to kill a specific victim and some of which do not. It has been used to refer to what is now called a "concurrent intent" principle, under which the attacker specifically intends to kill any *and all* group members, but need not "pre-select" individuals to kill (see People v. Smith (1973) 33 Cal.App.3d 51, 65 [citing Sutic and Aranda, infra, which were transferred intent cases]; People v. Orabuena (1976) 56 Cal.App.3d 540, citing Smith, supra; see also People v. Bland, supra, 28 Cal.4th at p. 323). It has been used to refer to a transferred intent principle, under which the actor's premeditated intent to kill one person can "transfer" to an unintended victim. (People v. Sutic (1953) 41 Cal.2d 483, 491-492; People v. Aranda (1938) 12 Cal.2d 307, 310; In re Sergio R. (1991) 228 Cal.App.3d 588, 596 [citing Orabuena, supra, which was concurrent intent case].) It has even been used to support a reading of the intent element in the homicide statutes (a reading that has been rejected) as requiring only the intent to kill "***a*** person," not necessarily the person killed, without resort to the transferred

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considered."].)

intent doctrine (People v. Bland, supra, 28 Cal.4th at p. 323, citing Justice Mosk's concurring opinion in People v. Scott (1996) 14 Cal.4th 544, 554.)

Given that the phrase has been used to apply to such different principles, it seems clear at the very least that the phrase is ambiguous. Applying the Chapman analysis to determine whether the failure to provide a voluntary manslaughter instruction as to Trudell was harmless beyond a reasonable doubt, the question then becomes whether the jury's verdicts finding Matthew guilty of the premeditated murder and attempted premeditated murders of Trudell, John, and James necessarily reflect findings that the perpetrator specifically intended to kill each of those victims. The record does not support such a conclusion.

It entirely possible that the jurors understood the ambiguous instruction to mean that so long as the perpetrator intended to kill one person in firing his weapon, that intent applied to any of the people who were shot, even if they were shot unintentionally or without an intent to kill those "specific individuals." This possibility becomes even greater when the other instructions and arguments are considered. The instructions on intent to kill spoke only in terms of an intent "to kill" (CT 704; RT 3262), intent to "kill a human being" (CT 703, 705; RT 3263-3264), intent to "kill another human being" (CT 707; RT 3265), and intent to "kill another person" (CT 707; RT 3265). They did not speak in terms of intending to kill the "person killed" or the "person injured" or the specific victims by name. As judges and commentators have observed in construing the same language in the statutes, it is susceptible of a reading that the intent to kill element only requires an unlawful intent to kill "***a*** human being," not necessarily the person killed, or an "'intent to kill ***a***, not a specific, human being.'" (People v. Scott, supra, 14 Cal.4th 544, 554, conc. opn. of Mosk, J. [and authorities cited therein].) Hence, this reading achieves the same result as the transferred intent doctrine, being that the defendant need not intend to kill the deceased or injured victim so long as he intended to kill *someone* in harming or killing the victim. (Ibid; accord People v. Bland, supra, 28 Cal.4th at p. 323.) In other words, the language of the instructions

as a whole is susceptible of a reading that – in colloquial terms – a shooter's intent to kill follows his bullet, even if that bullet strikes an unintended victim.

The arguments lend further support to the possibility that the jurors so understood the instruction. Because the prosecutor was emphatic that the shooter intended to kill each specific victim (going so far as to argue that he moved around the room and took careful aim at each victim, although none of the eyewitnesses even suggested as much), he never addressed the question of liability if that hypothesis were not true. (RT 3283-3284, 3289-3290, 3442-3444.) However, Mr. Selvin – counsel for Michael – briefly argued that the shooter intended to shoot and to kill Dewayne Arnold and that the other victims were unintended, having been struck accidentally by an inexperienced shooter who did not have control over his automatic weapon. (RT 3363.) Significantly, however, he conceded that the boys were guilty of second-degree murder as to all of the victims, even those shot unintentionally. (RT 3324-3328.) He explained, "whether [the shooter]'s actually firing at everybody or he's firing at one and can't control it and he's firing at the others, ***legally it doesn't matter***." (RT 3363, emphasis supplied.) Even if he did not intend to kill all of the victims, "when he's firing, he has an intent to kill;" consequently, the shooter was guilty of murder even as to any unintended victims. (RT 3363-3364.) Counsel for Matthew never addressed whether the shootings of the other victims were intentional or unintentional nor did either defense attorney ever differentiate between the murder and attempted murder charges or specially address the latter charges. (See RT 3317-3776, 3380-3423; see, e.g., People v. Brady (1987) 190 Cal.App.3d 124, 137 [arguments of defense counsel did not clarify potential ambiguity in instructions where defense counsel never identified critical issue for jury to resolve]; People v. Crandell (1988) 46 Cal.3d 833, 885 [where no defense argument made, argument of counsel did not clarify misleading nature of instruction and prosecutor's argument].)

In sum, given the instructions and the argument as a whole, the jury may well have returned its verdicts as to Trudell, John, and James based on a finding

that the perpetrator shot them with a premeditated intent to kill "a human being" – being Arnold and Watchman – but not **those** human beings. Hence, their verdicts do not prove that the trial court's refusal to instruct on voluntary manslaughter as to Trudell based on a theory that he was shot unintentionally, in the course of the reasonably impassioned, intentional shootings of Arnold and Watchman, was harmless beyond a reasonable doubt.

In any event, even if the jury necessarily found that all of the shootings were intentional, that does not mean that they would have rejected the alternative theory that the perpetrator shot them in a reasonable heat of passion because he reasonably associated them with the series of events that provoked his passion had they been properly instructed. (See Part Argument C-2, above; People v. Breverman, supra, 19 Cal.4th at pp. 149-152, 163; People v. Minifie, supra, 13 Cal.4th at pp. 1067-1068; People v. Bridgehouse, supra, 47 Cal.2d at p. 409-414.)

In sum, none of the jury's verdicts demonstrate beyond a reasonable doubt that they resolved the issues posed by the erroneously omitted instructions adversely to Matthew. Turning, then, to the evidence, it is beyond dispute that the errors were not harmless beyond a reasonable doubt.

#### 4. Considering the evidence as a whole, respondent cannot prove beyond a reasonable doubt that the errors did not affect the verdicts.

Once again, according to the prosecution's theory, although Michael was the "leader" and the one "in command," Matthew was the actual shooter. (RT 3292, 3298.) However, he argued that the distinction was irrelevant since the evidence established that the boys had an agreed upon plan to kill – likely "conditioned" upon encountering resistance from the apartment's occupants – before arriving at the apartment. (RT 3290-3291, 3298, 3308-3309, 3312-3313.) Hence, both boys were equally guilty of all of the charged crimes and the

"multiple murder" special circumstance under an aiding and abetting theory. (Pen. Code § 190.2, subd. (c).)

As discussed in Argument I, it seems clear from the jury's verdicts that it determined Matthew was the actual shooter. It is equally clear, however, that the jury rejected the prosecution's theory that the boys had a premeditated plan to kill – even a "conditional" one – when they went to the apartment armed with weapons. Again, the jury found Michael guilty of the charged first-degree murders and attempted murders with premeditation, but acquitted him of the multiple murder special circumstance allegation. (CT 739-751.) Of course, the only additional requirement for the multiple murder special circumstance was that he intended to kill in aiding and abetting the shootings. Again, during deliberations, the jurors specifically inquired into this requirement. (CT 659.) The court answered their inquiry by explaining that the aider and abettor must intend to kill and such intent exists where "the purpose, plan, or goal, includes killing." (CT 659.1) Thus, it is clear from the verdicts that the jurors concluded Michael did not intend to kill, but rather convicted him on the theory that the shooting was a "natural and probable consequence" of the assault with a firearm which he aided and abetted. (Pen. Code § 190.2, subd. (c); CT 697 [jurors instructed on liability for natural and probable consequences of aiding and abetting assault with a firearm].) Particularly since Michael was characterized as the "leader" – a characterization with compelling evidentiary support – it follows that the jurors determined that the boys' original plan was only to commit an assault with a firearm and that Matthew only formed the intent to kill in response to the suddenly developing situation they encountered at the apartment.

As horrific and tragic the result, there was enormous room for doubt that this 18-year-old defendant with no criminal record or history of violence harbored malice when he pulled the trigger of his weapon. Matthew was barely more than a child when he was awakened in the middle of the night by his mother who, by *all* accounts, had been the recent victim of an unprovoked act of brutality. According

to the prosecution's own evidence, his mother was extremely upset, sobbing, and hysterical when she went home to her sons. She recalled telling them that she had been beaten and the circumstantial evidence strongly indicated that she told them a group of people at Watchman's apartment had beaten her and stolen her purse, and that they believed her. The boys were understandably quite upset by her appalling story and appearance. Far from allowing them time to "cool," their mother's unceasing "hysteria" as they drove around looking for Watchman's apartment (at her insistence) could only have further stoked the flames of their passion.

When the boys entered the apartment, Michael furiously and repeatedly demanded to know who had "beaten" their mother and "stolen" her purse. The intensity of the situation only escalated. Watchman responded by ordering them to "get the hell out of my house." Dewayne Arnold, a large man who no doubt was emboldened by the extraordinary amount of alcohol and methamphetamine in his system, demanded "what the fuck was going on," stood up, and a physical confrontation occurred between the two men during which a lamp was knocked over with a loud crash and a single shot was fired from their location. The next round of rapidly fired shots exploded in the midst of this violent and terrifying confusion. A total of 14 .223 caliber bullets were fired, striking Arnold seven times and Watchman three times. Three people behind Watchman and Arnold, James, John, and Trudell, who were struck once, once, and twice, respectively. In sum, there was compelling evidence that the perpetrator was reasonably provoked to passion and committed the shooting in the heat of it.

While the prosecutor argued that the boys' conduct following the shooting evidenced calm deliberation (RT 3313-3314), this Court has held that a defendant's post-crime conduct is "irrelevant to ascertaining defendant's state of mind immediately before, or during, the killing." (People v. Anderson, supra, 70 Cal.2d at p. 32 [defendant's effort to "cover up" killing irrelevant to whether killing premeditated and deliberate or committed in state of "explosive" passion]; accord People v. Jiminez, supra, 95 Cal.App.2d 840, 842-843 [post-crime conduct,

including flight, insufficient to prove premeditation]; Austin v. United States (1967 D.C. App. Ct.) 382 F.2d 129, 139-140 [premeditation and deliberation "is manifestly not established beyond a reasonable doubt by evidence showing that (the defendant) acted with deliberation afterward, in an effort to avoid detection and punishment . . . ."].) Similarly, while the prosecutor emphatically argued that the number of gunshot wounds to the victims proved a cold-blooded killing (RT 3280, 3281, 3441), the Court has consistently recognized that, "[a]bsent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder." (People v. Anderson, supra, 70 Cal.2d at p. 25; accord People v. Alcala (1984) 36 Cal.3d 604, 626; People v. Birreuta, supra, 162 Cal.App.3d at p. 462, n. 6 [evidence supported finding of killings in sudden quarrel or heat of passion where defendant shot wife six times and a second woman four times].) Thus, the facts that Arnold was shot seven times and Watchman shot three times was completely consistent with the perpetrator having been reasonably provoked into a heat of passion directed toward them.

As to the shootings of Leslie Trudell, who was shot twice, and Rodney James and Beulah John, who were each shot only once, the evidence discussed in part C-2 strongly suggested that they were the unintentional byproducts of the explosion of violence directed toward Arnold and Watchman. While the prosecutor made much of the locations of the bloodstains "all around the room" to argue that the shooter must have intentionally shot each individual victim, the evidence simply did not support his position. (RT 3283-3284, 3444.) The bloodstains corresponded to Trudell's and James's positions immediately behind the couch when they were shot, in the firing line of Arnold and Watchman. (People's Exhibits 31 and 33; Deft. A' Exhibit H.)

The only bloodstain that was not directly behind the couch was located on the kitchen floor, which appears from the photographs to have been only two or three feet from the kitchen table. (People's Exhibit 33; Deft. A's Exhibit H.)

According to Beulah John, she was sitting at the kitchen table, located directly behind the couch, when she was shot. (RT 2523-25254, 2529-2530; Deft. A's Ex. A.) While John could not recall anything between the time that she was shot and being transported by ambulance to the hospital, Martin Jones recalled seeing John take a few steps after the shooting ceased. (RT 2348.) She did eventually end up on the kitchen floor, where both Victoria Gonzalez and Lea Coss saw her. (RT 2693-2694, 2745.) Hence, the clear inference to be drawn from all of this evidence was that John was in the same line of fire at the kitchen table when she was shot, after which she took a step or to into the kitchen, where she lay down and bled, accounting for the bloodstain at that location.

In addition to the number of gunshot wounds, the prosecutor also argued that the locations of the wounds proved that the victims were all shot intentionally. In making this argument, the prosecutor misstated the evidence in both respects. Although he argued that all of the victims were shot in vital spots, rather than in the legs or other extremities (RT 3441), in truth, Beulah John was shot in the leg and Rodney James was shot in the arm or shoulder. (RT 2270, 2437, 2523, 2744-2745.) Similarly, although the prosecutor argued that John and James were each shot twice (RT 3292, 3441-3442), each was shot only once. (RT 2270, 2437, 2523, 2557, 2568-2569.) In fact, contrasted with the number and locations of the gunshot wounds to Arnold and Watchman, the number and locations of the wounds to the other victims supports, rather than undermines, the inference that they were shot unintentionally in the course of shooting Arnold and Watchman. Finally, the fact that several other people in the room who were *not* in the line of fire were *not* shot lends strong support to the inference that the people who were in the line of fire were not shot intentionally.

In any event, for all of the reasons discussed above, even if all of the shootings were intentional, there was compelling evidence that they were all committed in a reasonable heat of passion. At the very least, the evidence that the shootings were *not* committed in a reasonable heat of passion was not "so

overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence" of the error. (Yates v. Evatt, supra, 500 U.S. at p. 405; see also People v. Rios, supra, 23 Cal.4th at pp. 450, 462 [where issue properly presented, prosecution must prove beyond a reasonable doubt that killing was *not* committed in reasonable heat of passion in order to prove malice]; Mullaney v. Wilbur, supra, 421 U.S. at pp. 698-699.) Because the Court cannot determine beyond a reasonable doubt that that the verdicts were surely unattributable to the erroneous omission of voluntary manslaughter and attempted voluntary manslaughter instructions, the judgment must be reversed. (Sullivan v. Louisiana, supra, 508 U.S. at p. 579.)

## III. THE CUMULATIVE EFFECT OF THE OMISSION OF CRITICAL INSTRUCTIONS ON HEAT OF PASSION AND PROVOCATION AND THEIR RELATIONSHIP TO PREMEDITATION ALONG WITH THE PROSECUTOR'S REPEATED MISSTATEMENTS OF THE APPLICABLE LEGAL PRINCIPLES VIOLATED STATE LAW AND MATTHEW'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, AND TO A RELIABLE GUILT PHASE DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

### A. Introduction.

The first-degree murder charges and premeditated, attempted murder charges required the prosecution to prove beyond a reasonable doubt that the perpetrator harbored malice and premeditated the shootings. (Pen. Code §§ 664, 187, 189.) As discussed above, defense counsel requested instructions on the lesser-included offense of voluntary manslaughter in a reasonable heat of passion, but the court denied the request as to all but one count because it believed that provocation must come from the victim killed or injured. (CT 587-591.)

In the alternative, counsel for both brothers explained that their defense theory was that the evidence of heat of passion and provocation nevertheless raised reasonable doubt that the boys premeditated and deliberated and therefore were guilty of the lesser-included offense of second-degree murder. Counsel argued that even if provocation must come from the victim in order to reduce murder to manslaughter, there is no such limitation on the kind of provocation relevant to the question of whether premeditation exists. (RT 2954-2957, 2959-2962, 3184-3185.) Hence, on the theory that the boys committed the shooting in a heat of passion, which is inconsistent with premeditation and deliberation, counsel requested instructions on the lesser-included offense of second-degree murder and

on the relevance of provocation evidence with CALJIC No. 8.73 as to all counts. (RT 2954-2957, 2959-2962, 3184-3185.)

The prosecutor emphatically argued that provocation must come from the victim not only to reduce murder to manslaughter but also to "reduce" first-degree murder to second-degree murder, and therefore requested instructions limiting the jury's consideration of the evidence to the Regina Watchman charge. (RT 2958, 3183; CT 12733-12734.) The court disagreed, reasoning that the jury could consider any evidence of provocation on the question of whether the shooter premeditated and deliberated all of the killings and any attempted killings. (RT 3185-3186.)

Hence, concluding that there was substantial evidence from which the jurors could find that the shootings were not premeditated, the trial court instructed the jury on second-degree murder as lesser-included offenses to the charged murders. (CT 705; RT 3263-3264.) In addition, the court provided a modified version of CALJIC No. 8.73, which informed the jurors, "[i]f the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation." (CT 712; RT 3268.) Finally, as noted in Argument II, above, with respect to passion and premeditation, the trial court provided only the standard premeditation instruction, CALJIC No. 8.20, which made fleeting, unadorned reference to the term "heat of passion." (CT 704, RT 3262-3263.) However, rather than tailoring the requested instructions on voluntary manslaughter in a reasonable heat of passion to conform to the defense theory of second-degree murder in an unreasonable (or subjective) heat of passion, the court simply omitted them in their entirety. Hence, the jury instructions did not define or explain the terms "heat of passion" or "provocation" and explain the relationship between the two terms and their dual relationship to the element of premeditation and deliberation.

As fully explained below, by refusing the instructions on voluntary manslaughter in the heat of passion in their entirety rather than tailoring them, the instructions provided were woefully inadequate to explain the critical legal principles underlying the boys' defense that the shootings were committed in a subjective state of passion, and therefore not with premeditation, in violation of state law and Matthew's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. At the very least, the instructions were incomplete, ambiguous, and potentially misleading with regard to the applicable law and the scope of the evidence the jury could consider in assessing whether the state had proved premeditation beyond a reasonable doubt. That potential to mislead was realized through the prosecutor's repeated misstatements of the applicable law, which included, *inter alia*, misstatements that the "provocation" referred to in CALJIC No. 8.73 must come from the victim killed or injured, that provocation must be actual rather than perceived, and that any lethal response to such provocation must be "reasonable" in order to "reduce" the crime to second-degree murder. Because it is reasonably likely that the jurors in this capital case were misled regarding the law applicable to the critical premeditation element, to the only lesser-included offense option available to them, and to Matthew's primary defense theory, as well as to the scope of constitutionally relevant evidence that they could consider in resolving the critical questions posed by this case, the errors violated state law as well as Matthew's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Finally, because respondent cannot prove the error harmless beyond a reasonable doubt, the judgment must be reversed.

### B. The General Legal Principles Regarding Instructions, Arguments, And The Interplay Between The Two.

#### 1. The trial court's instructional obligations.

As discussed in Argument II, it is well established under California law that "even in the absence of a request, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (People v. St. Martin (1970) 1 Cal.3d 524, 531; accord, e.g., People v. Wickersham, supra, 32 Cal.3d at p. 324.) "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. [Citations.]" (People v. Wilson, supra, 66 Cal.2d at p. 759.)

Included within this *sua sponte* instructional obligation is the duty to instruct on lesser-included offenses whenever the "evidence raises a question as to whether all of the elements of the charged offense were present . . . ." (People v. Breverman, supra, 19 Cal.4th at p. 154.) In this regard, the court must provide complete and accurate instructions on "all theories" of a lesser-included offense. (Id. at p. 162; People v. Wilson, supra, 66 Cal.2d at p. 759 [trial court erred where it instructed on lesser-included offense of misdemeanor manslaughter but failed to instruct *sua sponte* on misdemeanor basis for manslaughter theory, being brandishing and its elements].)

Given the need for heightened reliability in capital cases, a trial court's instructional obligations are greater in such cases. (Beck v. Alabama, supra, 447 U.S. at p. 637-638.) Hence, the federal constitution also guarantees capital defendants the right to complete and accurate instructions on lesser-included offenses supported by the evidence. (Ibid.) This guarantee applies even if the jury retains discretion at sentencing to impose a sentence less than death. (Hooks v. Ward (10th Cir. 1999) 184 F.3d 1206, 1227; see also Beck v. Alabama, supra, at p. 629 [judge retained discretion to review jury's sentence of death and impose life imprisonment].)

Furthermore, as discussed in Argument II-B, the Fifth, Sixth, and Fourteenth Amendments require the trial court to provide factually supported instructions on the accused's theory of defense upon request. (See, e.g., Conde v.

Henry, supra, 198 F.3d 734, 739-740; Bashor v. Riley (9th Cir. 1984) 730 F.2d 1228, 1240.) Because it is the trial court's ultimate responsibility to ensure that the jury is instructed correctly, such instructions must be complete and accurate. (See, e.g., People v. Wickersham, supra, 32 Cal.3d at p. 326; People v. Bolden (1990) 217 Cal.App.3d 1591, 1597; United States v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1411-1414 [where trial counsel requested general intoxication instruction, but not instruction specifically relating intoxication to aiding and abetting liability, trial court erred in failing to provide such instruction on own motion]; Bashor v. Risley, supra, 730 F.2d at p. 1240 [due process entitles defendant to adequate instruction on his or her theory of defense].)

Thus, even if the trial court is not under a *sua sponte* duty to give a particular instruction, once it agrees to instruct on a particular legal principle in support of a defense theory, it must to do so accurately and completely. (See, e.g., People v. Castillo (1997) 16 Cal.4th 1009, 1015 [although no sua sponte duty to instruct on voluntary intoxication, once trial court does so, it has obligation to do so correctly; if instructions were misleading to the extent that they caused jury to believe it could not consider such evidence on the issue of premeditation, it would amount to trial court error even in absence of request or objection]; People v. Montiel (1993) 5 Cal.4th 877, 942 ["though there is no *sua sponte* duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation (citation), when such instructions are given, they should be accurate and complete"]; People v. Cummings, supra, 4 Cal.4th at p. 1337; People v. Malone (1988) 47 Cal.3d 1, 49.) If the court perceives that requested instructions are incorrect in part, it must tailor the instructions to conform to the defense theory rather than deny them outright. (See, e.g., People v. Falsetta (1999) 21 Cal.4th 903, 924; People v. Fudge (1994) 7 Cal.4th 1075, 1110; People v. Malone, supra, 47 Cal.3d at p. 49; People v. Jeffers (1996) 41 Cal.App.4th 917, 924-925; People v. Brady, supra, 190 Cal.App.3d 124, 136 [trial "court must correct (perceived)

defects in proffered instructions where the nature of the defendant's theory is made clear to it."]; United States v. Newcomb (6th Cir 1993) 6 F.3d 1129, 1132.)

**2. The prosecutor's duties.**

With respect to the duty of the prosecutor, it is not to secure convictions but rather to ensure that justice is done and that the defendant receives a fair and impartial trial. (Berger v. United States (1934) 295 U.S. 78, 88; In re Ferguson (1971) 5 Cal.3d 525, 531; N. Mariana Islands v. Bowie (9th Cir. 2001) 243 F.3d 1109, 1116.) For these reasons, "prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (United States v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1323, citing Berger, supra; accord People v. Espinoza (1992) 3 Cal.4th 806, 820 [a prosecutor is held to a standard higher than that imposed on other attorneys because he or she exercises the sovereign power of the state].) For the same reasons, "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 (1962) 58 Cal.2d 229, 247; accord Berger v. United States, supra, at p. 88; People v. Brophy (1954) 122 Cal.App.2d 638, 652, People v. Talle (1952) 111 Cal.App.2d 650, 677.)

Given these truths, under both state and federal law, it is serious misconduct for a prosecutor to misstate the law in closing argument to the jury. (People v. Hill (1998) 17 Cal.4th 800, 829-830; People v. Marshall, supra, 13 Cal.4th at p. 831; People v. Bell (1989) 49 Cal.3d 502, 538; People v. Nguyen (1995) 40 Cal.App.4th 28, 35-37; United States v. Rodrigues (9th Cir. 1999) 170 F.3d 881; United States v. Artus (9th Cir. 1979) 591 F.2d 526, 528.) Furthermore, because one hallmark of a fair jury trial and a reliable verdict is that the jurors focus on the vital factual and legal issues presented by the case (see, e.g., Shannon v. United States (1994) 512 U.S. 573, 579; United States v. Layton (9th Cir. 1985) 767 F.2d 549, 556; In re Rodriguez (1981) 119 Cal.App.3d 457, 467),

prosecutorial argument that serves to distract or confuse the jury or becloud the principal issues is improper. (See, e.g., People v. Edwards (1991) 54 Cal.3d 787, 835-836; Aliwoli v. Carter (7th Cir. 2000) 225 F.3d 826, 829-830, cert. denied 531 U.S. 1167 (2001); Arrieta-Agressot v. United States (1st Cir. 1993) 3 F.3d 525, 529.)

### 3. The interplay between instructions and argument.

Even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (People v. Brown (1988) 45 Cal.3d 1247, 1255.) For instance, even standard and generally correct instructions may be incomplete or potentially ambiguous if they are not responsive to the evidence. (See, e.g., People v. Bolden, supra, 217 Cal.App.3d at p. 1603; People v. Nguyen (1988) 204 Cal.App.3d 181; People v. Brady, supra, 190 Cal.App.3d at pp. 134-137.) Such instructions may be misleading when considered with the prosecutor's argument, even if that argument is not patently incorrect or improper. (People v. Brown, supra, at p. 1255; see also People v. Claire (1992) 2 Cal.4th 629, 663; People v. Lucero (1988) 44 Cal.3d 1006, 1031 and n.15 ["our concern is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury"]; People v. Edelbacher, supra, 47 Cal.3d at p. 1035 and n.16 [because prosecutor's argument exacerbated instructional error, unnecessary to resolve whether argument amounted to misconduct to which objection ordinarily necessary to preserve]; Taylor v. Kentucky (1978) 436 U.S. 478, 486-490 and 14 [despite provision of generally adequate and correct instructions on prosecution's burden of proof, refusal to provide requested instructions on presumption of innocence and prohibition against considering indictment as evidence was error in light of prosecutor's argument, regardless of whether the "prosecutorial comments, standing alone, would rise to the level of reversible error . . . [because]

they are relevant to the need for carefully framed instructions designed to assure that the accused be judged only on the evidence"].)

Where it is reasonably likely that "the interplay of argument and individually proper instructions produced a distorted meaning" of the applicable legal principles, error has occurred under state law. (People v. Brown, supra, at p. 1255-1256; accord People v. Claire, supra, at p. 663; People v. Edelbacher, supra, 47 Cal.3d at pp. 1035-1040 [combination of potentially ambiguous instruction and potentially misleading but not necessarily incorrect argument by the prosecutor created a reasonable likelihood jurors were misled]; People v. Crandell, supra, 46 Cal.3d at pp. 882-885 [same]; People v. Brady, supra, 190 Cal.App.3d at p. 137.) Where it is reasonably likely that the jury was misled to believe that it could not consider constitutionally relevant evidence (Boyde v. California (1990) 494 U.S. 370, 380), or that it applied the instructions in some other way that violated the constitution (Estelle v. McGuire (1991) 502 U.S. 62, 71-72), the error is also one of federal constitutional dimension. (See also, e.g., People v. Roder (1983) 33 Cal.3d 491, 503-504, and n. 13 [combination of potentially ambiguous instruction on presumption and prosecutor's argument misstating the legal principles addressed therein created reasonable likelihood of misunderstanding and amounted to constitutional error]; Belmontes v. Woodford (9th Cir. 2003) 350 F.3d 861, 900-907.)

### C. The Legal Principles Applicable To Second-Degree Murder In A Subjective Or Unreasonable Heat Of Passion.

Of course, in order to assess the propriety of instructions and/or argument, it is necessary to "ascertain at the threshold what the relevant law provides." (People v. Warren (1988) 45 Cal.3d 471, 487.) Both first and second-degree murder require malice aforethought. (Pen. Code § 187.) The difference between the two crimes is that the former requires the additional element of premeditation

and deliberation (or murder by some specified means). (Pen. Code § 189.) State law and the federal constitution impose on the prosecution the burden or proving the elements of malice and premeditation and deliberation beyond a reasonable doubt. (Pen. Code § 189; see, e.g., People v. Anderson, supra, 70 Cal.2d at p. 25; United States v. Gaudin, supra, 515 U.S. at p. 510; Sullivan v. Louisiana, supra, 508 U.S. at pp. 267-278.)

As discussed at length in Argument II, malice is negated when both the subjective and objective components of heat of passion are satisfied. (See, e.g., People v. Gutierrez, supra, 28 Cal.4th at p. 1044.) The objective component requires "provocation" in the sense that a reasonable person would be provoked into a state of passion under like circumstances. (See, e.g., People v. Breverman, supra, 19 Cal.4th at p. 163.) The subjective component is satisfied where the defendant actually killed in the heat of "passion," a shorthand reference to "hot blood," "hot anger," or any other "'violent, intense, high-wrought, or enthusiastic emotion' [Citation], other than revenge. [Citation]." (People v. Breverman, supra, 19 Cal.4th at p. 163; People v. Steger (1976) 16 Cal.3d 39, 547; People v. Bender (1945) 27 Cal.2d 164, 178-179; People v. Taylor (1961) 197 Cal.App.2d 372, 380.)

Where only the subjective prong is satisfied, the crime is murder, but only second-degree murder. This is so because the subjective mental state of heat of passion is inconsistent with, or prevents, premeditation and deliberation. (People v. Wickersham, supra, 32 Cal.3d at p. 329; People v. Valentine, supra, 28 Cal.2d at p. 132; People v. Bender, supra, 27 Cal.2d at pp. 178-179, 184-186 [killing perpetrated by "violent act on the spur of a moment during hot anger" is inconsistent with premeditation and deliberation; where evidence demonstrated such killing but no evidence of provocation to negate malice, Court reduced crime from first to second-degree murder]; People v. Sanchez (1864) 24 Cal. 17; People v. Padilla, supra, 103 Cal.App.4th 675 [if hallucination incites defendant to kill in a state of passion, there is not adequate "provocation" to negate malice;

nevertheless, the defendant's subjective state of passion would "negate" premeditation and reduce first-degree murder to second-degree]; People v. Fitzpatrick (1992) 2 Cal.App.4th 1285, 1295; People v. Thompkins (1987) 195 Cal.App.3d 244, 251.) In order to differentiate from the other ways in which to raise reasonable doubt on the element of premeditation, and since the heat of passion necessary to negate malice and reduce murder to manslaughter must be a reasonable one, this theory of second-degree murder may properly be described as "unreasonable heat of passion" or "subjective heat of passion."

So understood, the critical question is whether the actor committed the killing in an actual state of impulsive "passion." In making this assessment, "a defendant is entitled to have the jury take into consideration all the elements in the case which might be expected to operate on his mind," including anything that might have "provoked" his passion. (People v. Smith, supra, 151 Cal. at p. 628; accord People v. Minifie, supra, 13 Cal.4th at p. 1064; People v. Bridgehouse, supra, 47 Cal.2d at p. 410.) In other words, while the existence of someone else's conduct, or "provocation," is highly *relevant* to this question, it is *not necessary* to demonstrating a subjective heat of passion inconsistent with premeditation. (See, e.g., People v. Wickersham, supra, 32 Cal.3d. at p. 327, 329 [evidence would have supported second-degree murder under unreasonable heat of passion theory where there was substantial evidence killing committed in hot blood, yet "virtually no" evidence of provocation]; People v. Valentine, supra, 28 Cal.2d at pp. 131-135 [killing in heat of passion inconsistent with premeditation, to which evidence of even slight provocation is relevant; instruction to contrary erroneous]; People v. Padilla, supra, 103 Cal.App.4th 675 [if defendant was provoked to passion based on his own hallucinations, it would not satisfy objective component for voluntary manslaughter, but would satisfy subjective component to show heat of passion and negate premeditation]; In re Thomas C., supra, 183 Cal.App.3d at p. 794 [while defendant's depressed mental state and distress over family problems supported finding of subjective heat of passion, it did not amount to adequate provocation

under objective reasonable persons standard; trial court correctly concluded defendant's mental state inconsistent with premeditation and therefore guilty of second-degree murder, but did not negate malice to reduce to voluntary manslaughter]; People v. Webb (1956) 143 Cal.App.2d 402, 423 [in resolving whether evidence was sufficient to prove premeditation rather than impassioned killing, "the evidence of provocation is relevant but not decisive. It is a factor, but not a conclusive factor, that should be considered on the issue of premeditation"]; see also People v. Anderson, supra, 70 Cal.2d at p. 28 [killing in heat of passion or "explosion of violence" is inconsistent with premeditation without regard to existence or non-existence of provocation]; People v. Pensinger (1991) 52 Cal.3d 1210, 1239 [same].)

Given that the critical question is the defendant's subjective mental state, the jury can consider *anything* that could have provoked the defendant's passion; put another way, the jury can consider any evidence that the defendant "formed the intent to kill as a direct response to" a particular act or event and "acted immediately" to carry it out. (People v. Wickersham, supra, 32 Cal.3d at pp. 327, 329 [where there was "virtually no evidence" of provocation, jury could nevertheless find that defendant formed the intent to kill immediately and only in response to victim's attempt to grab defendant's gun and therefore the evidence was sufficient to warrant instructions on second-degree murder under an unreasonable heat of passion theory as well as on the relevance of provocation evidence to that theory].) The kind of relevant provocation evidence that can and should be considered in this context obviously need not be of a character sufficient to amount to "adequate provocation" in the voluntary manslaughter context, since otherwise there would be no distinction between murder and manslaughter. (People v. Fitzpatrick, supra, 2 Cal.App.4th at p. 1295; accord People v. Wickersham, supra, 32 Cal.3d at p. 32; People v. Valentine, supra, 28 Cal.2d at pp. 131-135; People v. Thomas (1945) 25 Cal.2d 880, 886; People v. Padilla, supra, 103 Cal.App.4th at p. 678.)

For instance, even assuming arguendo that provocation must come from the victim in order to establish reasonable heat of passion under section 192, there is no such limitation on the kind of relevant provocation evidence that the jury can and should consider in determining whether the defendant killed in the heat of an "unreasonable" heat of passion. Nor is there a threshold requirement that provocation must actually have occurred or even that the defendant must *reasonably* believe it occurred. If there is any evidence that the defendant believed, even if unreasonably, that a particular event occurred and formed the intent to kill in an emotional response to it, the jury can and should consider that evidence in deciding whether the killing was premeditated or committed in a fit of passion. (See, e.g., People v. Padilla, supra, 103 Cal.App.4th 675 [defendant's hallucinations can and should be considered in assessing whether defendant committed first-degree murder with premeditation or second-degree murder in subjective heat of passion; trial court committed prejudicial error in excluding such evidence].) The Court has recognized that the exchange of "heated words," a struggle, or even the victim's otherwise reasonable act of grabbing the defendant's gun, immediately before the killing is highly relevant to the question of whether the defendant killed in a subjective state of passion and therefore whether he premeditated and deliberated. (People v. Wickersham, supra, 32 Cal.3d at p. 329.)

Finally, pursuant to the foregoing authorities, where the defendant is charged with first-degree premeditated murder and there is evidence that the killing was committed in an unreasonable or subjective heat of passion, it "raises a question as to whether all of the elements of the charged offense were present . . . ." (People v. Breverman, supra, 19 Cal.4th at p. 154.) Hence, state law imposes upon the trial court a *sua sponte* obligation to provide "instructions on second-degree murder *under this theory.*" (People v. Wickersham, supra, 32 Cal.3d at p. 329; accord People v. Breverman, supra, 19 Cal.4th at pp. 60, 162; People v. Wilson, supra, 66 Cal.2d 749, 759.) In a capital case, the federal constitution also mandates accurate and complete instructions on this theory of lesser-included

offense where supported by the evidence. (See Beck v. Alabama, supra, 447 U.S. at pp. 637-638.) Furthermore, where the defense theory is that the defendant is guilty of second-degree murder in an unreasonable heat of passion and he requests instruction thereon, the federal constitution also entitles him to complete and accurate instructions on that theory of defense. (See, e.g., Conde v. Henry, supra, 198 f.3d at pp. 739-740; United States v. Sayetsitty, supra, 107 F.3d at p. 1414.) That is, the court must completely and accurately instruct the jury that heat of passion negatives premeditation and deliberation and therefore a killing committed in a heat of passion is second-degree murder.

With respect to the separate but related question of instructions on the relevance of *provocation* evidence to the defendant's mental state, this Court has issued conflicting decisions as to whether the trial court is required to provide such instruction *sua sponte*. (Compare People v. Mayfield (1997) 14 Cal.4th 668, 678 [no *sua sponte* duty]; People v. Johnson (1993) 6 Cal.4th 1, 43 [*sua sponte* duty]; see also People v. Steele, supra, supra, 27 Cal.4th at p. 1250 [recognizing but declining to resolve conflict].) Nevertheless, it is clear that where instruction on this principle is supported by substantial evidence and the defendant requests it in support of his defense theory, the trial court is required to provide it. (See, e.g., People v. Saille (1991) 54 Cal.3d 1103, 1120; People v. Mayfield, supra, 14 Cal.4th at p. 778 see also Bashor v. Risley, supra, 730 F.2d at p. 1240.) And, of course, once the court agrees to provide instructions in support of a defense theory, it must do so accurately and completely. (See, e.g., People v. Castillo, supra, 16 Cal.4th at p. 1015; People v. Montiel, supra, 5 Cal.4th at p. 842; People v. Cummings, supra, 4 Cal.4th at p. 1337; People v. Malone, supra, 47 Cal.3d at p. 49; United States v. Sayetsitty, supra, 107 F.3d at p. 1414.) With these legal principles in mind, Matthew now turns to the facts of this case.

### D. The Trial Court Violated State Law And The Federal Constitution By Failing To Provide Complete And Accurate Instructions On The Defense Theory That Matthew Was Guilty

**Of The Lesser-Included Offense Of Second-Degree Murder Due To An Unreasonable Heat Of Passion.**

As explained in detail in Argument II-C, there was substantial evidence that the shooting was committed in a subjective heat of passion which was a direct and immediate response to, or "provoked" by, the series of events preceding it. Trial counsel thus requested instructions on voluntary manslaughter in a reasonable heat of passion, as well as on second-degree murder under an unreasonable or subjective heat of passion theory and on the relevance of provocation evidence to support that theory. (RT 2947, 2954-2957, 2959-2962, 3184-3185; CT 587-591.)

The trial court agreed that there was substantial evidence that the shootings were committed in a subjective heat of passion and therefore instructed the jury on the lesser-included offense of second-degree murder. (CT 705; RT 3263-3264.) The court also agreed that relevant provocation evidence in this context need not come from the victim and therefore instructed the jury, over the prosecution's objection, that it could consider evidence of provocation in determining whether the shootings were premeditated, without limiting the jury's consideration of that evidence to a particular victim. (RT 3185-3186, 3268; CT 712.) As discussed above, the trial court refused the voluntary manslaughter instructions as to all of the victims other than Regina Watchman because it concluded that the doctrine was inapplicable as a matter of law as to the other victims. (RT 2947-2948.) However, rather than tailoring those instructions to conform to the defense theory of second-degree murder in an unreasonable or subjective heat of passion, the court simply rejected them in their entirety.

As noted in the above Introduction, with respect to passion and premeditation, the trial court provided only the standard premeditation instruction, CALJIC No. 8.20, which made fleeting, unadorned reference to the term "heat of passion." (CT 704, RT 3262-3263.) The court also delivered a modified version of CALJIC No. 8.73, which provided, "If the evidence establishes that there was

provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation." (CT 712; RT 3268.) Unfortunately, these instructions did not explain or define the term "heat of passion" in CALJIC No. 8.20, did not explain or define the term "provocation" in CALJIC No. 8.73, and – most critically – did not explain the critical relationship between the two terms or their dual relationship to the element premeditation. Such instructions were vital to the jurors' understanding of the boys' defense theory.

In this regard, the standard, *un*modified version of CALJIC No. 8.73 provides as follows:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, *but the provocation was not sufficient to reduce the homicide to manslaughter*, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation. (CALJIC No. 8.73, emphasis supplied.)

It is clear from the face of CALIC No. 8.73 in its standard form that it presupposes that instructions on voluntary manslaughter in the heat of passion have been provided and is intended to supplement those instructions. Of course, the standard voluntary manslaughter instructions explain the meanings of the terms "heat of passion" and "provocation" and the critical relationship between the two terms and their relationship to the element of malice. (See CALJIC Nos. 8.42, 8.43, 8.44.) Thus, in the typical case, contemplated by the face of CALJIC No. 8.73, these instructions combined with CALJIC Nos. 8.20 and 8.73 are generally sufficient to apprise the jurors of the legal principles applicable to second-degree murder under an unreasonable or subjective heat of passion theory. (See, e.g., People v. Steele, supra, 27 Cal.4th 1230-1251 [where jury was provided with CALJIC No. 8.20 *and* instructions on voluntary manslaughter in the heat of passion, there was no

prejudicial error in failing to elaborate on meaning of term "heat of passion" in CALJIC No. 8.20].)

Without such instructions, however, the jury is left with no guidance as to the meaning of the terms "heat of passion," "provocation," and their critical relationship to each other and to the element of premeditation. Of course, As this Court has recognized, if the trial court believes that requested instructions on a defense theory are incorrect, it must tailor the instructions to conform to the law rather than deny them outright. (See, e.g., People v. Falsetta, supra, 21 Cal.4th at p. 924; People v. Fudge, supra, 7 Cal.4th at p. 1110; accord People v. Brady, supra, 190 Cal.App.3d at p. 134; United States v. Newcomb, supra, 6 F.3d at p. 1132.) In a capital case such as this, where the requested instructions go to the primary defense theory and the only lesser-included offense option given the jury, both state law and the federal constitution demand complete and accurate instructions on that defense theory. (See, e.g., Beck v. Alabama, supra, 447 U.S. at pp. 637-638; People v. Breverman, supra, 19 Cal.4th at pp. 160, 162; People v. Castillo, supra, 16 Cal.4th at p. 1015, People v. Wickersham, supra, 32 Cal.3d at p. 329; Conde v. Henry, supra, F.3d at pp. 739-740; United States v. Sayetsitty, supra, 107 F.3d 1414.)

Pursuant to these authorities, where, as here: 1) the defense requests instructions on voluntary manslaughter in a reasonable heat of passion *and* on second-degree murder under an unreasonable heat of passion theory; 2) the court concludes that there is substantial evidence that the killing was committed in a subjective state of passion and agrees to instruct on second-degree murder under that theory; but 3) finds that the evidence is insufficient as a matter of law to satisfy the objective, reasonableness prong to negate malice and support a verdict of voluntary manslaughter, the court may *not* simply reject the voluntary manslaughter instructions in their entirety. Rather, the court should modify the requested voluntary manslaughter instructions to conform to the law relating to

defense theory of second-degree murder under an unreasonable or subjective heat of passion.

Specifically, one of the standard voluntary manslaughter instructions, CALJIC No. 8.42 provides:

> To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation.
>
> [Legally adequate provocation may occur in a short, or over a considerable, period of time.]
>
> The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.
>
> If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

This instruction should be modified to explain that, in assessing whether the defendant acted in the heat of passion and not with premeditation, "The question to be answered is whether, at the time of the killing, *the reason of the accused* was obscured or disturbed by passion to such an extent that he acted rashly and without deliberation and reflection, and from passion rather than from judgment." (See, e.g., People v. Wickersham, supra, 32 Cal.3d at p. 329; People v. Valentine, supra, 28 Cal.2d at p. 132; People v. Padilla, supra, 103 Cal.App.4th at p. 678.) With regard to relevant provocation evidence, the instruction should be modified to explain that, in answering whether the defendant acted with premeditation or from passion, the jury may consider "[all of] the circumstances in which the defendant was placed and the facts that confronted him," including whether his passion was provoked. (See, e.g., People v. Bridgehouse, supra, 47 Cal.2d at p. 410; People v. Smith, supra, 151 Cal. at p. 628.) The jury should be instructed that the act or event provoking the defendant's passion may be real or perceived, need not come from any particular source, and need not be such as to provoke passion in a reasonable person, so long as it "excite[d] and arouse[d] this defendant's passion" and he "act[ed] under the influence of that passion."

Similarly, CALJIC No. 8.44 provides:

> Neither fear, revenge, nor the emotion induced by and accompanying or following an intent to commit a felony, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter. Any or all of these emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. Also, any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether that choice is reasonable or unreasonable.

This instruction should simply be modified to delete "in the law of manslaughter" and substitute "in the law of premeditation, as defined in CALJIC No. 8.20."

Once agan, absent such instructions, untethered, unadorned references to "heat of passion "in CALJIC No. 8.20 and "provocation" in CALJIC No. 8.73 are

utterly inadequate to explain the relevant legal principles to the jurors. In this regard, the concerns expressed by Justice Cardozo over 75 years ago highlight the virtual impossibility of lay jurors understanding the delicate dividing line between an impassioned and impulsive though intentional killing and a premeditated and deliberated killing without clear, complete direction from the court. In addressing New York law, under which – like California – premeditation and deliberation may be achieved in a matter of seconds, so long as the actor makes a choice or "decision" to kill or not to kill, Justice Cardozo observed:

> There can be no intent unless there is a choice, yet . . . the choice without more is enough to justify the inference that the intent was deliberate and premeditated. The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its formation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds may be enough. . . . *The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it.* I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying phraseology, scores of men have gone to their death.

(What Medicine Can Do for Law, quoted in Austin v. United States, supra, 127 U.S. App. 180; see also CALJIC No. 8.20 [explaining that premeditation involves a "choice" to kill and may be arrived at in any period of time].) Indeed, the distinction between an impassioned and impulsive killing and a premeditated and deliberated killing is even more obscure under California law, which now provides that "[t]o prove that a killing was 'deliberate and premeditated,' it is not necessary to prove that a defendant meaningfully and maturely reflected upon the gravity of his or her act" (Pen. Code § 189) – a point on which the jurors in this case were explicitly instructed. (CT 704.)

Certainly, the need for clear and accurate instructions differentiating between a premeditated, deliberate murder and an impulsive murder committed in the heat of passion are particularly critical where, as here, the accused's very life depends on the jurors' understanding the distinction. Because those principles went to the heart of Matthew's defense and the only lesser-included offense option available to the jurors, the court's failure to provide complete and accurate instructions on the legal principles underlying second-degree murder in an unreasonable or subjective heat of passion violated state law, as well as Matthew's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments pursuant to the foregoing authorities.

In any event, as set forth below, even if the instructions were "not crucially erroneous, deficient or misleading on their face" (People v. Brown, supra, 45 Cal.3d at p. 1255), they "became so" when the prosecutor repeatedly misstated the legal principles underlying the defense theory. (See, e.g., People v. Claire, supra, 2 Cal.4th at p. 663; People v. Lucero, supra, 44 Cal.3d at p. 1031 and n.15; People v. Brown, supra, at p. 1255). Considering the record as a whole, it is more than reasonably likely that the jurors were misled as to the law regarding premeditation and Matthew's primary defense, and misled to believe that it could not consider constitutionally relevant provocation evidence in violation of Matthew's federal constitutional rights. (Estelle v. McGuire, supra, 502 U.S. at pp. 71-72; Boyde v. California, supra, 494 U.S. at p. 380.)

### E. The Interplay Between The Instructions And Arguments Created A Reasonable Likelihood That The Jury Was Misled To Apply The Instructions In A Way That Violated The Federal Constitution.

As this Court has explained, when reviewing a claim that the interplay between instructions and argument distorted the meaning of the law, it is appropriate to consider at the threshold defense counsel's arguments and whether

they clarified any ambiguity. (See, e.g., People v. Brown, 45 Cal.3d at pp. 1255-1256.) However, in conducting such review, it is essential to keep in mind the well-settled legal principled that, on matters of law, arguments of defense counsel do *not* substitute for instructions by the court. (See, e.g., Boyde v. California, supra, 494 U.S. at p. 384; Carter v. Kentucky (1981) 450 U.S. 288, 304.) As the Supreme Court explained in Boyde:

> Arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed s definitive and binding statements of the law. (Boyde v. California, supra, 494 U.S. at p. 384.)

Here, as discussed in Argument II-E-2, above, apart from the prosecutor's recitation of CALJIC No. 8.20, *none* of the attorneys even mentioned the term "heat of passion" much less explained it, connected it to the "provocation" referred to in CALJIC No. 8.73, or explained their relationship to the mental state elements of the charged crimes. Instead, rather than focusing on the critical question of whether the killing was committed impulsively, in fit of passion or intense emotion, the arguments focused almost entirely on the existence or non-existence of "provocation" and whether it "reduced" the crime to second-degree murder or negated premeditation. (See RT 3347-3348, 3373, 3375, 3446-3450; see, e.g., People v. Brady, supra, 190 Cal.App.3d at p. 137 [arguments of counsel did not clarify potential ambiguity in instructions where defense counsel never identified critical issue for jury to resolve]; accord, e.g., People v. Crandell, supra, 46 Cal.3d at p. 885.)

The prosecutor incorrectly told the jurors that the central question was whether "*provocation*" (not heat of passion) "prevented the person provoked from forming the intent to kill as a process of premeditation and deliberation." (RT 3446.) As the prosecutor incorrectly put it another way, there must be

"*provocation* that *reduces* the crime from a willful, premeditated murder to a second-degree murder . . . ." (RT 3450.) Michael's counsel similarly framed the issue as whether there was "provocation in [the shooter's] mind." (RT 3348.) In other words, the arguments of all of the parties suggested that the critical question was whether provocation somehow negated or was inconsistent with premeditation.

The problem is that neither the instructions nor the arguments explained *how* "provocation" is in any way inconsistent with premeditation. In fact, a third party's *provocation* is *not* inconsistent with premeditation and deliberation. While the defendant's *heat of passion* precludes or negates, and therefore cannot coexist with, premeditation and deliberation, a third party's provocation certainly can. In other words, an actor may be highly provoked, yet still kill with premeditation. (People v. Webb, supra, 143 Cal.App.2d at p. 423 ["although provocation is shown, in a proper case, premeditation can also exist"]; People v. Blakeley, supra, 23 Cal.4th at p. 96, dis. opn. of Mosk, J. ["in no case is (the actor) disabled by provocation from forming the indicated intent or proceeding with the indicated disregard"].)

Significantly, the prosecution conceded that the boys committed their crimes in response to acts of the victims, including the assault on their mother and Dewayne Arnold's attempt "to do something." (RT 3306-3307, 3313-3314, 3447-3450.) The prosecution also conceded that the boys were "upset about what happened to their mother." (RT 3450.) The critical question then was not whether "provocation" existed or occurred since the prosecutor implicitly conceded that they committed their crimes, and "formed the intent to kill as a direct response to" certain events (See, e.g., People v. Wickersham, supra, 32 Cal.3d at p. 327, 329.) Rather, under the law and based on the facts, the central question was whether the boys acted or responded in the heat of *passion* or anger, or "formed the intent to kill as a direct response" to those acts and "acted immediately to carry it out." (People v. Wickersham, supra, 32 Cal.3d at pp. 327, 329.)

By focusing almost entirely on the existence or non-existence of "provocation" the critical question presented by the evidence by this case – *the question on which Matthew's life hinged* – was hopelessly beclouded. The jury's focus was improperly shifted from Matthew's subjective mental state to the victims' conduct and the emotionally charged, yet legally irrelevant, question of whether they "deserved" what they got. (RT 3308, 3422, 3447; cf. People v. Minifie, supra, 13 Cal.4th at p. 1068.)

In this regard, the prosecutor argued that the only evidence of "provocation" that the jury could consider in determining whether the shooter premeditated was the conduct in which the victims *actually* engaged, as opposed to what the boys *believed* had occurred. (RT 3308, 3420-3421, 3446, 3449.) This argument was a gross misstatement of the law, advancing a standard for "provocation" that is greater than that even required in the voluntary manslaughter context. (See, e.g., People v. Lee, supra, 20 Cal.4th at p. 59 [even under objective standard of adequate provocation in voluntary manslaughter context, mistaken belief as to provocation is sufficient]; People v. Logan, supra, 175 Cal. at p. 49 People v. Brooks, 185 Cal.App.3d at pp. 693-695; see also People v. Padilla, supra, 103 Cal.App.4th at p. 698 [defendant's unreasonable belief, based on hallucination, relevant provocation evidence to consider in second-degree murder in unreasonable heat of passion context].)

Matthew's counsel quite properly argued that, despite what actually occurred, the relevant inquiry was what the boys *believed* had occurred. (RT 3421.) In this regard, counsel argued that although Ms. Souza claimed little recollection of what she had told her sons and despite what had actually occurred, the jurors could infer from the other evidence that the boys believed that their mother had been "completely beaten up" by "people there" at the apartment. (RT 3420.)

However, the prosecutor made a speaking objection that the counsel's argument "misstates testimony not 'some people.' [Ms. Souza is] very clear. It

was only the woman that kicked her out. I object to Mr. Costain's misstates [*sic*], repeated misstates. Of the evidence, your honor, is his wishful thinking." (RT 3421.) The court overruled the objection not on the ground that defense counsel's position was legally correct, but rather on the ground that "each side can argue the evidence as they see it." (RT 3421; see People v. Edelbacher, supra, 47 Cal.3d at pp. 1039-1040 [in finding reasonable likelihood jurors misunderstood law, Court emphasized that while defense counsel correctly argued the law, the prosecutor objected to his argument; and, although the trial "court overruled the objection, it did so with remarks that counsel was given latitude in argument and the jury was instructed on the law, which 'could well have left the jury with the (wrong) impression'"].) The court's ruling was incorrect.

Certainly, what the boys did or did not believe was a question of fact for counsel to argue and the jurors to resolve. However, the essential question of whether a defendant's mistaken belief can be considered at all in assessing whether he premeditated and deliberated was not a question of fact; it was a vital question of *law* on which the jurors should have received *instructions*. (See, e.g., People v. Johnson (1992) 3 Cal.4th 1183, 1261, conc. opns. of Mosk, J., joined by Kennard, J. [even if court not ordinarily required to give particular instruction, "the court is obligated to give an express instruction on the matter if there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception . . . ."]; People v. Livaditis (1992) 2 Cal.4th 759, 784 [even if court is ordinarily not required to instruct on particular legal principle, it must do so if there is a reasonable likelihood that the jury will be misled without it where "the court or the parties make an improper contrary suggestion"].)

Similarly, despite the fact that the trial court had rejected the prosecutor's request for instructions limiting the jury's consideration of provocation evidence to the Regina Watchman charge on the ground that provocation must come from the victim, the prosecutor *repeatedly* argued that incorrect legal principle to the jurors. He told the jurors that because it was only Watchman who even arguably

engaged in "provocation" under CALJIC No. 8.73, the jurors could not consider her provocative acts as to the charges involving the other victims. (RT 3311, 3446-3449.) Indeed, the prosecutor relied heavily on the absence of evidence that the other victims *actually* engaged in any egregious conduct in arguing that the element of premeditation and deliberation had been established as to them since there was no "provocation" "to prevent" premeditation or to "reduce" the crimes. (RT 3289, 3311, 3446-3448, 3450.) Once again, this argument distorted the law, which permits consideration of *any* evidence tending to show that the defendant formed the intent to kill immediately in response to *any* act or event – regardless of whether it was real or perceived and regardless of whether it came from the victim. (See, e.g., People v. Wickersham, supra, 32 Cal.3d at pp. 327, 329; People v. Padilla, supra, 103 Cal.App.4th at p. 678.)

Michael's counsel, Mr. Selvin, objected that the prosecutor was misstating the law in arguing that the provocation referred to in CALJIC No. 8.73 must come from the victim and therefore jury's consideration of provocation was limited to the Regina Watchman charge. (RT 3449.) In front of the jurors, the court overruled the objection, again observing that "this is in the realm of argument on how they should look at the evidence, not a dispute of the law as I understand it." (RT 3449.) Again, the court was incorrect. While the weight of evidence was for the jury to decide, the proper *scope* of the provocation evidence the jury could and should *consider* was a question of *law* on which the court should have instructed the jurors. (See, e.g., People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J.; People v. Livaditis, supra, 2 Cal.4th at p. 784.) By overruling defense counsel's objection to the prosecutor's argument in front of the jurors, the court not only failed to correct a critical misstatement of law, it effectively instructed the jury that the prosecutor's position was not legally incorrect. (See, e.g., Caldwell v. Mississippi, supra, 472 U.S. at p. 339 [by overruling objection to misstatement of law and telling jury that remarks were appropriate, court "strongly impl(ied) that the prosecutor's" misstatement of law

"was correct"]; People v. Evans (1994) 25 Cal.App.4th 358, 368 [by overruling objection, court gave jurors the "unmistakable impression that what the prosecution" argued was "legitimate"].) Absent clear and unequivocal direction – either in the court's original charge or in response to the prosecutor's argument – the lay jurors were totally unequipped to decide which attorney's explanation of the scope of evidence they could consider was correct.[25]

Further, defense counsel for both brothers argued that Dewayne Arnold's acts in confronting Michael and engaging in a physical altercation with him, which immediately precipitated the shooting, demonstrated that the shooter was provoked to respond immediately by firing his weapon. (RT 3363, 3401.) In rebuttal, the prosecutor emphatically responded that Arnold's response was entirely "reasonable". (RT 3447.) Therefore, he explained, "that's not provocation, ladies and gentlemen." (RT 3447.) Once again, the prosecutor's argument that only "unreasonable" conduct is legal "provocation" was a serious misstatement of the law. Once again, the question for the jury to decide was not whether the victims' conduct was "reasonable" or whether they "deserved" what they got, but rather the *shooter's state of mind.* Once again, in answering that critical question, Matthew was entitled to have the jury consider *any* act – reasonable or not – that could have played a part in provoking his anger or immediate, responsive, unpremeditated intent to kill. (See, e.g., People v. Wickersham, supra, 32 Cal.3d at p. 322 [jury could consider evidence that victim grabbed defendant's gun as relevant "provocation" evidence on issue of whether defendant killed in unreasonable heat of passion and therefore was guilty of second-degree murder].)

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[25] Although Matthew's counsel did not specifically join in the objection, early in the proceedings, the trial court informed the attorneys that it only wanted to hear argument from one attorney. (RT 435.)

Thus, having improperly limited the jurors' focus to the existence or non-existence of provocation rather than to the defendants' state of mind, to the Regina Watchman charge alone, and to the conduct in which she actually engaged, the prosecutor turned his attention to the nature of Watchman's act and whether it amounted to "provocation" sufficient to "reduce" her murder to one in the second-degree. Consistent with his position that the only relevant provocation was what actually occurred, the prosecution characterized Watchman's assault on Ms. Souza as a trivial act of "hair pulling" "between two women." (RT 3308, 3446, 3449.) The prosecutor conceded that the boys' acts in going to the apartment armed with weapons were direct responses to that assault. (RT 3306-3307, 3313-3314, 3447-3450.) However, he emphatically argued that given the trivial nature of her actual conduct and the fact that it was "not provocation given directly at these guys," the boys overreacted. (RT 3308, 3310-3312, 3446.) The prosecutor asked the jurors to consider whether their own children would similarly have responded to a trivial assault upon them and decide whether the defendants' response was "***reasonable***," "responsible and mature" (RT 3452-3453) or "natural" (RT 3311). Because the boys' response was an unreasonable overreaction, the prosecutor argued, Watchman's arguable act of "provocation" was insufficient to "prevent" the defendants from premeditating and deliberating, and thus was "not provocation" sufficient to "reduce" Watchman's murder to second-degree murder. (RT 3449-3450.)

Again, the prosecutor's argument misstated the legal principles that should have been addressed in the instructions. There is, of course, no reasonableness requirement in the unreasonable or subjective heat of passion context. By arguing that there was, the prosecutor's argument improperly advanced a heightened standard for provocation and heat of passion, lessened his burden of proving premeditation beyond a reasonable doubt, and undercut Matthew's primary defense. Indeed, the prosecutor's argument as a whole effectively destroyed counsel's tactical basis for requesting that the jury *not* be instructed on voluntary

manslaughter in a reasonable heat of passion as to Watchman so as to avoid confusing the jurors regarding the standards of provocation applicable to manslaughter and second-degree murder. (RT 3230-3231.)

Respondent will undoubtedly argue that the jurors were instructed that the arguments of counsel were just that and therefore the prosecutor's argument could not have misled the jurors regarding the law. Any such argument should be rejected.

Absent clear direction from the court, the jurors were effectively forced to make a credibility determination between opposing counsels' explanations of the relevant law. And, in considering two competing views of the law in this regard, it has long been recognized that the contest is not a fair one. "Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (People v. Talle, supra, 111 Cal.App.2d 650, 677, cited with approval in People v. Thomas (1992) 2 Cal.4th 489, 529; accord People v. Taylor, supra, 197 Cal.App.2d at p. 383; People v. Brophy (1954) 122 Cal.App.2d 638, 652; United States v. LaPage (9th Cir. 2001) 231 F.3d 488, 49 [in contrast to the prosecutor, "the jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism"].) At the very least, "the prosecutor and defense counsel, through their arguments" presented two inconsistent versions of the applicable law, and the Court has "no way of knowing which [version] the jurors adopted . . ." (People v. Edelbacher, supra, 47 Cal.3d at p. 1040.) Under the circumstances, it is reasonably probable that the jurors were misled to believe that it could not consider critically relevant evidence in determining whether the prosecution had carried its burden of proving the element of premeditation. (Ibid.)

Respondent may further argue that because counsel did not object to all of the prosecutor's misstatements, he cannot challenge them on appeal. Once again,

any such argument would be without merit. In assessing whether it is reasonably likely that the interplay of instructions and argument distorted the law, the Court reviews arguments to which no objection and was made because its "concern is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury". (People v. Lucero, supra, 44 Cal.3d at p. 1031 and n.15; see also People v. Edelbacher, supra, 47 Cal.3d at p. 1035 and n.16 [because prosecutor's argument exacerbated instructional error, it was unnecessary to resolve whether it amounted to misconduct and therefore unnecessary to resolve whether objection was necessary to preserve claim of misconduct on appeal]; Taylor v. Kentucky, supra, 436 U.S. at pp. 486-490 and 14 [despite provision of generally adequate instructions, combination of court's refusal to provide additional instructions and prosecutor's potentially misleading argument violated defendant's right to due process, regardless of whether the "prosecutorial comments, standing alone, would rise to the level of reversible error . . . (because) they are relevant to the need for carefully framed instructions . . ."].) Indeed, this is entirely consistent with the fundamental principle that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (People v. Vera (1997) 15 Cal.4th 269, 276.) In any event, from the court's responses to the objections that were made, it seems clear that any other objections would have been futile and risked emphasizing the improper matters to the jurors. (See, e.g., People v. Hill, supra, 17 Cal.4th at p. 820 [objection to misconduct unnecessary where it would be futile]; accord People v. Chavez (1980) 26 Cal.3d 344, 350, n. 5; People v. Zemavasky (1942) 20 Cal.2d 56, 62 [further objections unnecessary where they would be "useless and would have served only to emphasize the matter to the jurors"].)

Under the circumstances, the combination of the instructional void on the legal principles vital to Matthew's primary defense and the only lesser-included offense option provided to the jury and the prosecutor's repeated misstatements of

the law created a reasonable likelihood that the jurors misunderstood the law relating to Matthew's defense and believed that it could not consider constitutionally relevant provocation evidence in determining whether the prosecution had proved the element of premeditation and deliberation as to all of the charges. Hence, error of federal constitutional dimension occurred. (See, e.g. Estelle v. McGuire, supra, 502 U.S. 62, 71-72; Boyde v. California, supra, 494 U.S. 370, 380; see also Crane v. Kentucky, supra, 473 U.S. at p. 690 [criminal defendants have constitutional right to present and have jury consider highly relevant evidence in their defense]; accord California v. Trombetta (1984) 467 U.S. 479, 489; Davis v. Alaska (1974) 415 U.S. 308; Chambers v. Mississippi (1973) 410 U.S. 284.)

Finally, the reasonable likelihood that the jurors misapprehended the law is starkly illustrated by their verdicts. As discussed in Argument II, in support of his theory that both boys premeditated the crimes, the prosecutor argued that premeditation and deliberation can be "conditional," and therefore the evidence established premeditation even if their plan to kill was conditioned upon encountering resistance from the apartment's occupants. (RT 3290-3291, 3311-3312.) Presuming, as the Court must, that the jurors followed the law (see, e.g., People v. Sanchez (2001) 26 Cal.4th 834, 852), then the jury's finding that Michael did not intend to kill (by acquitting him of the special circumstance allegation) reflects their rejection of the prosecution's theory that the boys armed themselves and went to the apartment with any intent – even a conditional one – to kill. (See also CT 659-659.1 [during deliberations, jurors specifically inquired into requirement that aider and abettor intend to kill and were again informed that there is such a requirement and that such intent exists where "the purpose, plan, or goal, includes killing"].) Given that Michael was characterized as the "leader" and the absence of *any* evidence that Matthew's intent was any different from that of his "leader" before he pulled the trigger of his weapon, the evidence and verdicts compel the conclusion that the jury must have determined that Matthew only

formed the intent to kill in response to the chaotic and rapidly escalating collision of circumstances he encountered upon entering the apartment and acted immediately to carry it out. Such a finding seems plainly inconsistent with its findings of premeditation as to all of the victims. (See People v. Wickersham, supra, 32 Cal.3d at pp. 327-329; see also authorities discussed in part F below.) Applying the presumption that the jurors followed the law as they understood it, the reasonably likely explanation for this seeming inconsistency is that the jurors misunderstood and were misled regarding the relevant law.

### F. Reversal Is Required.

Where, as here, error of federal constitutional dimension has occurred, reversal is required unless the court determines that it was harmless beyond a reasonable doubt. (Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt, supra, 500 U.S. at p. 404; Chapman v. California, supra, 386 U.S. at p. 24; People v. Lucero, supra, 44 Cal.3d 1006, 1032.) Respondent will be unable to meet this burden.

The evidence of premeditation was negligible at best. As this Court has explained:

> The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as "planning" activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" (Citation); (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so

> particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2). (People v. Anderson, supra, 70 Cal.2d at pp. 26-27; accord, e.g., People v. Sanchez (1995) 12 Cal.4th 1, 31-32.)

As to evidence of planning activity, as discussed above, the prosecutor conceded that the boys might not have embarked upon an unconditional plan to kill any of the apartment's occupants. Nevertheless, he argued that the fact that the boys went to the apartment armed with guns provided compelling proof that they had a "conditional" plan to kill, which depended upon whether they encountered resistance from the apartment's occupants. (RT 3290-3291, 3311-3312.) However, by finding that Michael did not intend to kill, it is clear from the verdicts that the jurors rejected the prosecution's theory. In other words, although the boys did arm themselves with weapons before going to the apartment, it seems clear that the jurors had reasonable doubt that they planned to kill or use those guns as *murder* weapons. (See, e.g., People v. Anderson, supra, 70 Cal.2d t pp. 21-22 [use of a deadly weapon does not necessarily demonstrate plan to kill].)

Similarly, as to motive evidence, while the boys were motivated to go the apartment with guns by the attack on their mother and possible theft of her purse, they were also motivated to so do by the passion engendered thereby. Moreover, the jury's verdicts demonstrate that the boys were not motivated *to kill* upon arriving at the apartment. The actual motive for the shooting – the attack on their mother combined with the rapid and violent escalation of events with which the boys were confronted upon their arrival – was, as discussed in the preceding arguments, more consistent with an explosion of violence than with premeditation.

Finally, as discussed in Argument II-C, the manner of killing was at least as consistent with an explosion of violence as it was with premeditation, if not more so. The shooting erupted immediately after Dewayne Arnold engaged in a physical struggle with Michael and after Regina Watchman's heated words from

which – as the prosecutor argued – the boys could surmise that she was one of their mother's attackers. (RT 330, 3313.) Arnold was shot seven times and Watchman was shot three times. As further discussed above, the evidence was at least as consistent with an unintentional shooting of the other victims in the same explosion of violence directed toward Arnold and Watchman as it was with a premeditated intent to kill them. (See, e.g., People v. Anderson, supra, 70 Cal.2d at pp. 21, 25 [multiple acts of violence against victim not alone sufficient to prove premeditation; evidence insufficient in that case where, *inter alia* victim stabbed 60 times]; People v. Jiminez, supra, 95 Cal.App.2d at pp. 842-843 [evidence insufficient to prove premeditation where, *inter alia*, victim stabbed eight times]; see also Austin v. United States, supra, 382 F.2d at p. 132 [evidence insufficient to prove premeditation rather than subjective heat of passion where victim stabbed 26 times].)

While the prosecutor argued at trial that the boys' flight from the scene, disposal of the weapons, and disappearance for a few days before surrendering evidenced premeditation and deliberation (RT 3314-3315), the boys' post-crime conduct "was irrelevant to ascertaining defendant's state of mind immediately before, or during, the killing." (People v. Anderson, supra, 70 Cal.2d at p. 32 [defendant's effort to "cover up" killing irrelevant to whether killing premeditated and deliberate]; accord People v. Jiminez, supra, 95 Cal.App.2d at pp. 842-843 [post-crime conduct, including flight, insufficient to prove premeditation]; Austin v. United States, supra, 382 F.2d at pp. 139-140 [premeditation and deliberation "is manifestly not established beyond a reasonable doubt by evidence showing that [defendant] acted with deliberation afterward, in an effort to avoid detection and punishment . . . ."].) Indeed, the dubiousness of the prosecutor's contention that the boys' flight was evidence of their guilt of premeditated murder and attempted murder is demonstrated by the prosecutor's later, inconsistent, argument that the boys' *surrender* to police also manifested a consciousness of guilt as to the charged crimes. (RT 3438.)

Given the dearth of evidence that the shooting was premeditated and deliberated along with the jury's findings, respondent simply cannot prove beyond a reasonable doubt that the inadequate and misleading instructions and argument did not contribute to the jury's verdicts. (See Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt, supra, 500 U.S. at p. 404.) Certainly, the jury' guilt phase verdicts are not sufficiently reliable to satisfy the Eighth Amendment. (See Beck v. Alabama, supra, 447 U.S. at pp. 637-638.) The judgment must be reversed.

## IV. REVERSAL OF THE ATTEMPTED MURDER CONVICTIONS IS REQUIRED DUE TO AN AMBIGUOUS INSTRUCTION RESULTING IN A REASONABLE LIKELIHOOD THAT THE JURORS MISUNDERSTOOD THAT IT COULD RETURN GUILTY VERDICTS WITHOUT FINDING THAT THE PERPETRATOR SPECIFICALLY INTENDED TO KILL THE VICTIMS AND NOT MERELY THE TARGETS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

### A. Introduction.

As discussed in Argument II-C-2, above, there was compelling evidence that although the perpetrator may have intended to shoot and kill Dewayne Arnold and Regina Watchman, the shootings of Leslie Trudell and the surviving victims, Beulah John, and Rodney James, were unintentional. If this were the case, the shooter was nevertheless liable for the actual killing of Leslie Trudell under the transferred intent doctrine. (People v. Bland, supra, 28 Cal.4th at pp. 317, 322.) However, the transferred intent doctrine would not apply to hold the shooter liable for *attempted* murder of John and James, since the specific intent to kill required for attempted murder cannot be "transferred" from an intended victim to an unintended victim. (Id. at pp. 326-331.)

As further discussed in Argument II-E-3, on the prosecution's motion, the trial court provided a special, pinpoint instruction that it was "not necessary that premeditation and deliberation be directed at a specific individual, it may be directed at a group." (CT 561, 704; RT 2946, 3263.) Unfortunately, as fully set forth below, this instruction was, at best, confusing and misleading with regard to the prosecution's burden to prove beyond a reasonable doubt the critical intent to kill element of the attempted murder charges. As further set forth below, there is a reasonable likelihood that the jurors misunderstood the law and believed that the

shooters intent to kill one victim applied to all of the victims who happened to be struck by the bullets, even those shot unintentionally. Because it is reasonably likely that the at least one juror misunderstood the instructions to permit convictions on the attempted murder charges without finding the essential intent to kill element beyond a reasonable doubt, the error violated state law as well as Matthew's federal constitutional rights to due process, trial by jury, and a reliable guilt phase determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Finally, because respondent cannot prove the error harmless beyond a reasonable doubt, the attempted murder convictions must be reversed.

### B. Attempted Murder Requires Proof Beyond A Reasonable Doubt That The Defendant Specifically Intended To Kill The Particular Victim, Not Someone Else.

Both first-degree premeditated murder and attempted murder with premeditation require the specific intent to kill. (Pen. Code §§ 187, 189, 664; People v. Bland, supra, 28 Cal.4th at pp. 327-328 [and authorities cited therein].) Under state law and the federal constitution, the prosecution bears the burden of proving this element beyond a reasonable doubt. (See, e.g., United States v. Gaudin, supra, 515 U.S. at pp. 509-511, 522-523; Sullivan v. Louisiana, supra, 508 U.S. 275; Osborne v. Ohio, supra, 495 U.S. at pp. 123-124; Carella v. California, supra, 491 U.S. at p. 265; Mullaney v. Wilbur, supra, 421 U.S. at p. 698.)

Under the transferred intent doctrine, the defendant's intent to kill one victim will transfer to an unintended victim when the unintended victim is actually killed, regardless of whether or not the target is killed. As the Court has explained, "[w]hether one conceptualizes the matter by saying that the intent to kill the intended target transfers to others also killed, or by saying that intent to kill need not be directed at a specific person, the result is the same: assuming legal causation, a person maliciously intending to kill is guilty of the murder of all

person actually killed. If the intent is premeditated, the murder or murders are of the first degree." (People v. Bland, supra, 28 Cal.4th at p. 323 [and authorities cited therein].)

However, attempted murder is different. "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, ***not someone else.***" (Id. at p. 328, emphasis supplied [and authorities cited therein].) The "[d]efendant's guilt of attempted murder must be judged separately as to each alleged victim." (Ibid.) In this regard, the defendant's "primary intent to kill a specific target does not rule out a *concurrent* intent to kill others." (Id. at p. 329, n. 6.) Hence, where the defendant intends not only to kill his primary target but also specifically intends to kill any other persons within the "kill zone" of that target, he is liable for their attempted murder because he harbors an intent to kill each victim. (Id. at pp. 329-331.) Because this "concurrent intent" principle still requires specific intent to kill each victim, "it is not a legal doctrine requiring special jury instructions, as it the doctrine of transferred intent." (Id. at p. 329, n. 6.)

### C. From The Instructions And Arguments As A Whole, It Is Reasonably Likely That The Jurors Misunderstood That It Did Not Need To Find That Matthew Specifically Intended To Kill James And John In Order To Convict Him Of Attempting To Murder Them With Premeditation And Deliberation.

As noted above, the jurors were instructed that a premeditated intent to kill need not "be directed at a specific individual, it may be directed at a group." (CT 704; RT 3263.) As discussed in Argument II-E-3, this phrase is ambiguous, having been used to refer to very different legal principles, some of which do require a specific intent to kill each individual victim and some of which do not. The question then is whether is it reasonably likely that the jurors misunderstood from this instruction that it was not necessary for them to find that the perpetrator specifically intended to kill both James and John in order to find him guilty of

attempting to murder them with premeditation and deliberation. (See, e.g., People v. Clair, supra, 2 Cal.4th at pp. 662-663; Estelle v. McGuire, supra, 502 U.S. 62, 71-72; Boyde v. California, supra, 494 U.S. 370, 380.) Reading the instructions and arguments as a whole (see, e.g., Boyde v. California, supra, 394 U.S. at p. 378; People v. Brown, supra, 45 Cal.3d at p. 1255 People v. Musslewhite, supra, 17 Cal.4th at p. 1248), the answer is yes.

As further discussed in Argument II-E-3, with respect to the critical intent to kill element, the other instructions spoke only in terms of an intent "to kill" (CT 704; RT 3262), intent to "kill a human being" (CT 703, 705; RT 3263-3264), intent to "kill another human being" (CT 707; RT 3265), and intent to "kill another person" (CT 707; RT 3265). They did not speak in terms of intent to kill the "person killed," or the "person injured," or refer to the specific victims by name. Once again, the language used in these instructions is susceptible of a reading that the intent to kill element only requires an unlawful intent to kill "***a*** human being, not the person intended to be killed," or an "'intent to kill ***a***, not a specific, human being.'" (People v. Scott, supra, 14 Cal.4th at p. 554, conc. opn. of Mosk, J. [and authorities cited therein].) Hence, this reading achieves the same result as the transferred intent doctrine, being that the defendant need not intend to kill the victim actually killed or injured so long as he intended to kill *someone* in harming or killing the victim. (Ibid; accord People v. Bland, supra, 28 Cal.4th at p. 323.) In other words, the language of the instructions as a whole is susceptible of a reading that – in colloquial terms – a shooter's intent to kill follows his bullet, even if that bullet strikes an unintended victim *and* the victim lives. While such a reading is irrelevant where the unintended victim *dies*, it is critical where the unintended victim does not die. Once again, "to be guilty of attempted murder, the defendant must intend to kill the alleged victim, *not someone else*." (People v. Bland, supra, 28 Cal.4th at p. 328, emphasis supplied.)

As discussed in Argument II-E-3, the arguments to the jury lend further support to the reasonable likelihood that the jurors misunderstood that, in order to

be guilty of attempted murder, the defendant need not intend to kill the alleged victim so long as he intended to kill someone else. Because the prosecutor was emphatic that the shooter intended to kill each specific victim (going so far as to argue that he moved around the room and took careful aim at each victim, although none of the eyewitnesses even suggested as much), he never addressed the question of liability if that hypothesis were not true. (RT 3283-3284, 3289-3290, 3442-3444.) However, Michael's counsel argued that the shooter intended to shoot and to kill Dewayne Arnold and that the other victims were unintended, having been struck accidentally by an inexperienced shooter who did not have control over his automatic weapon. (RT 3363.) Significantly, he conceded that the boys were guilty of second-degree murder as to all of the victims, even those shot unintentionally. (RT 3324-3328.) He expressly conceded, "whether [the shooter]'s actually firing at everybody or he's firing at one and can't control it and he's firing at the others, ***legally it doesn't matter***." (RT 3363, emphasis supplied.) Even if he did not intend to kill all of the victims, "when he's firing, he has an intent to kill;" consequently, the shooter was guilty of murder even as to any unintended victims. (RT 3363-3364.) Given that this concession came from the mouth of one of the defense attorneys, it undoubtedly carried great weight. Matthew's counsel never addressed whether the shootings of the other victims were intentional or unintentional nor did *either* defense attorney ever differentiate between the murder and attempted murder charges or specially address the latter charges. (See RT 3317-3776, 3380-3423; see, e.g., People v. Brady, supra, 190 Cal.App.3d at p. 137 [arguments of counsel did not clarify potential ambiguity in instructions where defense counsel never identified critical issue for jury to resolve]; see also People v. Crandell, supra, 46 Cal.3d at p. 835.)

In sum, considering the instructions and the argument as a whole, it is reasonably likely that the jury misunderstood that it could return attempted murder verdicts as to James and John based on a finding that the perpetrator shot them with a premeditated intent to kill "a human being" – such as Arnold and

Watchman – but not **those** human beings. Because it is reasonably likely that the jurors misunderstood that it could convict without finding an essential element beyond a reasonable doubt, the error violated state law as well as the Matthew's federal constitutional rights to due process, trial by jury, and reliability in the guilt phase verdicts in this capital case. (See, e.g., Estelle v. McGuire, supra, 502 U.S. 62, 71-72; Boyde v. California, supra, 494 U.S. 370, 380; Beck v. Alabama, supra, 447 U.S. at pp. 637-638.)

### D. The Error Was Not Waived.

Respondent may argue that because counsel did not object to the instruction, he waived the error for appeal. Any such argument must be rejected.

Penal Code section 1259 provides that an "appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code § 1259; accord People v. Smithey (1999) 20 Cal.4th 936, 976, n. 7 [rejecting Attorney General's waiver argument where defendant's claim was that instruction violated his right to due process of law, which "is not of the type that must be preserved by objection"].) Of course, Matthew has claimed a reasonable likelihood that the jurors applied an ambiguous instruction in a way that affected his substantial rights, and hence the provision of the ambiguous instruction is reviewable on appeal notwithstanding the absence of an objection below. (See, e.g., People v. Prieto (2003) 30 Cal.4th 226, 247; see also People v. Yeoman (2003) 31 Cal.4th 93, 118 [and authorities cited therein – reviewing court may consider claim raised for first time on appeal if it involves a pure question of law on undisputed facts]; People v. Champion (1995) 9 Cal.4th 879, 908 and n. 6 [if question of whether claim preserved is "close and difficult" must be resolved in favor of preservation].)

### E. The Attempted Murder Convictions Must Be Reversed Because Respondent Will Be Unable To Prove The Error Harmless Beyond A Reasonable Doubt.

As discussed in Argument III, where, as here, it is reasonably likely that the jurors understood the instructions in a way that violates the federal constitution, reversal is required unless respondent can prove beyond a reasonable doubt that the verdict "was surely unattributable to the error." (Sullivan v. Louisiana, supra, 508 U.S. at p. 279; accord Chapman v. California, supra, 386 U.S. at p. 24.) Respondent will be unable to carry its burden in this case.

As discussed in greater detail Argument II-C-2, the evidence was compelling that the shootings of John and James were unintentional. They were located behind the intended targets, Watchman and Arnold, when they were shot. Witnesses described the round of gunshots as being rapidly fired, without any breaks or pauses between them to suggest that the shooter was taking aim at anyone other than Arnold and Watchman. In stark contrast to the intended targets, who were shot seven times and three times respectively, John and James were each shot only once and in their extremities. The apartment's occupants who were not located behind or near Arnold and Watchman were not harmed in any way. On this record, respondent simply cannot prove beyond a reasonable doubt that the instruction allowing verdicts of attempted premeditated murder without necessarily finding that the shooter specifically intended to kill both John and James did not contribute to the verdicts. The attempted murder convictions must be reversed.

## V. THE PROVISION OF CALJIC 17.41.1 VIOLATED MATTHEW'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL.

Over Matthew's objection, the jury in this case was instructed in the guilt phase with CALJIC 17.41.1 as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation. (CT 726; RT 2966.)

In People v. Engelman (2002) 28 Cal.4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. Matthew respectfully submits that its provision in his case did violate his rights under the Sixth and Fourteenth Amendments and therefore raises the issue here in order for the Court to reconsider its decision in Engelman and to preserve the error for review in federal court.

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (See, e.g., Tanner v. United States (1987) 483 U.S. 107, 127; United States v. Brown (D.C. Cir. 1987) 823 Fd.2d 591, 596.) However, CALJIC 17.41.1 pointedly tells each juror that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may repeat his or her words to the judge and allege some impropriety, real or imagined, which the juror believed occurred in the jury room.

The instruction, in short, assures the jurors that their words might be used against them and that candor in the jury room could be punished. The instruction

therefore chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (Attridge v. Cencorp (2nd Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (McDonald v. Pless (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., People v. Collins (1976) 17 Cal.3d 687, 693.) Where jurors find it necessary or advisable to conceal concerns from one another, they will not interact and try to persuade others to accept their viewpoints. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled." (United States v. Symington (9th Cir. 1999) 195 F.3d 1080, 1086 citing Note, Public Disclosures of Jury Deliberations, 98 Harv. L. Rev. 886, 889.) Long ago, Justice Cardozo noted, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (Clark v. United States (1933) 289 U.S. 1, 13.)

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., Tanner v. United States (1987) 483 U.S. 107 [inquiry into juror intoxication during deliberations not permitted]; United States v. Marques (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150, "(n)o evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations should bar CALJIC 17.41.1 so that it may not be allowed to chill free exchange and discourse during deliberations.

The right to trial by jury, pursuant to the Sixth Amendment and California Constitution, Article I, section 16, is a right to the verdict by a unanimous jury. (Apodaca v. Oregon (1972) 406 U.S. 404.) That right is abridged by CALJIC 17.41.1 because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., Perez v. Marshall (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

It is not a satisfactory answer to say that the matter is moot because no juror called any such problem to the court's attention. Such an answer ignores the likelihood that a juror who would hold fast to an unpopular decision if he knew that he could not be hauled before the court to account for it. He may, nevertheless, be unwilling to do so if he knows his fellow jurors are going to report him to the judge. The likelihood of such a "chilling effect" is a strong argument in favor of simply not giving an instruction such as CALJIC No. 17.41.1 in the first place. There is no way to assess how much the instruction chilled speech in the jury room. There is no way to determine what thoughts and arguments were squelched by jurors who anticipated, feared and wished to avoid sanctions at the hands of the trial court.

The giving of the instruction on "the integrity of a trial" amounted to a "structural" defect in the trial mechanism, much like a complete denial of a jury. (Rose v. Clark (1986) 478 U.S. 570, 579; Arizona v. Fulminante (1991) 499 U.S. 279, 309.) Automatic reversal of the judgment is the appropriate remedy because where this novel and threatening instruction is given, "there has been no jury verdict within the meaning of the Sixth Amendment." (Sullivan v. Louisiana, supra, 508 U.S. at p. 280; People v. Cahill, supra, 5 Cal.4$^{th}$ at p. 502.)

## VI. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR VIOLATED MATTHEW'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS BY USING FALSE EVIDENCE IN THE GUILT AND PENALTY PHASES TO SECURE MATTHEW'S CONVICTIONS AND DEATH SENTENCE.

### A. Introduction.

As explained below, throughout his guilt and penalty phase arguments, the prosecutor consistently misled the jury by purporting to cite to several vital pieces of "evidence" which supported the charged crimes and warranted a death sentence, but which were, in fact, false. In so doing, the prosecutor effectively created, presented, and relied upon false evidence with which to convict Matthew and secure a death judgment, in violation of Matthew's state and federal constitutional rights to due process. As further set forth below, the judgment must be reversed because respondent will be unable to carry its burden of proving the violations harmless beyond a reasonable doubt.

### B. The Prosecutor's Use Of False Evidence Throughout His Guilt And Penalty Phase Arguments Violated Matthew's State And Federal Due Process Rights To Fundamental Fairness.

It is well settled that state and federal constitutional due process guarantees to fundamental fairness prohibit the state from using false evidence to obtain a conviction or a death sentence. (See, e.g., Banks v. Dretke (2004) 540 U.S. 668, 693, 699-702; United States v. Agurs (1976) 472 U.S. 97, 103; Giglio v. United States (1972) 405 U.S. 150, 153; Napue v. Illinois (1959) 360 U.S. 264, 269; People v. Seaton (2001) 26 Cal.4th 598, 647; Belmontes v. Woodford, supra, 350 F.3d at p. 881; United States v. LaPage, supra, 231 F.3d at p. 491.) The prohibition against utilizing false evidence applies not only to the presentation of

testimony, but also to a prosecutor's argument to the jury. (See, e.g., Banks v. Dretke, supra, 504 U.S. at pp. 699-700; Killian v. Poole (9th Cir. 2002) 282 F.3d 1204, 1209; United States v. Kojayan, supra, 8 F.3d at pp. 1317-1323; People v. Kasim (1997) 56 Cal.App.4th 1360, 1386-1387.) While "the prosecution may argue all reasonable inferences, and has a broad range within which to argue the facts and the law," he "may not mislead the jury." (People v. Daggett, supra, 225 Cal.App.3d at p. 757; accord United States v. Blueford (9th Cir. 2002) 312 F.3d 962, 968; People v. Hill, supra, 17 Cal.4th at p. 845; People v. Bell, supra, 49 Cal.3d at pp. 538-539; People v. Varona (1983) 143 Cal.App.3d 566, 570; see also United States v. Kojayan, supra, 8 F.3d 1315, 1317-1318 [prosecutor's false remarks in summation improper and violated due process]; Paxton v. Ward (10th Cir. 1999) 199 F.3d 1197, 1216-1218 [prosecutor's misrepresentations in argument infringed upon rights to rebut and confront evidence and argument and warranted habeas relief]; People v. Kassim, supra, 56 Cal.App.4th at pp. 1586-1587 [prosecutor's misrepresentations in summation rendered trial fundamentally unfair].)

Finally, "[t]he prosecution has an *independent*, constitutional duty to correct testimony he knows to be false. Napue v. Illinois, 360 U.S. 264, 269-270 (1959); N. Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001)." (Belmontes v. Woodford, supra, 350 F.3d at p. 881; accord Banks v. Dretke, supra, 504 U.S. at p. 695; People v. Kassim, supra, 56 Cal.App.4th at p. 1386.) Therefore, whether "defense counsel is aware of the falsity of the statement is beside the point." (Belmontes v. Woodford, supra, at p. 881.) In other words, a defense objection is not required to trigger the prosecutor's duty to ensure that the jury does not rely on false evidence to convict the defendant or sentence him to death. (Belmontes v. Woodford, supra, at p. 881.) Any argument to the contrary "overlooks the fact that the prosecutor's duty to correct false [evidence] arises, not simply out of a duty of fairness to the defendant, but out of 'the free standing constitutional duty of the State and its representatives to protect the system against false [evidence].' [Citation.]." (Ibid.)

Here, as noted in Arguments II, III, and IV, above, the prosecutor misrepresented critical facts in his guilt phase summation to the jurors. He emphatically argued that the evidence proved that Matthew had shot *all* of the victims with a cold-blooded, premeditated intent to kill. As "evidence" to support his theory, the prosecutor pointed to the "fact" that all of the victims had been shot in vital spots, rather than in the legs or other extremities. (RT 3441.) This "evidence" was false. In truth, Beulah John was shot in the leg and Rodney James was shot in the arm or shoulder. (RT 2270, 2437, 2523, 2744-2745.) Similarly, to rebut the implication that they had been shot unintentionally, the prosecutor pointed to the "evidence" that John and James had each been shot twice. (RT 3292, 3441-3442.) Again, this "evidence" was false; in truth, each was shot only once. (RT 2270, 2437, 2523, 2557, 2568-2569.)

Furthermore, as discussed in Argument I, the prosecutor's trial theory was that Matthew, not Michael, was the shooter. In support of this theory, the prosecutor pointed to the "evidence" that stippling was absent from Dewayne Arnold's skin and clothing. (RT 3454.) This "evidence," the prosecutor argued, proved that Arnold had not been shot within close range, which, in turn, proved that Matthew – who was standing further away from Arnold than Michael – must have been the shooter. (RT 3454.) Again, this "evidence" was false. Dewayne Arnold's shirt was not preserved or tested for the presence of stippling. (RT 2012-2013.) Therefore, there was no evidence that stippling was absent from his clothing.

Similarly, and as discussed further in Arguments VIII and IX, below, the prosecutor repeatedly misrepresented the facts in his penalty phase summation in order to portray Matthew as a cold-blooded predator who deserved to die. He vehemently argued that Matthew, as the shooter, did not intend merely to kill the five people he shot, but intended to kill as many people as possible. To support his theory, he pointed to the "evidence" that Matthew only ceased firing, and was prevented from killing more victims, because he ran out of ammunition: "What if

he hadn't run out of ammunition in that room? Do you think at some point he just thought: I've shot up enough people, I'm going to stop now. He was either going to run out of victims or run out of ammunition, one of the two. Fortunately, it was ammunition." (RT 3921.) Again, this powerful "evidence" of a particularly cold-blooded shooting spree was simply untrue.

In truth, the evidence showed only that 14 rounds of .223 ammunition were fired from the same gun. (RT 2557, 2568-2569.) Because the gun actually used was never recovered, there was no direct evidence that it carried only 14 rounds of ammunition. Nor was there any circumstantial evidence to support the inference that the shooter ceased firing only because he ran out of ammunition. According to the prosecution's own guilt phase evidence, at the time of the shooting, magazines that fired .223 ammunition could hold anywhere from five to "50 or even more" rounds. (RT 2865-2866.) Indeed, magazines carrying 20 to 30 rounds were "fairly common." (RT 2866.) Not a single witness testified that the shooter ever made an unsuccessful attempt to fire the gun. Not a single witness testified to any matter that would support such an inference, such as hearing the sound of a clicking trigger. In short, the prosecutor's representation of the evidence was an outright falsity.

Continuing his theme of portraying the shooting as deliberative and sadistic rather than reactive and precipitous, the prosecutor pointed to the "evidence" of "powder burns on the victim[s]. Placing the gun up to their body, sending a piece of lead going thousands of feet per second through their body again and again." (RT 3921.) Again, this "evidence" was false. There was no evidence that any of the victims suffered powder burns or that the shooter placed the gun against any victim's body and repeatedly fired it. The pathologist did agree that stippling can loosely be described as powder burns to the skin and explained that it is usually found when the person has been shot within close range, generally within about 20 inches. (RT 1948-1950.) However, she explicitly testified that she did *not* find stippling to the skin, or "powder burns," on *any* of the victims. (RT 1950, 1959,

1996, 2012-2103.) Indeed, she testified that both Watchman and Arnold "had the appearance of distant wounds" and that Trudell had been shot from a distance of *at least* three feet *or more*. (RT 1951, 1959.)

Furthermore, in response to the mitigating fact that Matthew had no criminal record, the prosecutor took pains to specify that the evidence revealed only the absence of an "*adult felony conviction* record." (RT 3920, emphasis supplied.) In this regard, he emphatically argued, "he couldn't have a long *adult* history for Christ's sake, he was only 18 when he did this. It took him only a few months to get to the top. That's somehow supposed to be mitigation? You're supposed to think that he's somehow less deserving of what he's got coming because of that? I suggest to you that there's no mitigation here." (RT 3920, emphasis supplied.) The prosecutor's implication was obvious that while Matthew did not have an "adult felony conviction record," he may well have had a long juvenile or other record to which the prosecutor was privy but the jury was not. Once again, the implication was absolutely false. Matthew had no record at all. (Probation Report at p. 6.)

Similarly, the prosecutor argued that life without parole would not be an appropriate punishment because Matthew would enjoy many aspects of life in prison of which he had deprived the victims, such as "get[ting] married and hav[ing] conjugal visits." (RT 3922.) These remarks, which were unsupported by any evidence presented at trial, were also false. Prisoners sentenced to life without parole are *not* allowed conjugal visits, or overnight family visits. (Pen. Code § 2601 [amended in 1997 to delete language granting prisoners "right" to "personal visits"]; CCR Title 15, section 3177, subd. (b)(2) [prisoners sentenced to life without parole are not entitled to "family visits," defined as overnight visits with family members].)

Furthermore, and as discussed in greater detail in the arguments below, given the dearth of aggravating evidence, the prosecutor relied heavily on the impact of the crimes on the victims as a reason to vote for death. In this regard,

the prosecutor pointed to the "evidence" that Rodney James, who had survived the shooting, turned to heroin as a result of the shooting and died of a heroin overdose two years later, a death for which Matthew was responsible. (RT 1871, 3885-3886.) As the prosecutor emphasized, James "didn't die right away, he died a slow death over a couple of years due to intravenous heroin use and eventual overdose. But you can consider that, what he went through because of what someone else did." (RT 3885-3886.) Once again, the prosecutor grossly misrepresented the evidence.

There was never any evidence presented that James had ever even used heroin. While the prosecutor did introduce James's death certificate, that document revealed nothing more than that he died two years after the shooting; the box entitled "cause of death" was marked "pending" and indicated an autopsy had been performed but did not reveal its results. (Trial Ex. 35.) In short, the prosecutor's representation that there was evidence that James had died of a drug overdose as a result of the shooting was utterly false.

Finally, in his penalty phase argument, the prosecutor embarked upon a scathing attack on Matthew's defense counsel, Mr. Costain, as a liar whom the jurors should not trust. As "evidence" to support his argument, the prosecutor quoted at length from a guilt phase summation, which he attributed to Mr. Costain and attacked as false. (RT 3887-3889 [citing to RT 3370 and 3372, quoting from guilt phase summation, and attributing it to Mr. Costain].) For instance, he quoted at length from a guilt phase argument suggesting that one of the party guests may have "planted" Ms. Souza's purse in Esther Dale's trunk after the shooting. (RT 3887, citing and quoting from RT 3772.) The prosecutor used this summation to personally attack Mr. Costain: "That's the argument that [Matthew's counsel] got up and made to you. . . . Arguing this to you all the time when he knows that if this thing goes to penalty phase, he's all prepared to put on a woman I was not aware of until the penalty phase, May Ruth Underwood. Remember the woman that came in, she's the one that the defense put on to say that she had to give

Rebecca a ride home 36 times because she locked her purse and her keys in Esther's trunk. *And yet it is the same guy arguing to you in the guilt phase: how do we know that's how it happened? You know, think about things like that. . . . Remember that remember Mr. Costain's argument to you in the guilt part when he gets up here and argues lingering doubt as a reason to impose the life without possibility of parole instead of the death penalty.*" (RT 3887-3889, emphasis supplied.) In truth, however, the arguments from which the prosecutor quoted at length, and for which he castigated Matthew's counsel, were the arguments of ***Michael's counsel, not Matthew's counsel.*** (RT 3370, 3772 [summation of Michael's counsel].)

In sum, throughout his guilt and penalty phase arguments, the prosecutor twisted and mischaracterized the facts to create and use false evidence with which to convict Matthew and persuade the jury to vote for death. The prosecutor's conduct violated Matthew's state and federal constitutional rights to due process. (See, e.g.. Banks v. Dretke, supra, 504 U.S. at pp. 699-700; Killian v. Poole, supra, 282 F.3d at p. 1209; United States v. Kojayan, supra, 8 F.3d at p. 1318; People v. Kasim, supra, 56 Cal.App.4th at pp. 1386-1387; People v. Daggett, supra, 225 Cal.App.3d at p. 757.)

It is true that counsel did not object to the prosecutor's false and misleading representation of the evidence to the jurors. However, as noted above, such an objection is not necessary to trigger the prosecutor's *independent* duty to ensure that it does not present or rely upon false evidence. (See, e.g., Banks v. Dretke, supra, 504 U.S. at p. 695; Belmontes v. Woodford, supra, 350 F.3d at p. 881; People v. Kassim, supra, 56 Cal.App.4th at p. 1386.) Hence, such an objection is not necessary to preserve the prosecutor's breach of his duty for appeal. (Belmontes v. Woodford, supra, at p. 881; cf. People v. Ellison (2003) 111 Cal.App.4th 1360, 1370 [given that prosecutor had independent obligation to object to particular error, appellate court reviewed and corrected error even in

absence of defense counsel's objection]; People v. Abbaszadeh (2003) 106 Cal.App.4th 642, 649 [same].)

### C. Reversal Is Required.

Where, as here, the state violates the federal constitution by relying upon false evidence to obtain a conviction or death sentence, the judgment must be reversed unless the state proves the violation harmless beyond a reasonable doubt. (United States v. Bagley (1985) 473 U.S. 667, 679, n.9; United States v. LaPage, supra, 231 F.3d at p. 491.) Under this standard, reversal is required if there is "any reasonable likelihood" that the false evidence "affected the judgment of the jury." (Ibid.)

There is certainly a substantial likelihood that the prosecutor's presentation of false evidence affected both the guilt and penalty judgments of the jury. As a preliminary matter, several of the prosecutor's allusions to false evidence implied that the prosecutor was privy to evidence that the jurors were not, such as his misrepresentation that Matthew would be entitled to conjugal visits if sentenced to life without parole, that Matthew had a criminal record other than an "adult felony" record, and that Rodney James had become a heroin addict and died of a heroin overdose as a result of the shooting. Given the special regard juries have for prosecutors, as discussed in Argument II-B-2, above, such misrepresentations are well recognized as carrying great weight with jurors. (See, e.g., People v. Bolton (1979) 23 Cal.3d 208, 213 [recognizing that such statements, though "worthless as a matter of law," can by "dynamite" for jurors]; People v. Wagner (1975) 13 Cal.3d 612, 619-620 [where prosecutor suggests he is privy to evidence that jury never heard, it is reasonable to assume that jury believed prosecutor telling truth]; United States v. Kojayan, supra, 8 F.3d at p. 1323 [emphasizing that "Evidence matters; closing argument matters; statements from the prosecutor

matter a great deal" and holding prosecutor's false statements in summation required reversal].]

Other remarks were gross misstatements of the evidence that had been presented, such as the number and locations of the gunshot wounds and that the shooter only ceased firing when he ran out of ammunition. Respondent may argue that the jurors would have recalled the correct evidence and therefore the prosecutor's misrepresentations of that evidence were harmless. On this record, any such argument must be rejected.

Following the penalty phase verdict, Matthew applied to the trial judge to modify the death verdict. (CT 794-797.) Of course, a trial judge's ruling on such an application is limited to the evidence actually admitted and presented to the jury. (See, e.g., People v. Crittenden (1994) 9 Cal.4th 83, 151 [and authorities cited therein].) In ruling on Matthew's application, however, the trial judge in this case purported to refer to evidence that did not exist, but which corresponded only to the prosecutor's misrepresentations.

For instance, the trial judge emphasized the non-existent "evidence," created by the prosecutor, that Matthew did not stop shooting people until he had run out of bullets. (RT 3975.) Similarly, the judge emphasized that "these were particularly cold-blooded shootings; the evidence was uncontradicted and overwhelming that at least one of the fatal wounds was at close range to the head of Leslie Trudell" and pointed to the evidence about "stippling, which shows . . . a shot within two feet of Mr. Trudell to his head." (RT 3975.) Not only was this incorrect as to Trudell, who had been shot from at least a distance of three feet or more and did not bear any signs of stippling; it was incorrect as to all of the other victims, *none* of whom had been shot in head or bore signs of stippling to their skin. If the experienced trial judge, who had the benefit of actually reviewing the record before ruling on the application to modify the death judgment, was so

misled by the prosecutor's representation of the evidence, it is highly likely that the lay jurors were, as well.[26]

Moreover, the prosecutor's use of false evidence cut straight to the heart of the pivotal issues presented by this case – whether Matthew killed and/or attempted to kill the victims with premeditation and deliberation, whether he intended to kill all of the victims rather than only Arnold and Watchman, whether Matthew was the actual shooter, and whether death was the appropriate punishment due to the circumstances of the crimes alone. As discussed in Arguments I through IV, above, the evidence going to these issues was extraordinarily close. Similarly, as discussed in detail in Argument VIII, below, the evidence supporting the prosecution's case for death was equally close. The prosecution presented no aggravating evidence apart from the circumstances of the crimes themselves and their impact on the victims and their families – an aggravating factor that was artificially inflated with the prosecution's false statements. At the same time, Matthew presented an enormous amount of compelling mitigating evidence. The prosecutor's use of false evidence thus served to unfairly tip the scales of this closely balanced case in its favor. (See, e.g., King v. United States (D.C. 1967) 372 F.2d 383, 395 [where prosecutor makes false representations in summation regarding "nerve center issue(s)," the "prejudice digs in and holds on"].)

Further, the prosecutor's use of false evidence to attack the integrity of Matthew's defense counsel had a devastating effect on the penalty phase. As discussed in detail in Arguments VIII and XIV, the trial court refused to provide requested instructions regarding lingering doubt as to Matthew's role in the shooting and on the scope of mitigating evidence the jury could consider. Without

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[26] Furthermore, as discussed in detail in Argument IX, below, although the jurors were instructed in the guilt phase that the statements of counsel were not evidence (CT 670, 674), they were told to disregard that instruction during the penalty phase (CT 781).

those instructions, Matthew was forced to rely on the arguments of his counsel to guide the jury's consideration of his mitigating evidence. (Cf., e.g., People v. Wright (1990) 52 Cal.3d 367, 440-442 [observing special instructions regarding mitigating evidence unnecessary where defense counsel's argument correctly sets forth applicable rules]; see also Florida v. Nixon (2004) ___ U.S. ___ 125 S.Ct. 551 [emphasizing importance of defense counsel's credibility with jurors in offering mitigation at penalty phase].) Thus, defense counsel's credibility was vital to Matthew's penalty phase defense. The prosecutor's use of false evidence to impugn the integrity of his counsel and expressly urge the jurors to reject counsel's representations because he had lied to them in his guilt phase summation thus crippled Matthew's penalty phase defense. (See, e.g., Bruno v. Rushen (9th Cir. 1983) 721 F.3d 1193, 1195 [improper attacks on defense counsel's integrity "severely damage an accused's opportunity to present his case before the jury"]; see also People v. Hill, supra, 17 Cal.4th at p. 832 ["'an attack on the defendant's attorney can be seriously prejudicial . . . (and) is never excusable'"].) That the prosecutor's tactic had its desired effect of dissuading the jurors from accepting defense counsel's representations is evident from the record.

In their penalty phase arguments, both of Matthew's attorneys informed the jurors that, regardless of what action they took in the penalty phase, it would have no effect on their guilt phase verdicts ensuring that Matthew would never be released from prison. (RT 3894, 3904.) Nevertheless, during its penalty phase deliberations, the jurors submitted a written question to the court inquiring into the consequences of jury deadlock and specifically whether deadlock would result in reversal of their guilt phase verdicts. (RT 3933; CT 755; see also RT 3934 [in discussing response to jury inquiry, both defense counsel reminded the court that they had answered this question in their summations].) In other words, the prosecutor successfully persuaded the jury to be unwilling to accept defense counsel's representations without independent verification.

For all of these reasons, respondent cannot prove beyond a reasonable doubt that the prosecutor's use of false evidence in the guilt and penalty phases was harmless. At the very least, the cumulative effect of the prosecutor's conduct along with the other errors committed throughout the guilt and penalty phases (Arguments I through V and VIII through XVI) was prejudicial and violated Matthew's right to a fair trial and reliable guilt and penalty phase determinations, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and articles 7 and 15 of the California Constitution. (See, e.g., Chambers v. Mississippi, supra, 410 U.S. 284 [cumulative effect of errors violated defendant's right to fair trial]; People v. Hill, supra, 17 Cal.4th at pp. 844-847 [same]; Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862, 883, 893 [same]; Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622-625.) The judgment must be reversed. (Ibid.)

## *ERRORS UNDERLYING THE PENALTY PHASE*

## VII. THE TRIAL COURT'S EXCLUSION OF QUALIFIED JURORS AND REFUSAL TO EXCLUDE DISQUALIFIED JURORS UNDER THE WAINWRIGHT V. WITT STANDARD VIOLATED MATTHEW'S RIGHTS TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

### A. Introduction.

The trial court excused two prospective jurors for cause who had voiced reservations about imposing the death penalty, but who also clearly indicated that they would and could impose the penalty if the circumstances warranted it. At the same time, the court refused to excuse a prospective juror for cause who not only voiced reservations about imposing life without parole for a defendant convicted of premeditated murder, but who also clearly stated that the defense would carry the burden of persuading him to vote for life and was unable to conceive of any circumstances that could satisfy that burden. That biased juror actually sat on the jury that fixed Matthew's punishment at death. The court's exclusion of qualified jurors and refusal to exclude the disqualified juror violated Matthew's right to a fair and impartial jury, as guaranteed by state law and the Fifth, Sixth, Eighth and the Fourteenth Amendments. Hence, the penalty judgment must be reversed.

Moreover, as demonstrated by these rulings and others, the court's application of the Wainwright v. Witt standard for exclusion was inconsistent and unfairly favored the prosecution and the dismissal for cause of life-inclined venirepersons in violation of state law and Matthew's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. With peremptory challenges, the prosecutor removed the few life-inclined venirepersons who remained after the trial court's

unfair application of Witt. Ultimately, of the jury that sentenced Matthew to death, four members identified themselves as "strongly in favor" of the death penalty; four identified themselves as "moderately in favor" of the death penalty; and four identified themselves as "neutral." *All* of the prospective jurors who had expressed opposition to, or conscientious scruples against, the death penalty were excluded from the jury. As fully explained below, under clearly established United States Supreme Court precedent, the death sentence imposed by such a jury cannot be executed without violating the federal constitution. For all of these reasons, the death judgment must be reversed.

**B. The General Legal Principles.**

A criminal defendant is entitled to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the California Constitution. (See, e.g. Morgan v. Illinois (1992) 504 U.S. 719, 727 [and authorities cited therein]; People v. Wheeler (1978) 22 Cal.3d 258, 272.) In capital cases, if the state has excluded from the jury members of the community with any reservations about capital punishment, the sentencing body is not impartial. Of course, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (Witherspoon v. Illinois (1968) 391 U.S. 510, 521-522, fn. 20.) Hence, when the "pro-life" side of the spectrum is excluded, the State "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (Id., at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (Id. at p. 522, fn. omitted.)

The Court in Witherspoon suggested that a prospective juror may be excused for cause only if he makes it "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before" him. (Witherspoon v. Illinois, supra, 391 U.S. at p. 522, n.21.) Revisiting the issues 18 years later, the Court reaffirmed the fundamental principles underlying the Witherspoon decision and "clarified" the test for determining when a juror may be excluded for cause. (Wainwright v. Witt (1985) 469 U.S. 412, 424-426.) Under the Witt standard, a prospective juror may be excused for cause based upon his or her views of the death penalty only if the juror's answers convey a "definite impression" (Id. at p. 426) that his or her views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." (Wainwright v. Witt, supra, at p. 424, adopting test applied in Adams v. Texas (1980) 448 U.S. 38, 45; see also People v. Ghent (1987) 43 Cal.3d 739, 767 [adopting Witt standard]; accord, e.g., People v. Stewart (2004) 33 Cal.4th 425, 440-441; People v. Heard (2003) 31 Cal.4th 946, 963; People v. Crittenden (1994) 9 Cal.4th 83, 121; People v. Mincey (1992) 2 Cal.4th 408, 456.)

In other words, "[a] prospective juror is properly excluded [only] if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" (People v. Cunningham (2001) 25 Cal.4th 926, 974; accord People v. Heard, supra, 31 Cal.4th at p. 958.) "The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." (People v. Heard, supra, at pp. 958-959, internal quotation marks omitted, quoting from People v. Ochoa (2001) 26 Cal.4th 398, 431, People v. Bradford (1997) 15 Cal.4th 1229, 1318 and People v. Hill (1992) 3 Cal.4th 959, 1003.) "'Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (Morgan v. Illinois (1992) 504 U.S. 719, 726-728), it is equally true that the 'real

question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.' (People v. Cash (2002) 28 Cal.4th 703, 719-720.)" (People v. Heard, supra, 31 Cal.4th at p. 959.)

The moving party bears "the burden of demonstrating to the trial court that the [Witt] standard [is] satisfied as to each of the challenged jurors." (People v. Stewart, supra, 33 Cal.4th at p. 445; accord Wainwright v. Witt, supra, 469 U.S. at p. 423.) "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation]." (People v. Weaver (2001) 26 Cal.4th 876, 910; see also Wainwright v. Witt, supra, at p. 429.) The court's ruling ordinarily is entitled to deference and will be upheld on appeal if supported by substantial evidence. (See, e.g., Wainwright v. Witt, supra, at pp. 426-430; People v. Stewart, supra, at p. 451; People v. Heard, supra, 31 Cal.4th at p. 965; People v. Memro (1995) 11 Cal.4th 786, 817-818.)

Of course, judicial discretion "implies absence of arbitrary determination, capricious disposition," "free from partiality." (People v. Surplice (1962) 203 Cal.App.2d 784, 791; accord, e.g., People v. Warner (1978) 20 Cal.3d 678, 683 [discretion is "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."].) Furthermore, "a trial court's broad discretion in the conduct of voir dire is nevertheless subject to essential demands of fairness." (Hughes v. United States (6th Cir. 2001) 258 F.3d 453, 457; Wolfe v. Brigano (6th Cir. 2000) 232 F.3d 499, 504, conc. opn. of Wellford, J.; U.S. Const., Amend. XIV.) Hence, a trial court must apply the Witt standard in an even-handed and impartial manner. (See, e.g., People v. Champion, supra, 9 Cal.4th 879, 908.) A court's application of the Witt standard in an arbitrary, capricious, or partial manner does not comport with the essence of fairness guaranteed by due process of law. (Cf. Gray v. Klauser (9th Cir. 2001) 282 F.3d 633, 645-648, 651 [and

authorities cited therein -- a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates due process].) Certainly, such rulings amount to an abuse of discretion, which are not entitled to deference. (See, e.g., People v. Welch (1993) 5 Cal.4th 228, 234.)

Finally, the improper exclusion of even a single qualified juror for cause under these standards requires reversal per se. (See, e.g., Gray v. Mississippi (1987) 481 U.S. 648, 666-668; Davis v. Georgia (1976) 429 U.S. 122; People v. Heard, supra, 31 Cal.4th at pp. 965-966.) Conversely, if even a single disqualified juror biased in favor of the death penalty under the Witt standard is "empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (Morgan v. Illinois, supra, 504 U.S. at p. 729; accord, e.g., People v. Boyette (2002) 29 Cal.4th 318, 416; People v. Weaver, supra, 26 Cal.4th at p. 910.)

Applying the foregoing principles to this case, it is clear that the trial court erroneously excluded qualified jurors merely because they had reservations about the death penalty, erroneously refused to exclude a disqualified juror who was actually biased in favor of the death penalty, and otherwise applied the Witt standard in an arbitrary, capricious, and partial manner. The penalty judgment must be reversed.

### C. Prospective Juror Madali.

#### 1. Prospective juror Madali's responses to the jury questionnaire and on voir dire and her dismissal for cause.

The juror questionnaire asked the prospective jurors to select one of five options that "most accurately state[d] [their] philosophical opinion[s] regarding the death penalty," ranging from "strongly against" to "strong in favor." Prospective juror Madali identified herself as "neutral." (CT 5181.) Asked to described her "general feelings" about the death penalty, she stated: "I believe the

law is the law, you must abide by the law of the land and if that means the person/s fall under that category, so be it. I myself really don't know how I feel about the death penalty. I believe that God allows certain things and it all depends. I am really unsure." (CT 5181.) As to her "general feelings" about the punishment of 'life without the possibility of parole,'" Ms. Madali replied, "I don't disagree with it. It all depends on the circumstances." (CT 5185.) Asked which of the two penalties was the more severe punishment and why, she declined to choose one over the other, explaining "depending on the person, one could be more severe than the other, so I choose neither one." (CT 5185.) Asked whether she would "*want* to know more about the defendant's background and family history before deciding which penalty to impose," she answered that "it depends on the nature of the crime." (CT 5182, emphasis.) Asked if she would consider such information if "*required*" to do so, she agreed that she would. (CT 5185.)

Ms. Madali also identified herself as a Christian and taught children's classes at her church. (CT 5168 [Vol. 19].) Her church did not advocate either in favor or against the death penalty. (CT 5182-5183.) She also indicated that her religious beliefs would not interfere with her ability or willingness to serve as a juror. (CT 5168.) She was "unsure" if she held "any religious or philosophical principle that would affect [her] ability to vote for the death penalty as a judgment in this case." (CT 5182.)

On voir dire, the court immediately probed into Ms. Madaili's expressed uncertainty over her personal feelings about the death penalty. (RT 896.) The court explained that the selection process was intended to ensure that the sitting jurors could "realistically consider two options," one of which is the death penalty. (RT 896-897.) Ms. Madali responded that "it would be really, really difficult for me to make that decision. I mean it would take a whole lot before that decision could be made by me." (RT 897.) The court asked her to explain what she meant by a "whole lot." (RT 897.) She replied, "it is basically the whole circumstance [*sic*]. . . . I mean everything that's taken and accounted for. The evidence, the

person, what – the circumstance, what happened, all of that." (RT 897.) Thereafter, using a "whole lot" as a synonym for the circumstances under which Ms. Madali would impose the death penalty, the following colloquy occurred:

> [By the court:] . . . But when you talk about making that decision, is there something within you that you're kind of warning me about, that you might not be able to do that? You might not be able to realistically consider both choices because of your own feelings or the unsureness of your feelings?
>
> A: Yes.
>
> Q: As you – are there, now, realistically, practically thinking that you could keep an open mind, hear all of the evidence and depending on the evidence that you could impose the death penalty? Do you think you could?
>
> A: I don't know how to answer that. It really – I mean I – to me it would really take a whole – I mean when I say a whole lot, I don't know what would make it – I can't say that I wouldn't say no to the death penalty. But I – it would take a whole, whole, whole, lot.
>
> Q: If an individual were charged with, oh, being a major participant in the holocaust, if an individual were charged with blowing up a public building with 200 people including infants in it are those things you think –
>
> A: A possibility.
>
> Q: -- fit a whole lot?
>
> A: Yes.
>
> Q: If somebody's charged with shooting a gun and shooting several people, does that measure up to a whole lot in your mind?
>
> A: No. All depends on the state of mind too.
>
> Q: Okay. I understand as you're struggling with this trying to express your feelings, as I understand it, you're conveying that you really have a problem with the death penalty?

A: Yes.

Q: But you also have thought about it enough to appreciate a lot can go into it besides a body count; but then you also come back to the idea that you really have a problem with the death penalty?

A: Yes. (RT 897-899.)

The court thus concluded its voir dire examination. (RT 899.)

Michael's counsel questioned Ms. Madali further. (RT 899.) He explained that "there is no problem, even under the law, that you have a hard time to impose the death penalty" and, as the court had instructed the jurors, it was necessary for a juror to find that "the aggravating circumstances are so substantial that in comparison with the . . . mitigating circumstances, that it would warrant death instead of life." (RT 899-900.) He further explained that the real question was whether she could be open to both options. (RT 900.) Ms. Madali responded, "in my heart, it would make me sick to make that decision." (RT 900.) The court sustained the prosecutor's objection to counsel's reply that "it should make any intelligent, compassionate human being sick." (RT 900-901.) Again, Michael's counsel asked her, "the question is, can you – can you be open to that decision? Both ways?" (RT 901.) Ms. Madali responded with an unequivocal "yes." (RT 901.) The prosecutor declined to question Ms. Madali and instead immediately challenged her for cause. (RT 901.)

In support of his challenge, the prosecutor argued that Ms. Madali's "feelings regarding the death penalty would prevent or substantially impair her ability to follow the law, I think was demonstrated basically talking [*sic*] to her strong Christian faith," as evidenced by her active role in her church, "and she has real reservations about imposing the death penalty in any case." (RT 910.) The prosecutor added that she had indicated only that she would "possibly" "consider" the death penalty for someone involved in the Holocaust or the Kansas City

bombing. (RT 911.) He pointed to her statement that "in her heart . . . it would make her sick" to vote for the death penalty in a case such as this, where "someone . . .shoots a few people with a gun." (RT 911.) Based on these responses, the prosecutor argued that, "try as she might, she could never vote to impose the death penalty in any case." (RT 911.)

Michael's counsel responded by acknowledging that Ms. Madali would find it very difficult to impose the death penalty and that, "in her heart, it would make her sick." (RT 911-912.) However, this was insufficient to excuse her; "under the law she's still open to the death penalty and I thought my last question and her last answer indicated that." (RT 912.) He also reminded the court that her responses were similar to those of prospective juror Labuda, who "was very much pro death," who was the subject of the defense's most recent challenge for cause, but whom court had refused to excuse on the ground that he did not meet the Witt standard for disqualification. (RT 912; see also part F-1-a, below.) Matthew's counsel "submit[ted]" the matter on the arguments. (RT 914.)[27]

The court disagreed, observing that Mr. Labuda "was all over the place;" while Ms. Madali "was not all over the place." (RT 912.) Rather, the court emphasized, she was very clear that she would be "sickened at the thought of " voting to execute someone. (RT 913.) This statement "seemed to show the extremity of the situation to me." (RT 913.) The court stated, "I don't think we're setting up a standard of jurors are expected to become sick about the decision they're supposed to make" (RT 901) and criticized the defense position that this was "an appropriate standard." (RT 912.) As to Ms. Madaili's assurance that she would consider both penalties if the law so required, the court dismissed it, observing that defense counsel "got one right answer out of her after that unique standard that was set up, but she struggled and still was making it clear, even as

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[27] Once again, early in the proceedings, the trial judge directed the attorneys that he only wanted to hear argument from one attorney during trial, preferably the attorney who had questioned the prospective juror or the witness. (RT 435.)

she struggled, that it might be possible, but it took seconds of silence before she would even suggest that." (RT 912-913.) Finally, the court noted for the record that there were "five, six-second delays sometimes when she was asked about some of these questions. She was really struggling." (RT 911.) Concluding that the issue was not "close," the court granted the challenge for cause. (RT 914.)

### 2. The exclusion of prospective juror Madali for cause was unsupported by substantial evidence that her feelings about the death penalty would prevent or substantially impair her ability to perform her duties as a juror.

From the foregoing, it is clear that the court excused Ms. Madali based on her statement that it would make her "sick" at "heart" to vote to execute someone, combined with her "struggle" over the questions as evidenced by the "five, six second delays" in answering some of them. (RT 901, 911-913.) However, contrary to the court's ruling, this did not constitute substantial evidence that her feelings would prevent or substantially impair her ability to perform her duties as a juror under the Witt standard.

It "is clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under Witt, supra, 469 U.S. 412." (People v. Stewart, supra, 33 Cal.4th at p. 446.) As the United States Supreme Court has explained, "not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (Lockhart v. McCree (1986) 476 U.S. 162, 176; accord Witherspoon v. Illinois, supra, 391 U.S. at p. 522 ["a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or

religious scruples against its infliction"]; Adams v. Texas, supra, 448 U.S. 38, 50 [in applying the "prevent or substantially impair" standard, "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"]; People v. Stewart, supra, 33 Cal.4th at p. 446, People v. Heard, supra, 31 Cal.4th at pp. 959-965 [juror improperly excused for cause where he initially stated that he believed life without parole was worse punishment and that psychological factors would weigh heavily enough that he would probably vote against death penalty, but indicated that he would follow the law and would not automatically vote against the death penalty].)

Certainly, it is beyond dispute that "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man.' [Citation.]" (Witherspoon v. Illinois, supra, 391 U.S. at p. 515, n.8; accord, e.g., Eddings v. Oklahoma (1982) 455 U.S. 104, 127, dis. opn. of Burger, J. ["It can never be less than the most painful of our duties to pass on capital cases"]; McGautha v. California (1971) 402 U.S. 183, 208 [recognizing the "truly awesome responsibility of decreeing death for a fellow human being"].) Hence, the pain or extreme difficulty that otherwise inheres in the decision to execute another human being simply does *not* establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties. (People v Stewart, supra, 33 Cal.4th at pp. 446-449.) As the Court has explained:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult' *ever* to vote to impose the death penalty. . . . [H]owever, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her

> personal views actually would prevent or substantially impair the performance of his or her duties as a juror. . . . .
>
> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under Witt, supra, 469 U.S. 412. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under Witt, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (People v. Stewart, supra, 33 Cal.4th at p. 446.)

Pursuant to these authorities, it is abundantly clear that a prospective juror's statement that it would be "difficult" or "painful" *or make her "sick" at "heart"* to vote to kill another human being is not itself sufficient to exclude her under the Witt standard. Not once did Ms. Madali state that this feeling would prevent or substantially impair her ability to perform her duties or impose the death penalty if the circumstances warranted it. Not once did she indicate that she could not set her personal feelings aside and follow the law. To the contrary, whenever she was asked directly if she would consider both penalties if the law required it, she indicated an unambiguous willingness to follow the law, despite whatever personal feelings she may have had about the death penalty. In her questionnaire, Ms. Madali clearly stated that although "I myself really don't know how I feel about the death penalty," "*I believe the law is the law, you must abide by the law of the land* and if that means the person/s fall under that category, so be it." (CT 5181, emphasis supplied.) None of her answers on voir dire detracted from, undermined, or contradicted this unambiguous statement of her ability to serve as

a juror. To the contrary, although she stated that it would take a "whole lot" and be a painful and "really difficult" decision, she clearly indicated that she could vote for the death penalty if the "circumstance[s]" warranted it. (RT 897-899.) At the close of her voir dire examination and after the law had been explained to her, she unequivocally agreed that she would be "open" to both penalties. (RT 898-901.) Given these responses and pursuant to the foregoing authorities, Ms. Madali's statement that it would make her "sick" in her "heart" to impose death fell far short of demonstrating that this understandable feeling would "prevent or substantially impair" the performance of her duties as a juror.

To be sure, it is often difficult to review a trial court's ruling on a challenge for cause because some factors going into the decision, such as the juror's demeanor, are not apparent from a cold record. (See, e.g., People v. Stewart, supra, 33 Cal.4th at pp. 450-451 and n. 13 [and authorities cited therein.) Here, however, the Court has the benefit of a record of the subjective factors that went into the trial court's ruling. The trial court took care to note that "what isn't there [on the record] that should be part of the record" were "five, six-second delays sometimes when she was asked about some of these questions. She was really struggling." (RT 911.)

Once again, the fact that Ms. Madali may have been "struggling" over her answers to the questions, as evidenced by occasional "five, six-second delays," was an insufficient basis for excluding her from the jury. The questions to Ms. Madali were directed toward ascertaining her ability to kill another human being. It *should* be a "struggle" to answer such questions. The concern should not be with prospective jurors who do struggle over whether they could execute another human being, but rather with prospective jurors who do not. For these reasons, this Court has explicitly recognized that "delays" or "long periods" before answering such questions are "appropriate" and indicate nothing more than that the person is giving them the careful "reflection" and consideration that they *demand*. (See People v. Heard, supra, 31 Cal.4th at p. 967 and n.10 [in holding

that trial court erred in excusing juror for cause, Court rejected Attorney General's argument that "long periods of silence" between questions and his answers supported trial court's ruling].)

Indeed, accepting the trial court's converse reasoning that only those people who would *not* "struggle" over, or be pained or "sickened" by, the decision to execute another human being are qualified to serve as jurors would produce juries "uncommonly willing to condemn a man to die." (Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521.) Pursuant to the foregoing authorities, the court's stated reasons for excusing Ms. Madali's fell far short of amounting to substantial evidence that her feelings would prevent or substantially impair the performance of her duties as a juror.

Nor did the prosecutor otherwise bear his burden of demonstrating that the Witt standard was satisfied as to Ms. Madali. (Wainwright v. Witt, supra, 469 U.S. at p. 423; People v. Stewart, supra, 33 Cal.4th at p. 445.) To the contrary, her responses were striking in their consistency with the law guiding jurors' penalty decisions.

While the prosecutor argued that Ms. Madali would have "reservations" about voting for death, and the court itself twice observed that she had a "problem" with the death penalty (RT 898-899, 910), these were clearly insufficient reasons to exclude her. (Wainwright v. Witt, supra, 469 U.S. 412, 423; Adams v. Texas, supra, 448 U.S. at p. 40; Witherspoon v. Illinois, supra, 391 U.S. at pp. 518, 520-523.) When the court asked her directly if she "could realistically consider two options," she responded that "it would be really, really difficult for me to make that decision. I mean it would take a whole lot before that decision could be made by me." (RT 897.) Upon further inquiry, she explained that a "whole lot" meant that "it is basically the whole circumstance [*sic*]. . . . I mean everything that's taken and accounted for. The evidence, the person, what – the circumstance, what happened, all of that." (RT 897-898.) Of course, these responses mirrored the law requiring jurors to consider all of the relevant

"circumstance[s]" relating to the offense *and* the offender. (Pen. Code § 190.3; see also, e.g., Skipper v. South Carolina (1986) 476 U.S. 1, 4-5; Gregg v. Georgia (1976) 428 U.S. 153, 189; People v. Zapien (1993) 4 Cal.4th 929, 990.) And, a juror cannot vote for death without finding that the aggravating circumstances "substantially outweigh" the mitigating circumstances – in other words, without finding that a "whole lot" justifies the most extreme punishment. (See, e.g., People v. Prieto, supra, 30 Cal.4th at p. 263.) Hence, this Court has explicitly held that "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it *very difficult* for the juror ever to impose the death penalty." (See, e.g., People v. Stewart, supra, 33 Cal.4th p. 447; accord People v. Heard, supra, 31 Cal.4th at pp. 959-965 [juror improperly excused for cause where he initially stated that he believed life without parole was worse punishment and that psychological factors would weigh heavily enough that he would probably vote against death penalty, but indicated that he would follow the law and would not automatically vote against the death penalty]; People v. Kaurish (1990) 52 Cal.3d 648, 699 ["A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict"].)

The prosecutor also argued that Ms. Madali's disqualification under Witt was demonstrated by her statement that she would only "possibly" vote to execute someone involved in the holocaust or the Kansas City bombing for death. (RT 911.) As a preliminary matter, the prosecutor misstated the record. The court asked Ms. Madali if the "whole lot" under which she could vote for death would include involvement in the holocaust or the Kansas City bombing; in the midst of the court's question, she uttered the word "possibly," but when the question was

completed, she responded, "yes." (RT 898-899.) In any event, even if she would only "possibly" – meaning not automatically – vote for death in such cases, her response was entirely appropriate. (See, e.g., Gall v. Parker (6th Cir. 2000) 231 F.3d 265, 331 [juror improperly excused for cause where, *inter alia*, he indicated that he would "possibly" impose death under various factual scenarios].)

Furthermore, the hypothetical examples focused on only a single factor – the underlying crime or crimes – and not on any mitigating factors relating to the defendant himself or to the circumstances that led to those crimes. Once again, "no single factor . . . determines which penalty – death or life without the possibility of parole – is appropriate." (People v. Prieto, supra, 30 Cal.4th at p. 263 [and authorities cited therein].) Indeed, both the court and the prosecutor otherwise recognized that hypothetical examples based solely on the commission of the underlying crimes were inappropriate for this very reason. During the voir dire examination of Juror No. 5 who expressed clear "pro-death" sentiments, defense counsel asked him if he could vote for life if the defendants were found guilty of three murders. (RT 415.) The court sustained the prosecutor's objection to the question on the ground that it failed to take mitigation into account. (RT 415; see also RT 437.)

More importantly, when presented with a hypothetical reflecting the bare facts of this case – posited as "somebody's charged with shooting a gun and shooting several people" –Ms. Madali never suggested that she would *not* vote for death. (RT 898.) To the contrary, she simply responded that she would not *necessarily* vote for death *based on those facts alone* because it "all depends on the state of mind, too." (RT 898.) Again, upon further questioning in which the law was explained to her, she unequivocally stated that she would consider both options. (RT 901.) At bottom, Ms. Madali's statements that her "decision would likely depend on the facts [s]he was face[d] with . . . suggested that [her] selection would comport with the trial court's 'quest' to find jurors who 'conscientiously apply the law and find the facts.' Witt, supra, 469 U.S. at 423." (Gall v. Parker,

supra, 231 F.3d at p. 331; accord, e.g., People v. Hillhouse (2002) 27 Cal.4th 469, 488 ["a juror . . . who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so"].)

Similarly, the prosecutor's argument that Ms. Madali's was actually biased because her Christianity would automatically prevent or substantially impair her ability to perform her duties as a juror was without any basis in the facts or the law. (RT 910.) The only discussion of Madali's Christianity was in her questionnaire; the prosecutor did not even bother to question her about it. In her questionnaire, she did indicate that she was a Christian and active in her church, but never suggested that her church even had a stance on the death penalty, much less that her religious beliefs would prevent her from voting for death. To the contrary, she clearly stated that her religious beliefs would not interfere with her ability or willingness to serve as a juror in this case. (CT 5168.) She also indicated that she did not belong to any organization, which presumably would include her church, which advocated abolition of the death penalty. (CT 5184.) While she did indicate that she was "unsure" if she held a "religious or philosophical principle that would affect" her ability to vote for the death penalty (CT 5182), she further indicated that "I believe the law is the law, you must abide by the law of the land and if that means the person/s fall under that category, so be it. I myself really don't know how I feel about the death penalty. *I believe that God allows certain things and it all depends.* I am really unsure." (CT 5181, emphasis supplied.) Hence, contrary to the prosecutor's suggestion, her answers as a whole clearly indicated that her religion, or "God," would "allow" imposition of the death penalty "depend[ing] on the circumstances." (CT 5181.) If the prosecutor wished to explore how her religion would affect her duties, he should have questioned her regarding it. Instead, he relied on nothing more than her questionnaire answer that she was actively involved in her Christian church.

Neither the prosecutor nor the court could presume that, contrary to her other answers on the questionnaire, Ms. Madali's Christianity would prevent or substantially impair her ability to perform her duties as a juror. (See, e.g., Witherspoon v. Illinois, supra, 391 U.S. at p. 515, n.9 ["it cannot be assumed that a juror who describes himself as having . . . religious scruples against the infliction of the death penalty . . . thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him."]; accord, e.g., United States v. Padilla-Mendoza (9th Cir. 1998) 157 F.3d 730, 733 ["to presume that personal beliefs automatically render one unable to act as a juror is improper"].) Indeed, the prosecutor's argument to the contrary was particularly disingenuous given that 14 of the selected 18 jurors were Christian, many of whom, like Ms. Madali, were active in their churches. (CT 2856, 3623, 3595, 4172, 4453, 4564, 6873, 6956, 7340, 8162, 8604, 8881, 9208, 11329.)

Finally, it is true that a trial court's ruling on a challenge for cause is ordinarily a discretionary exercise to be treated with deference. (See, e.g., People v. Weaver, supra, 26 Cal.4th at p. 910.) However, as discussed in part B above, in order to trigger the deferential standard, discretion must be exercised fairly, not in an arbitrary, capricious, or partial manner. (See, e.g., People v. Warner, supra, 20 Cal.3d at p. 683.) Here, as explained in more detail in part E, below, the court's application of the Witt standard was far from evenhanded and impartial. (See, e.g., People v. Champion, supra, 9 Cal.4th at p. 908 [trial court's application of Witt must be evenhanded].) Hence, its finding that Ms. Madali's answers satisfied the Witt standard (as well as its finding that Juror No. 5 did not satisfy the standard, as discussed below) is not entitled to deference. (See, e.g., People v. Welch, supra, 5 Cal.4th at p. 234.)

For all of the foregoing reasons, the court's exclusion of Ms. Madali violated Matthew's rights to a fair and impartial jury in violation of the Sixth and Fourteenth Amendments. This error alone compels reversal of the penalty

judgment. (See, e.g., Gray v. Mississippi, supra, 481 U.S. at pp. 666-668; People v. Heard, supra, 31 Cal.4th at pp. 965-966.)

### D Prospective Juror Froyland.

#### 1. Prospective juror Froyland's responses to the jury questionnaire and on voir dire and his dismissal for cause.

Prospective juror Froyland identified himself on his questionnaire as "moderately in favor" of the death penalty. (CT 4521.) As to his "general feelings" about the death penalty, he responded: "Hard to look at most of the time – I mean having to exercise it. I wonder if it is a deterrent at all. Overall, I believe there is a need for it." (CT 4521.) Asked his "general feelings" about life without parole, he replied that "it's better than death and leaves the door open for personal rehabilitation. It seems, however there are few systems in place to accomplish this." (CT 4525.) He held no "religious or philosophical principle" that would affect his ability to vote for the death penalty. (CT 4522.) Asked if he would want to know about the defendant's background and why, he replied that he would in order "to be fair." (CT 4522.)

On voir dire, the court asked him if he could practically consider both penalties; he replied that he could, but "not without difficulty." (RT 745.) Asked to clarify, he explained that "the death penalty is a very final penalty, so not to be considered lightly." (RT 745.) Therefore, he would find it "very difficult" to vote for death, but would not "preclude[]" it, and in fact reiterated that he is moderately in favor of it. (RT 745-746.) The court explained that he would have to consider several factors relating to the crime and to the defendants and asked him if, "in light of that, do you think that you really would be a fair juror to decide that, about the death penalty?" (RT 747.) Mr. Froyland responded that he would be "more in favor of life." (RT 747.) The court asked again if he could "practically" "see [himself] as voting for the death penalty." (RT 747.) He replied, "I would have to

be persuaded at that point by the evidence." (RT 747.) The court pressed him, "to some extent, have you prejudged?" (RT 748.) Mr. Froyland emphasized that, "not having heard one fact, whatsoever," he would be "more likely to sway or fall on the side of lenient punishment." (RT 748.) Defense counsel having refused to stipulate to challenging Mr. Froyland for cause, the court granted the prosecutor's challenge and dismissed Mr. Froyland without explanation. (RT 748-749.)[28]

### 2. The exclusion of prospective juror Froyland for cause was unsupported by substantial evidence that his feelings about the death penalty would prevent or substantially impair his ability to perform his duties as a juror.

Once again, the court's dismissal of Mr. Froyland for cause was unsupported by substantial evidence that his feelings about the death penalty would prevent or substantially impair his ability to perform his duties as a juror. Mr. Froyland clearly and unequivocally stated that he was moderately in favor of the death penalty and in fact could and would impose it if persuaded by the evidence. (RT 745-749.) Contrary to suggesting his inability to perform his duties as a juror, his statement that "not having heard one fact, whatsoever," he would be "more likely to sway or fall on the side of lenient punishment" in fact paraphrased the law that he would be duty bound to follow as a juror. (RT 748; see Pen. Code § 190.3 [death may not be imposed if aggravating circumstances outweigh mitigating]; People v. Prieto, supra, 30 Cal.4th at p. 263.) Like Ms. Madali, Mr. Froyland's statement that his "decision would likely depend on the facts he was face[d] with . . . suggested that his selection would comport with the trial court's 'quest' to find jurors who 'conscientiously apply the law and find the facts.' Witt, supra, 469 U.S. at 423." (Gall v. Parker, supra, 231 F.3d at p. 331;

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[28] Counsel stipulated to several challenges for cause. (RT 108-119; CT 586.) Counsel refused to stipulate to excusing the jurors discussed in this argument.

Furthermore, neither the fact that he would find it "very difficult" to vote for death nor that he would have to be persuaded by the evidence to do so, was sufficient ground to excuse him. Once again, as this Court has recognized, "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it *very difficult* for the juror ever to impose the death penalty." (See, e.g., People v. Stewart, supra, 33 Cal.4th p. 447; accord People v. Heard, supra, 31 Cal.4th at pp. 959-965; People v. Kaurish, supra, 52 Cal.3d at p. 699; Wainwright v. Witt, supra, 469 U.S. 412, 423; Adams v. Texas, supra, 448 U.S. at p. 40; Witherspoon v. Illinois, supra, 391 U.S. at pp. 518, 520-523.) In sum, like Ms. Madali, far from meeting the Witt standard for exclusion, Mr. Froyland's answers as a whole demonstrated that he would be an ideal juror. The court's exclusion of Mr. Froyland violated Matthew's rights to a fair and impartial jury in violation of the Sixth and Fourteenth Amendments. This error alone compels reversal of the penalty judgment. (Gray v. Mississippi, supra, 481 U.S. at pp. 666-668; People v. Heard, supra, 31 Cal.4th at pp. 965-966.)

### 3. Counsel's "non-opposition" to the court's dismissal of Mr. Froyland for cause did not waive Matthew's right to challenge the error on appeal.

While counsel refused to stipulate to challenging Mr. Froyland for cause (see RT 108-119), it is true that he did not object or oppose Mr. Froyland's dismissal. Respondent may argue that counsel thereby waived Matthew's right to challenge the error on appeal. Any such argument must be rejected.

Voir dire in this case was conducted in 1998. At the time, the law did not require an objection or opposition to the erroneous dismissal of a juror for cause under Witherspoon-Witt in order to preserve the error for appeal. In People v.

Velasquez (1980) 26 Cal.3d 425, 443, the Court rejected the Attorney General's argument that the defendant waived a Witherspoon error by failing to object to the juror's dismissal. As the Court stated, "the decisions of the United States Supreme Court and of the California courts have unanimously ruled that Witherspoon error is not waived by mere failure to object." (Ibid., citing, *inter alia*, Maxwell v. Bishop (1970) 398 U.S. 262, People v. Risenhoover (1968) 70 Cal.2d 39, 56, and In re Anderson (1968) 69 Cal.2d 613, 618-619.) Thereafter, in People v. Lanphear (1980) 26 Cal.3d 814, 844, the Court relied on Velasquez in again rejecting the Attorney General's argument that the defendant waived Witherspoon error for failing to object. In People v. Cox (1991) 53 Cal.3d 618, 648, n.4, the Court again cited Velasquez in noting with respect to a claim that the trial court erroneously dismissed a juror for cause that "the failure to object does not waive the issue for appeal . . ." However, in 1997, the Court curiously observed that – despite Velasquez's clear reliance on California authority – "[w]e have not decided whether 'nonopposition' to a Witherspoon-Witt challenge for cause waives any claim of error on appeal. . . . We recognized controlling federal precedent holds that Witherspoon error is not waived by 'mere' failure to object in People v. Velasquez . . . ." (People v. Holt (1997) 15 Cal.4th 619, 651 and n. 4.) Since Holt, the Court has not issued any decision requiring an objection in order to preserve an erroneous dismissal of a juror for cause under Witherspoon-Witt. Hence, because the law did not impose such a requirement at the time of voir dire in this case – and indeed because the only cases directly on point held that no such objection is required – counsel's failure to object or oppose the court's dismissal of Mr. Froyland for cause did not waive Matthew's right to challenge the error on appeal. (Cf. People v. Weaver, supra, 26 Cal.4th at pp. 910-911 [where law in state of flux at time of voir dire as to whether expression of dissatisfaction necessary to preserve erroneous denial of for-cause challenge, absence of expression did not waive error for appeal]; accord People v. Boyette, supra, 29 Cal.4th at p. 416.)

## E. Juror No. 5.

### 1. Juror No. 5's responses to the jury questionnaire and on voir dire and the court's refusal to dismiss him for cause.

In his questionnaire, Juror No. 5 identified himself as "moderately in favor" of the death penalty. (CT 3608 [Vol. 13].) As to his "general feelings" about the death penalty, he expressed his belief in an "eye for an eye" in some cases. (CT 3608 [Vol. 13].) He stated that he would *not* want to know about the defendant's background in determining the appropriate penalty. (CT 3609.) If "*required*" to consider factors relating to the defendant, including background, "or any other sympathetic or other aspects of the defendant['s character or record as a basis for a sentence *less* than death," he replied only that "considerations are possible." (CT 3612.)

On voir dire, Michael's counsel asked Juror No. 5 to explain his statement that an "eye for an eye" was warranted in some cases. (RT 412-413.) Juror No. 5 responded that it was warranted in cases in which it was proved beyond a reasonable doubt that the defendant killed, but was not warranted if the killing were accidental or an act of war. (RT 413.) Michael's counsel asked him if it would be warranted if the defendant were found guilty of three murders. (RT 413-414.) As mentioned in part C, above, the court sustained the prosecutor's objection to this question on the ground that it did not take mitigation into account. (RT 415.) Michael's counsel reframed the question and asked Juror No. 5 if he would automatically vote for death if the defendants were found guilty beyond a reasonable doubt of the charges, "without other considerations." (RT 415.) Juror No. 5 replied that he would. (RT 415.)

The court immediately responded by posing a hypothetical example clearly intended to rehabilitate Juror No. 5. (RT 415.) The court presented a classic hypothetical involving a getaway driver involved in a bank robbery resulting in a homicide, but who was not actively involved in the robbery, not present when the

victims were killed, and had no intent to kill anyone. (RT 416-417.) The court explained that, under the law, the getaway driver would be liable for murder. (RT 416-417.) However, in determining the penalty, the jury would and should consider the getaway driver's relative culpability for the murders. Given that the getaway driver was guilty of murder under the law, the court asked Juror No. 5 if "in your mind, would that still mean that you felt there's only one of two possible punishments that would be appropriate, and that would be the death penalty over life without the possibility of parole." (RT 416-417.) Again, Juror No. 5 replied, "I believe so." (RT 417.) Nevertheless, the court pressed him further, asking if he could keep an "open mind to hear the evidence concerning the appropriate punishment that might come in the penalty phase?" Juror No. 5 replied only that he would "*try* to keep an open mind." (RT 417.)

Matthew's counsel probed further, asking Juror No.5 directly if he would "automatically" impose the death penalty if the defendants were found guilty as charged in this case. (RT 417-418.) This time he replied, "Well, I wouldn't say automatically." (RT 418.) Counsel asked him if he would be "inclined to give the death penalty" and Juror No. 5 agreed that he would. (RT 418.) Counsel asked him what might change his mind, but he was unable to articulate an example. (RT 418.) Counsel asked him if would place the burden on the defense to change his mind. (RT 419.) Juror No. 5 replied that he would. (RT 419.)

The prosecutor sought to rehabilitate Juror No. 5. (RT 419.) He emphasized that "it's sort of unfair" to ask him how he would vote if the defendants were found guilty as charged since he did not "know the circumstances of how those murders occurred," "what, if any reasons, they had, if they did, in fact do them," or anything about their "background." (RT 419-420.) Again, he asked Juror No. 5 if he could "listen" to such evidence before he decided the appropriate penalty. (RT 420.) The juror carefully replied, "I could listen." (RT 420.) If he found the defendants guilty as charged, he would "be leaning towards death," but mitigating evidence "could" change his mind. (RT 420.)

The defendants challenged Juror No. 5 for cause under Witt (RT 434.) Matthew's counsel acknowledged that he had not stated that he would "automatically" vote for death. However, he indicated that he would be inclined toward death if the defendants were convicted, he would apply a "presumption of death," he would place the burden on the defendants of rebutting that presumption, yet he was unable to articulate any facts with which the defendants could satisfy their burden. (RT 434, 437.) Given these statements, counsel concluded, "the juror should clearly, under Witt, be excluded." (RT 434.) Michael's counsel added that he would not be able to give fair consideration to the mitigating evidence. (RT 435-436.) The court denied the challenge for cause and Juror No. 5 was seated on the jury that fixed the punishment at death. (RT 439.)

**2. The court's refusal to dismiss Juror No. 5 based upon its implicit finding that he could follow his oath and perform his duties as a juror was unsupported by the evidence.**

As discussed in part B, above, under the Witt standard, a juror whose "'views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror'" must be excluded. (People v. Heard, supra, 31 Cal.4th at p. 959.) Empaneling even a single juror who is biased in favor of the death penalty under the Witt standard violates the Sixth and Fourteenth Amendments and precludes executing the death sentence. (Morgan v. Illinois, supra, 504 U.S. at p. 729; People v. Boyette, supra, 29 Cal.4th at p. 416; People v. Weaver, supra, 26 Cal.4th at p. 910.)

In People v. Boyette, supra, 29 Cal.4th 318, this Court held that a juror who gave answers strikingly similar to Juror No. 5's answers should have been excluded for cause from a capital jury under the Witt standard. In that case, the prospective juror indicated both that he was strongly in favor of the death penalty and that he was "somewhat pro-death." (Id. at pp. 417-418.) He initially stated that the death penalty should automatically be imposed on defendants convicted of

multiple murder. (Ibid.) He later agreed that he could vote for life if it was appropriate, but that he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty." (Ibid.) He "equivocated when asked whether he would exclude consideration of a life term, saying, 'Never having been in that situation, I have no idea.'" (Ibid.) Finally, he stated that he could not "assume" that "life without parole means what it says." (Ibid.) The trial court denied the defendant's challenge for cause under Witt.

This Court held that the juror was biased and therefore the trial court erred in denying the defense challenge for cause: "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. . . . Because this juror's views would have 'prevent(ed) or substantially impair(ed) the performance of his duties as a juror in accordance with his instructions and his oath,' (Wainwright v. Witt, supra, 469 U.S. at p. 424), the trial court erred in denying defendant's challenge for cause. (People v. Boyette, supra, 29 Cal.4th at p. 419.)

Here, while Juror No. 5 identified himself as "moderately in favor" of the death penalty, his answers as a whole clearly indicated that he was strongly in favor of the penalty. (RT 3608; see also e.g., People v. Ghent, supra, 43 Cal.3d at p. 768 [juror's answers must be considered as a whole].) As in Boyette, Juror No. 5 initially stated that he would automatically vote to execute a person convicted of multiple murder. (RT 415.) Just as in Boyette, although Juror No. 5 later attempted to backtrack from this "automatic" position by indicating that he could conceivably be convinced to vote for life (RT 418), he also clearly believed that death would be the presumptively appropriate penalty and the defense would bear the burden of rebutting that presumption, or convincing him to spare Matthew's life. (RT 418-419.). In other words, just as in Boyette, Juror No. 5 unequivocally

indicated that he "would apply a higher standard . . . to a life sentence than to one of death." (People v. Boyette, supra, 29 Cal.4th at p. 419.)

Furthermore, when pressed, Juror No. 5 chose his words very carefully, promising no more than to "listen" to mitigating evidence (RT 420), to "possibl[y]" consider mitigating evidence if *required* to do so (CT 3612), and to "*try* to keep an open mind" about the appropriate penalty (RT 417). Of course, the constitution guarantees a defendant "the right to a jury that will hear his case impartially, not one who tentatively promises to try." (Wolfe v. Brigano, supra, 232 F.3d at p. 503 [jurors' "tentative statements that they would try to decide the case based on the evidence" insufficient to support finding of impartiality]; see also Nance v. State (Ga. 2000) 526 S.E.2d 560, 567 [court erred in denying challenge for cause to juror who stated that she would automatically vote for death if jury found one aggravating circumstance, even though she ultimately agreed that she would "listen" to the law and facts and choose the appropriate sentence].)

Indeed, as counsel argued, despite his tentative promise to "try" to do so (RT 434, 437), Juror No. 5's other answers clearly indicated that he would not be able to follow his oath and fairly consider mitigating evidence or life without parole if the defendants were convicted of multiple murder. (See, e.g., Morgan v. Illinois, supra, 504 U.S. at p. 507 [juror who will not consider mitigating evidence must be excused].) Based on the court's tendentious hypothetical example, he stated that if a defendant were convicted of first-degree murder under the felony murder rule, but had no intent or plan to kill, was not physically present during the killing, and even had no knowledge of the killing, all of these circumstances would not "change [his] mind" and convince him to vote for life. (RT 417-417.) Despite substantial probing into what, if any, mitigating evidence could possibly "change [his] mind" and convince him to spare the life of a defendant who had killed, he was only able to articulate two such circumstances: accidental killings and casualties of war – circumstances that would not arise in any first-degree murder case (barring perhaps a felony-murder case), much less in this case. (RT

413-419.) Given his answers as a whole, it was clear that Juror No. 5 was biased in favor of execution in every first-degree murder case, regardless of the evidence, and that this bias would prevent or substantially impair his ability to perform his duties as a juror. As in Boyette, the court erred in denying the defense challenge for cause as to Juror No. 5. (People v. Boyette, supra, 29 Cal.4th at pp. 417-419; see also, e.g., Wolfe v. Brigano, supra, 232 F.3d at p. 503 [jurors' "tentative statements that they would try to decide the case based on the evidence" insufficient to support finding of impartiality].) Since the seating of even a single biased juror violates the defendant's right to a fair and impartial jury, reversal is required. (Morgan v. Illinois, supra, 504 U.S. at p. 729; accord, e.g., People v. Weaver, supra, 26 Cal.4th at p. 910.)

### 3. Matthew's right to a fair and impartial jury was not waived by his counsel's failure to exercise a peremptory challenge to exclude Juror No. 5.

It is true Matthew's counsel had peremptory challenges remaining but did not exercise one to remove Juror No. 5 when he was seated in the jury as *originally* constituted. However, that jury did not deliberate in the guilt or penalty phases. Rather, only one court session after the jury was sworn, one of the originally seated regular jurors – Juror No. 11 – was excused and replaced with one of the alternates. (RT 1861-1863.) It was this reconstituted jury that deliberated in both phases. Counsel *did* exhaust his peremptory challenges as to the alternate jurors. (RT 1842-1850.) Respondent may argue that counsel nevertheless waived Matthew's right to challenge the violation of his right to an impartial jury by failing to use a peremptory challenge to strike Juror No. 5 from the originally constituted jury. For the reasons explained below, such an argument must be rejected.

This Court has held that in order to preserve a trial court's erroneous denial of a challenge for cause for appeal, the defendant ordinarily must either exercise a

peremptory challenge to remove the challenged juror or show that he was unable to do so because his peremptory challenges were exhausted. (See, e.g., People v. Hillhouse, supra, 27 Cal.4th at p. 486 [and authorities cited therein].) The principal rationale for applying the exhaustion rule is that the failure to exhaust an available peremptory challenge implies counsel's "relative" satisfaction with the constituted jury *as a whole*, which may be based on some "nuanced and tactical" reason. (See, e.g., People v. Ayala (2000) 23 Cal.4th 225, 261; People v. Bemore (2000) 22 Cal.4th 809, 836; People v. Johnson, supra, 3 Cal.4th at pp. 1211-1212; People v. Morris (1991) 53 Cal.3d 185.) So long as the composition of that jury remains the same, the implication of satisfaction arguably applies.

However, the implication that counsel is satisfied with the jury as constituted would not continue to apply where, as here, the defendant *does* exhaust his peremptory challenges to the potential alternate jurors and an alternate juror is seated on the jury that fixes the punishment at death. Once one of the originally seated jurors is replaced with an alternate, the original composition of the jury with which counsel was "relatively satisfied" has *changed*. In other words, whatever possible tactical decision may have underlay accepting the panel as originally constituted is nullified when the composition of that panel changes. Indeed, this Court has recognized as much in other contexts. In In re Mendes (1979) 23 Cal.3d 847, the Court held that when a regular juror is discharged before the selection of alternate jurors commences, the trial court has the discretion to reopen jury selection completely in order to allow the parties to exercise remaining peremptory challenges against any of the remaining regular jurors already sworn. (Id. at p. 855.) This rule is based on the recognition that the panel as originally constituted has *changed* and therefore it cannot be assumed that either side is still satisfied with the jury as reconstituted. (Ibid.)[29] And, because Matthew's counsel

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[29] Indeed, the record of jury selection here otherwise illustrates how changing even a single juror may change counsel's strategy as to a group of jurors. When selecting five alternate jurors, all counsel originally passed and accepted the panel

*did* exhaust his peremptory challenges to the panel of alternates, there is no implication that he was "relatively satisfied" with the panel of alternates. Under these circumstances, there can be no implication of satisfaction with the *reconstituted* jury containing one of those alternates and therefore the principal rationale for implied waiver no longer exists.

It is true that the defendants did not expressly indicate their dissatisfaction with the jury after the alternates were selected or with the reconstituted jury when the alternate replaced the regular juror, which is now required under California law to preserve the erroneous denial of a for-cause challenge on appeal. However, voir dire in this case was conducted in 1998. As the Court recognized in 2001, the law on whether an expression of dissatisfaction is required to preserve the erroneous denial of a challenge for cause was in a state of flux before that date. (People v. Weaver, supra, 26 Cal.4th at pp. 910-911.) Hence, the Court held that the failure to express dissatisfaction in cases tried before 2001 decision will not bar review of an erroneous denial of a challenge for cause. (Ibid.; accord People v. Boyette, supra, 29 Cal.4th at p. 416.)

In any event, even if counsel did not effectively satisfy the exhaustion requirement, his inaction did not waive Matthew's right to challenge the violation of his right to a fair and impartial jury. Where trial counsel has failed to meet the so-called "exhaustion rule," this Court typically holds that the denial of the challenge for cause has been waived for appeal, but goes on to address the merits of the claim under an ineffective assistance of counsel analysis. (Strickland v. Washington (1984) 466 U.S. 668, 693-694 [Sixth Amendment guarantee to effective assistance of counsel]; People v. Pope (1979) 23 Cal.3d 412, 425-426

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without exercising any peremptory challenges. (RT 1839-1841.) Immediately afterward, alternate Juror No. 16 indicated that he might not be able to serve due to work issues. (RT 1842.) At that point, the court reopened voir dire, allowed the parties to rescind their passes and select six alternates. (RT 1842.) This time, counsel exercised all of their peremptory challenges as to the alternates. (RT 1843-1850.)

[same under Article I, section 15].) That is, the Court may examine whether counsel was constitutionally ineffective in failing to exercise an available peremptory challenge to strike a juror whom he has unsuccessfully challenged for cause. If the juror was not biased, or if a biased juror was not seated, examining the effectiveness of counsel may not be inappropriate, but it is moot. If the juror was not biased, then obviously counsel was not incompetent for failing to strike a biased juror. (See, e.g., People v. Coffman (2004) 34 Cal.4th 1, 48 [holding juror not biased and accordingly rejecting claim counsel ineffective for failing to challenge biased juror]; People v. Millwee (1998) 18 Cal.4th 297, 316 [same]; People v. Lucas (1995) 12 Cal.4th 415, 480; People v. Garceau (1993) 6 Cal.4th 140, 173-174 and n.11; United States v. Quintero-Barraza (9th Cir. 1995) 78 F.3d 1344, 1349.) If the prospective juror was biased but not seated, there was no violation of the right to trial by an impartial jury and the defendant suffered no harm. (See, e.g., Ross v. Oklahoma (1988) 487 U.S. 81, 87-89 [concluding that Oklahoma's similar exhaustion rule does not violate the federal constitution where biased juror has ***not*** been seated]; People v. Barnett (1998) 17 Cal.4th 1104, 1113 [applying exhaustion requirement to claim court erred in denying challenges for cause where challenged jurors were not seated, right to impartial jury was not violated, and defendant suffered no prejudice].) However, where a *biased* juror has actually been *seated*, counsel's failure to satisfy the exhaustion requirement must be disregarded.

When a biased juror has been seated, the defendant has been deprived of his fundamental right to trial by a fair and impartial jury. (See, e.g., Morgan v. Illinois, supra, 504 U.S. at p. 729; People v. Weaver, supra, 26 Cal.4th at p. 910; United States v. Gonzalez (9th Cir. 2000) 214 F.3d 1109, 1111; United States v. Eubanks (9th Cir. 1979) 591 F.2d 513, 517.) Without qualification, the Supreme Court has unambiguously declared that where such a violation has occurred and "the death sentence is imposed, the State is disentitled to execute the sentence." (Morgan v. Illinois, supra, 504 U.S. at p. 729; see also United States v. Martinez-

Salazar (2000) 528 U.S. 304, 316 [if trial court's denial of challenge for cause "result(s) in the seating of any juror who should have been dismissed for cause . . . that circumstance would require reversal"].) Counsel's research has failed to uncover a single case in which any court has held that a seated juror was biased, but also that counsel either waived his client's right to challenge the constitutional violation by failing to exhaust his peremptory challenges or was not ineffective in failing to remove that juror with a peremptory challenge. (See, e.g., People v. Farnham (2002) 28 Cal.4th 107, 132-133 [claim not preserved because exhaustion requirement not met, but also concluding jurors not biased]; People v. Hillhouse, supra, 27 Cal.4th at pp. 486-488 [same].) To apply the exhaustion requirement to avoid such a constitutional violation on appeal, or to analyze the effectiveness of counsel in failing to exercise an available peremptory challenge to prevent a biased juror from being seated, presupposes that counsel may waive his client's right to have an impartial jury decide whether his client lives or dies. (See Hughes v. United States, supra, 258 F.3d at p. 463; United States v. Quintero-Barraza, supra, 78 F.3d dis. opn. of Tang, J. at pp. 1353-1354 [discussing majority's dual holding that juror was not biased and counsel was not ineffective for failing to strike him: majority's "reasoning is confusing because either (the juror) is biased or he is not biased. If he is not biased, then counsel simply made no error in impaneling an unbiased juror. If (he) is biased, then the issue is whether counsel can functionally waive the defendant's right to an impartial jury."].) But this simply is not so. (Ibid.)

The starting point for this analysis is the fundamental rule that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" (Johnson v. Zerbst (1938) 304 U.S. 458, 464.) Of course, as this Court has observed, "'[b]y choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics.'" (In re Horton (1991) 54

Cal.3d 82, 95 [and authorities cited therein].) However, as to certain fundamental personal rights, waiver may not be implied through counsel's action or inaction; they require the defendant's personal and express, knowing and intelligent, waiver. Determining the manner in which certain rights may be waived (if they may be waived at all) often turns on a number of factors.

First and foremost, whether the defendant's express personal waiver is required turns on whether the right at issue is a "fundamental personal" one. (In re Horton, supra, 53 Cal.3d at p. 95; see also, e.g., People v. Collins (2001) 26 Cal.4th 297, 310.) If so, the nature of the right alone may require the defendant's express, personal, knowing, and intelligent waiver. In addition, courts may examine the significance of the fundamental personal right. If its is so critical that its violation amounts to a structural defect undermining the integrity of the trial requiring reversal per se (see, e.g., Vasquez v. Hillery (1986) 474 U.S. 254, 263-264), it is ordinarily the kind of right that the defendant must personally and expressly waive. (See, e.g., People v. Collins, supra, 26 Cal.4th at p. 310; People v. Webster (1991) 54 Cal.3d 411, 438 [concluding that right to peremptory challenges not "fundamental" right requiring personal waiver in part because, unlike violation of right to jury trial which requires automatic reversal, improper denial of peremptory challenge requires showing of prejudice].) Finally, if the waiver of a particular right can never be ascribed to "defense strategies and tactics" (In re Horton, supra, 54 Cal.3d at p. 94), it would follow that it is not the kind of right that counsel may waive on his client's behalf, but rather is one requiring the defendant's express personal waiver.

Under these principles, a defendant's state and federal constitutional right to trial by jury is a fundamental personal right, the violation of which amounts to structural error. (See, e.g., Sullivan v. Louisiana, supra, 508 U.S. at pp. 281-282; Duncan v. Louisiana (1968) 391 U.S. 145, 156-158; People v. Collins, supra, 26 cal.4th at pp. 310-311; People v. Ernst (1994) 8 Cal.4th 441, 449.) Therefore, it requires the defendant's express personal waiver under both state and federal law.

(See, e.g., Patton v. United States (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal constitution]; Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules]; People v. Collins, supra, 26 Cal.4th at pp. 304-305 and n.2 [express waiver in open court required under state and federal law]; see also Calif. Const., Art. I, § 16.)

According to the very text of the Sixth Amendment, trial by jury means trial by an "*impartial* jury." (See also People v. Wheeler, supra, 22 Cal.3d at pp. 265-266 [although right to impartial jury is not explicitly stated in California Constitution, it is implied].) The right to an impartial jury ""is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."' [Citations]." (In re Hitchings (1993) 6 Cal.4th 97, 110.) Hence, it is as much a critical, "fundamental personal right" as is the right to trial by jury. (People v. Boulerice (1992) 5 Cal.App.4th 463, 473 [observing right to trial by impartial jury is "fundamental personal right"]; accord, e.g., Rogers v. McMullen (11th Cir. 1982) 673 F.2d 1185, 1189-1190 and n.5, cert. denied, 459 U.S. 1110 (1983).)

Indeed, "[t]he right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution" (People v. Wheeler, supra, 22 Cal.3d at p. 283.) As the United States Supreme Court has emphasized, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ." (Gentile v. State Bar of Nev. (1991) 501 U.S. 1030, 1075.) Moreover, it is a deeply personal right, particularly in the capital context. Indeed, it is difficult to conceive of a right more "personal" than a defendant's right to have a fair and impartial decisionmaker declare whether he shall live or die.

Furthermore, the fundamental right to an impartial jury is so important that the seating of even a single biased juror "taints the entire trial" (Wolfe v. Brigano, supra, 232 F.3d at p. 503), amounts to structural error, and requires reversal per se. (See, e.g., Morgan v. Illinois, supra, 504 U.S. at p. 729; People v. Weaver, supra, 26 Cal.4th at p. 910; In re Carpenter (1995) 9 Cal.4th 634, 654 ["a biased

adjudicator is one of the few 'structural defects in the constitution, which defy analysis by "harmless error" standards'"]; Hughes v. United States, supra, 258 F.3d at p. 463 [seating of biased juror is structural defect]; Johnson v. Armantrout (8th Cir. 1992) 961 F.2d 748, 755 [same; "trying a defendant before a biased jury is akin to providing him with no trial at all"]; United States v. Gonzalez, supra, 214 F.3d at p. 1111 [seating of even one biased juror requires reversal per se]; United States v. Eubanks, supra, 591 F.2d 513, 517 [same]; see also Gray v. Mississippi, supra, 481 U.S. at p. 668 ["impartiality of the adjudicator goes to the very integrity of the legal system;" hence, violation of right to impartial jury trial by excluding "pro-life" juror who does not satisfy Witt standard requires reversal per se].) Finally, the waiver of the right to an impartial jury cannot be ascribed to "defense strategies and tactics." (In re Horton, supra, 54 Cal.3d at p. 94.) "The question of whether to seat a biased juror is not a discretionary or strategic decision." (Hughes v. United States, supra, at p. 463; cf. Gardner v. Florida, supra, 430 U.S. at p. 361 [Court refuses to find that counsel's failure to object waived right to challenge federal constitutional violation because, *inter alia*, "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision" not to object].) For all of the foregoing reasons, "if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' [Citation], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury." (Hughes v. United States, supra, 258 F.3d at p. 463; accord McCullough v. Bennett (N.D.N.Y. 2003) 317 F.Supp.2d 112, 119.)

Even assuming for argument's sake that counsel could technically waive his client's right to an impartial jury through inaction alone, the outcome would not change. It is beyond dispute that: a) an attorney's failure to remove a biased juror falls below an objective standard of reasonableness and cannot be justified by any conceivable trial "tactic;" and b) *as a matter of law*, the seating of a biased

juror establishes the second, prejudice prong necessary to establish that counsel was constitutionally ineffective. (Hughes v. United States, supra, 258 F.3d at pp. 463-464; Johnson v. Armontrout, supra, 961 F.2d at pp. 754-755; McCullough v. Bennett, supra, 317 F.Supp.2d at p. 119; accord People v. Weaver, supra, 26 Cal.4th at p. 911 ["because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if he had failed to" preserve the claim].) In other words, establishing the bias of a deliberating juror necessarily establishes that counsel was constitutionally ineffective in failing to remove that juror with an available peremptory challenge. (Ibid; see also Strickland v. Washington, supra, 466 U.S. at pp. 693-694.)

In other words, regardless of the analytical approach and whether the blame for the violation is placed on the shoulders of the trial court, trial counsel, or both, the end result is that the defendant was deprived of his right to an impartial jury. (Cf. People v. Estrada (1998) 63 Cal.App.4th 1090, 1096 ["The direction of a blow is less important than the wound inflicted."]; Tejada v. Dubois (1st Cir. 1998) 142 F.3d 18, 24-25 ["It is unnecessary for us to attempt to divide the blame between lawyer and judge. . . . Instead, our constitutional focus is on the defendant . . . and he lost regardless" of the offender].) The reasons for the deprivation are immaterial and do not change the fact that, if a biased juror is actually seated on a jury that fixes the punishment at death, the State is disentitled from executing the death judgment. (See, e.g., Morgan v. Illinois, supra, 504 U.S. at p. 729; People v. Weaver, supra, 26 Cal.4th at p. 910.)

Consistent with the foregoing principles, other jurisdictions recognize that the seating of a biased juror violates the Sixth and Fourteenth Amendments and therefore requires reversal without regard to counsel's action or inaction. Some courts simply refuse to find waiver under these circumstances. (See, e.g., United States v. Martinez-Salazar, supra, 528 U.S. at p. 316 [we "reject the contention that under federal law, a defendant is obliged to use a peremptory challenge to

cure a judge's error" in denying a challenge for cause; if court's ruling "result(s) in the seating of any juror who should have been dismissed for cause . . . that circumstance would require reversal"]; Johnson v. Armontrout, supra, 961 F.2d at p. 754 [rejecting state's argument that counsel's failure to object to seating of biased juror waived claim for review: "When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. (Citations.) If a defendant proves that jurors were actually biased, the conviction must be set aside (Citations)"]; United States v. Nelson (2d Cir. 2002) 277 F.3d 164, 204-213 [questioning whether seating of biased juror and thus right to be tried by an impartial tribunal. is waivable under any circumstance; but in any event holding defendant's express waiver was invalid and trial court's erroneous denial of challenge to biased juror for cause was reviewable on appeal]; Morrison v. Colorado (Co. 2000) 19 P.2d 668, 671 ["regardless of whether the defendant chose to use a peremptory challenge on the allegedly objectionable juror, because he challenged [her] for cause and she served on the jury, his right to an impartial trial was violated if his challenge for cause was improperly denied"]; State v. Gesch (Wisc. 1992) 482 N.W.2d 99, 100 [rejecting state's argument that defense counsel can waive defendant's right to impartial jury by failing to strike biased juror with peremptory challenge]; see also United States v. Quintero-Barraza, supra, 78 F.3d at pp. 1353-1354, dis. opn. of Tang J. [observing that majority's dual holdings that juror was not biased and that counsel not ineffective for failing to strike biased juror "is confusing because either (the juror) is biased or he is not biased. If he is not biased, then counsel simply made no error in impaneling an unbiased juror. If (he) is biased, then the issue is whether counsel can functionally waive the defendant's right to an impartial jury;" concluding that counsel cannot waive client's right to impartial jury].)

Others courts have reversed by finding counsel constitutionally ineffective for the reasons discussed above. (See, e.g., Hughes v. United States, supra, 258 F.3d at pp. 463-464; Johnson v. Armontrout, supra, 961 F.2d at pp. 754-755;

McCullough v. Bennett, supra, 317 F.Supp.2d at p. 119.) Still others apply both analyses and reach the same conclusion. (See, e.g., Johnson v. Armontrout, supra, at pp. 754-755.) In sum, where, as here, it has been shown that a biased juror actually sat on a jury which returned a death verdict, the state is disentitled from executing the death judgment regardless of whether trial counsel satisfied the exhaustion rule.

Finally, it bears emphasis that the essential purpose of the general waiver doctrine is to bring errors to the attention of the trial court so that they may be corrected or avoided. (See, e.g., People v. Scott (1994) 9 Cal.4th 331, 353-356; People v. Welch, supra, 5 Cal.4th at p. 235.) This purpose is certainly met where, as here, counsel does challenge a prospective juror for cause, and specifies the basis for the challenge, but the court declines to take steps to avoid the deprivation of defendant's right to an impartial jury.

For all of the foregoing reasons, trial counsel's failure to exhaust his peremptory challenges to the jury as *originally* constituted did not waive Matthew's Sixth and Fourteenth Amendment rights to an impartial jury. Because he was deprived of that basic right, the penalty judgment must be reversed.

### F. The Actions Of The Trial Court And The Prosecutor Produced A Jury Culled Of All Those Who Revealed During Voir Dire That They Had Conscientious Scruples Against Or Were Otherwise Opposed To Capital Punishment, Which Violated Matthew's Rights to A Fair And Impartial Jury And Requires Reversal.

As discussed above, the United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." (Adams v. Texas, supra, 448 U.S. at p. 43; accord Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521.) Here, of the selected jurors and

alternates, five identified themselves as strongly in favor of the death penalty; five identified themselves as moderately in favor of the death penalty; six identified themselves as neutral; and one identified himself as both moderately in favor and moderately against the death penalty. (CT 2869, 3608, 3636, 4185, 4466, 4577, 4907, 6886, 6969, 7353, 7494, 8175, 8617, 8894, 9221, 9788, 9896, 11342.) Of the deliberating jurors, four identified themselves as strongly in favor of the death penalty; four identified themselves as moderately in favor of the death penalty; and four identified themselves as neutral. (CT 3608, 3636, 4185, 4577, 4907, 6886, 7494, 8617, 8894, 9788, 9896, 11342.)

The state excluded from the jury all of the venirepersons who had identified themselves as opposed to the death penalty in principle or who otherwise expressed reservations about imposing the death penalty. Specifically, and as fully explained below, the trial court applied the Witt standard in an arbitrary, inconsistent, and fundamentally unfair manner to exclude "life-inclined" jurors. As to the few remaining "life-inclined" jurors who escaped the court's uneven application of Witt, the prosecutor excluded them with peremptory challenges. The joint efforts of the two state actors thus resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (Adams v. Texas (1980) 448 U.S. 38, 43) and therefore produced "a jury uncommonly willing to condemn a man to die" (Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521). For this reason alone, the death sentence cannot be executed. (Ibid.)

### 1. The trial court applied the Witt standard in an arbitrary and capricious manner, which was fundamentally unfair and amounted to an abuse of discretion not entitled to deference.

A number of prospective jurors made it "unmistakably clear" that they would automatically vote for one penalty over another, regardless of the evidence,

and were accordingly excused for cause. Of course, there is little discretion for the trial court to exercise with respect to such clearly disqualified jurors. (See, e.g., Wainwright v. Witt, supra, 469 U.S. at p. 423; Witherspoon v. Illinois, supra, 391 U.S. at p. 522 and n.21.)

The court's exercise of discretion becomes significant, however, as to those jurors who are not so "unambiguous" or "unmistakably clear" about their feelings. (Wainwright v. Witt, supra, at pp. 426, 429.) Under the Witt standard, the court must make the more difficult determination of whether those jurors' feelings would "prevent or substantially impair" their ability to follow their oaths and perform their duties as jurors. (Id. at p. 423.) As discussed above, the court's exercise of discretion in determining whether challenged jurors meet this standard is "subject to essential demands of fairness" (Hughes v. United States, supra, 258 F.3d at p. 457; Wolfe v. Brigano, supra, 232 F.3d at p. 504; U.S. Const., Amend. XIV) and may not be arbitrary, capricious or partial (People v. Warner, supra, 20 Cal.3d at p. 683; People v. Surplice, supra, 203 Cal.App.2d at p. 791; Gray v. Klauser, supra, 282 F.3d pp. 645-648, 651 [and authorities cited therein].)

Unfortunately, an examination of the court's rulings on challenges for cause in this case to jurors who were not "unmistakably clear" about their feelings reveals that its application of the Witt standard was not even-handed. To the contrary, as demonstrated below, a comparison of the trial court's application of the Witt standard to "life-inclined" and "death-inclined" venirepersons whose answers were remarkably similar reveals that its exercise of discretion was arbitrary and capricious. (Cf. People v. Heard, supra, 31 Cal.4th at p. 964 [in concluding that trial court improperly excused juror for cause based on particular answer, Court observed that a number of seated jurors provided the same answer].)

In other words, the court's uneven application of the Witt standard was fundamentally unfair (cf. Gray v. Klauser, supra, 282 F.3d at pp. 645-648, 651), resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital

punishment" (Adams v. Texas, supra, 448 U.S. at p. 43) and therefore produced "a jury uncommonly willing to condemn a man to die" (Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521). For this reason alone, the death sentence cannot be executed. (Ibid.) At the very least, because the court's application of the Witt standard was arbitrary and capricious, its rulings as to Ms. Madali, Mr. Froyland, and Juror No. 5, discussed above, are not entitled to deference. (See, e.g., People v. Welch, supra, 5 Cal.4th at p. 234.)

**a. "Death-inclined" jurors whom the court refused to excuse for cause.**

As discussed in parts C and D, Ms. Madali and Mr. Froyland were dismissed because their answers as a whole indicated that they would be inclined to vote for one penalty over the other (in their case, life), that it would be very difficult for them to vote for the other penalty (in their case, death), and that it would require substantial evidence to persuade them to do so. (CT 5168, 5181-5185; RT 745-749, 896-901.) Viewing the court's rulings as a representation of its interpretation of the Witt standard for exclusion, then both fundamental fairness and judicial discretion required the court to apply that standard consistently to both "life-inclined" jurors and "death-inclined" jurors. As counsel pointed out below (RT 912), and as will be demonstrated, it did not.

Similar to Ms. Madali and Mr. Froyland, and as discussed in part E, Juror No. 5's answers as a whole indicated that he would be inclined to vote for one penalty over the other (in his case, death), that it would be very difficult to vote for the other penalty (in his case, life), and that it would require substantial evidence to persuade him to do so. (CT 3608-3612; RT 412-420.) There were differences in their responses, of course. While Ms. Madali could envision cases in which she would vote for death (RT 897-899), short of accidents and casualties of war, Juror No. 5, on the other hand, could not envision murder cases in which he would vote for life. (RT 416-419.) While Ms. Madali unequivocally promised to follow the

law and consider all the evidence in deciding the appropriate penalty (RT 901;CT 5181), Juror No. 5 only promised only "try." (RT 420.) Ms. Madali's and Mr. Froyland's statements that they would only vote for death if persuaded by the evidence were entirely consistent with the law and their duties as jurors (see People v. Prieto, supra, 30 Cal.4th at p. 263), while Juror No. 5's statement that he would vote for life only in the face of substantial mitigating evidence was inconsistent with the law and his duties as a juror (see People v. Boyette, supra, 29 Cal.4th at p. 419.) Even under the court's interpretation and application of the Witt standard for exclusion, Juror No. 5 met it even more clearly than Ms. Madali and Mr. Froyland. It seems obvious, then, that the most important difference between their answers, and the reason Ms. Madali and Mr. Froyland were dismissed for cause and Juror No. 5 was not, was that Ms. Madali and Mr. Froyland were life-inclined while Juror No. 5 was strongly death-inclined. Unfortunately, the troubling comparisons do not end with Ms. Madali, Mr. Froyland and Juror No. 5.

Prospective juror Labuda, whose father-in-law was an investigator for the Alameda County District Attorney's Office, identified himself on the questionnaire as "moderately in favor" of the death penalty. (CT 4955, 4962-4963.) As to his general feelings about the death penalty, he stated that he felt "generally" that it was right;" as to his general feelings about life without parole, he stated, "why should one that was found guilty of murder get anything less than the victim??" (CT 4962, 4966.) Asked whether he would "want" to know more about the defendant's background before deciding the appropriate penalty, he answered that he would not, explaining "what difference would it make." (CT 4963.) Asked if he could consider background or "any sympathetic or any other aspect about the defendant[']s character or record as a basis for a sentence *less* than death" if he were "*required*" to do so, he again responded in the negative, explaining, "I doubt it. The defendants would be on trial for what they did, not who they are or their background." (CT 4966.)

On voir dire, Mr. Labuda stated that he believed in an "eye for an eye" and that he leaned "strongly towards the death penalty." (RT 853, 857.) In its voir dire examination, the court explained that the law would require him to listen to such evidence before deciding the appropriate penalty and asked if he could do so; Mr. Labuda agreed that he could. (RT 846-848.)

Michael's counsel immediately questioned Mr. Labuda about the inconsistency between his questionnaire answer and his answer to the judge regarding his willingness to consider mitigating evidence. (RT 851, 853.) Mr. Labuda replied that he was still unsure of what "difference" the defendant's background would make in deciding the appropriate penalty, but he "guess[ed]" that he would not automatically vote for death regardless of other factors. (RT 852.) However, he was "more strongly towards the death penalty. And the fact that the way they're brought up or – I guess I wouldn't consider those factors as much. . . . I would look at them maybe less. I don't understand how a person was brought up would influence that decision." (RT 853.) Asked if his views favoring the death penalty would "impede[]" his consideration of such evidence, he replied, "I guess so." (RT 853.)

Matthew's counsel explained that in order to determine the appropriate penalty if the defendants were found guilty as charged, the law required the jurors to consider evidence about the defendant himself, including his background. (RT 854.) Understanding that the law would require him to do so, counsel asked him if he would "honestly" consider the defendant's background. (RT 854.) The court reporter noted that Mr. Labuda did not respond. (RT 854.) Counsel explained, "it's okay if you can't. Honestly, it is." (R 854.) Mr. Labuda replied, "I guess not. I guess I couldn't." (RT 854.)

As it did with Juror No. 5, the court immediately embarked upon an effort to rehabilitate Mr. Labuda. (RT 854.) The court asked Mr. Labuda to assume hypothetically a defendant with no criminal history, who "his entire adult life . . . has been a pillar of the community. 10 years ago he rushed into a burning

building and saved two kitties. You have a right and a duty to consider that evidence in determining what punishment is appropriate. Do you have any problem considering that evidence?" (RT 856.) Mr. Labuda replied that he did not. (RT 856.) However, upon further questioning by Michael's counsel, he agreed that his "true feeling" was "an eye for an eye." (RT 857.) The court again responded by asking Mr. Labuda if he could "consider both penalty options," to which Mr. Labuda replied that he could. (RT 857.) The court denied the defense challenge for cause to Mr. Labuda. (RT 871-876.)

Thus, like Ms. Madali and Mr. Froyland, Mr. Labuda's answers as a whole clearly indicated that he was inclined to vote for one penalty over the other (in his case, death), that it would be – at the very least – difficult for him to consider relevant evidence supporting the other penalty (in his case, life), and that he would have to be persuaded by the evidence to vote for the other penalty. Furthermore, like Ms. Madali, Mr. Labuda was "struggling," as evidenced by his answers and – just like Ms. Madali – his "delay" in answering some of the questions. (RT 854, 911.) The significant difference in their responses was that Ms. Madali and Mr. Froyland were open to hearing and considering all kinds of aggravating evidence in determining the appropriate penalty while Mr. Labuda expressed extreme reluctance to consider highly relevant mitigating evidence, even if required to do so. (CT 4966, 852-856.) Again, if Ms. Madali and Mr. Froyland met the court's interpretation of the Witt standard for exclusion, Mr. Labuda surely did, as well. Again, it seems clear that the most significant difference in their responses, and the reason the court excluded Ms. Madail and Mr. Froyland but not Mr. Labuda, was that Ms. Madali and Mr. Froyland were life-inclined while Mr. Labuda was "strongly" death-inclined. (RT 852-853.)

Similarly, prospective juror Illige identified herself as "moderately in favor" of the death penalty. (CT 4851-4852.) Asked about her general feelings regarding both penalties, she stated on her questionnaire, "I do feel strongly that a person commits a murder, he/she should be punished. . . . We do not need any

more prisons! They're costly and stupid! A murder without a cause deserves the death penalty." (CT 4851, 4855.) Asked whether she could consider "any sympathetic or any other aspect about the defendant[']s character or record as a basis for a sentence *less* than death" if she were "*required*" to do so, she unequivocally answered, "No, those factors will not effect [sic] my decision on the penalty. Emotionally, I will feel sorry for the defendants about his/her family history; however I believe that every human being (as a grown-up) should have the mental ability to decide 'rights' from 'wrongs'." (CT 4855, emphasis in original.)

On voir dire, the court inquired into her stated refusal to consider sympathetic factors about the defendants in determining the appropriate penalty. (RT 810.) She replied, "I still stand by that." (RT 810.) The court explained that the law would require her to consider "all kinds of evidence," including facts about the defendants and asked her, "it that's the law[,] could you follow that?" (RT 810.) Ms Illige finally responded that she would. (RT 810.) In a patent effort to rehabilitate and qualify Ms. Illige, the court asked her if she "would have a problem" with considering evidence that the defendant's had committed great, selfless acts of heroism in mitigation and she replied that she would not. (RT 811.) The court told her that jurors were to have an open mind about the appropriate penalty; she initially agreed that she could have an open mind, but later explained that because she did not "know anything about the case, I can't say whether I would have an open mind." (RT 813-814.)

Michael's counsel clarified that she would "know" something "about the case" if they reached the penalty phase because the defendants would be guilty of at least two murders. (RT 818-819.) He explained that the question was whether she could keep an open mind about the appropriate penalty once the jurors found the defendants guilty beyond a reasonable doubt. (RT 818-819.) This time she replied, "I may be contradictory [*sic*] to myself, but I think at this time, if I went through the first phase, and I pretty much believe with all the evidence that's

presented to me, that he's guilty as hell, then I think I would vote for the death penalty. I don't know. That's what I'm thinking right now." (RT 819.)

On the prosecutor's examination, Ms. Illige reiterated that she would "be leaning towards the death penalty" if the defendants were guilty as charged. (RT 819.) As the court had asked, the prosecutor asked her if she would consider "good things" about the defendants, such as great acts of heroism. (RT 819.) This time she replied that that if the defendants were guilty as charged, it would "just very strongly influence my decision that the guy should be put on the death penalty [but] I *may* consider other factors." (RT 819-820, emphasis supplied.) The prosecutor pressed her, again asking if she would "listen and consider the good evidence that was presented about the defendants." (RT 820.) She finally replied that she "guess[ed]" she would "listen." (RT 820.) Again, the trial court denied the defense challenge for cause. (RT 870-871.)

Once again, like Ms. Madali and Mr. Froyland, Ms. Illige's answers as a whole clearly revealed that she was inclined toward one penalty (in her case, death). Unlike Ms. Madali and Mr. Froyland, who promised to consider all of the evidence and indeed would vote for death if persuaded by the aggravating evidence, Ms. Illige was extremely reluctant to even *consider* mitigating evidence, when pressed agreed only that she "guess[ed]" she would "*listen*" to such evidence, and never indicated that even extreme mitigation could persuade her to vote for life. (CT 4855, 810, 818-820.) Once again, if Ms. Madali and Mr. Froyland satisfied the Witt standard for exclusion, there can be no question that Ms. Illige did, as well. (RT 870-871.) The court's dismissal of Ms. Madali and Mr. Froyland and its refusal to dismiss Ms. Illige further reflects the court's uneven and inconsistent application of the standard.

Finally, prospective juror Wesson identified himself as "moderately in favor" of the death penalty. (CT 6281.) He believed that the death penalty was appropriate in some cases. (CT 6281.) As to the cases in which it was not appropriate, he explained that life without parole "should be awarded only in

circumstances that were not premeditated and were more accident than intended" and that he did not believe that life without parole "is a punishment." (CT 6285.) Asked if he could consider mitigating evidence about the defendant if "*required*" to do so, he explained that "*motives or lack thereof* should determine the penalty. It is important to know why or where an individual's life was at prior or during the offense. Adjustment to jail is irrelevant." (RT 6286.)

On voir dire, the court followed up on Mr. Wesson's answer that life without parole would only be appropriate for crimes that were not premeditated but "more accidental." (RT 1045.) The court explained that accidents do not qualify as first-degree murder. The court did *not* explain that the first-degree murder charges in this case would require a finding of premeditation, but rather simply asked him if he would have an open mind as to both penalties if the defendants were found guilty as charged. (RT 1045-1047.) Mr. Wesson explained that he could. (RT 1047.)

Upon questioning by Michael's counsel, Mr. Wesson reiterated that the death penalty should be imposed in cases of premeditated murder. (RT 1053-1054.) Michael's counsel asked him what the appropriate penalty would be if the defendants were convicted as charged in this case and at least one of the crimes was premeditated murder. (RT 1054-1055.) Again, Mr. Wesson replied that, "based solely on whether it was premeditated or not, I would have to be inclined for the death penalty," because "the death penalty was appropriate in "every case where [he] found premeditation to be present." (RT 1055; see also, e.g., People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005 ["a prospective juror who would invariably vote either for or against the death penalty because of one or more of the circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances is . . . subject to challenge for cause . . ."].) He also reiterated that if a defendant were convicted of premeditated murder and sentenced to life without parole, he would "eventually become acclimated to [his] environment and eventually [he] wouldn't necessarily

be being punished. (RT 1055-1056.) Mr. Wesson indicated that he believed that evidence of the defendants' post-crime behavior was irrelevant. (RT 1059-1060.) The court again asked him if he would consider such evidence if the law required him to do so; while still expressing reservations about the relevance of such evidence, he replied that he would consider it in making the penalty determination if the law required him to do so. (RT 1058-1060.) The court denied the defense challenge to Mr. Wesson for cause. (RT 1072-1076, 1331-1332..)

Again, like Ms. Madali and Mr. Froyland, Mr. Wesson was strongly inclined toward one penalty and would have to be persuaded by the evidence to vote for the other. If Ms. Madali and Mr. Froyland satisfied the Witt standard, then so did Mr. Wesson.

**b. "Life-inclined" jurors whom the court excused for cause.**

Based on the court's application of the Witt standard to the "death-inclined" jurors, it would appear that the court determined that the standard was not satisfied even if a prospective juror was "strongly" in favor of one penalty over the other, would find it difficult to vote for the other penalty if the defendants were convicted of premeditated murder, would have to be persuaded by the evidence to vote for the other penalty, expressed great reluctance, even unwillingness, to even consider certain kinds of constitutionally relevant evidence, and could not envision a situation in which they could vote for the other penalty. Once again, if this were the court's interpretation of the Witt standard, then the court had to apply that standard fairly and impartially. Again, it did not.

As already demonstrated, Ms. Madali's and Mr. Froyland's answers certainly would not satisfy this standard. Similarly, prospective juror Rutland identified herself as moderately against the death penalty, explaining that she opposed its application except under "special and/or severe circumstances." (CT 3035; RT 552.) She held no religious or philosophical principle that would affect

her ability to vote for death. (CT 3036.) The court immediately inquired into these statements, asking Ms. Rutland directly, "do you think it is a realistic possibility that you could impose the death penalty in this case?" (RT 552.) She understandably replied, "I'd have to know more about . . . the case than what you've told me, but generally speaking I'm not in favor of the death penalty." (RT 552.) Ms. Rutland agreed with the court's impression that she had "not ruled out the possibility of imposing the death penalty, but that basically you don't think it should exist." (RT 552.) Given these feelings, the court pressed, "realistically, practically speaking, do you really think you could give the People, the representative of the People a fair shake in this?" (RT 552-553.) She replied, "no, because I don't believe in the death penalty, basically." (RT 553.) Finally, the court asked her if "*short of* mass murderers, serial killers, or war criminals, do you really think that you could consider it at all?" (RT 553.) She replied, that the case would have to present the "severe circumstances, such as the ones you've described . . . " (RT 553, emphasis supplied.) The trial court granted the prosecutor's challenge for cause without explanation. (RT 553.)

Nothing in Ms. Rutland's answers indicated that she was any more inclined to vote for life than the death-inclined jurors were to vote for death. Her sentiments, in fact, were an entirely accurate reflection of the law: the death penalty is only appropriate except under "special and/or severe circumstances." (RT 3035.) The court made no effort to flesh out those circumstances other than to ask her if she could vote to execute someone "*short of*" the most heinous offenders, such as mass murderers. In stark contrast, when the death-inclined jurors expressed their emphatic feelings that convicted murderers should be sentenced to death, the court did not ask them if they would consider voting for life for people "*short of*" the most sympathetic offenders, such as war heroes. Rather the court simply asked them if they would consider evidence such as past acts of heroism and based a finding of impartiality on their willingness (no matter how reluctant) to do so.

Similarly, prospective juror Leong identified himself as neutral regarding the death penalty and held no religious or philosophical beliefs that would affect his ability to vote for death, but also indicated that he did not believe that the death penalty is necessary. (CT 7654-7655; RT 1239.) The court immediately inquired into Mr. Leong's latter statement; he replied that he questioned whether it would be appropriate to take a defendant's life "if it's not a serious killing." (RT 1239.) Rather than inquiring further, the court granted the prosecutor's challenge for cause without explanation. (RT 1239.)

Once again, Mr. Leong expressed no greater preference for one penalty or reluctance to vote for the other than the death-inclined jurors whom the court refused to excuse for cause. Rather than providing sufficient basis to conclude its voir dire and exclude Mr. Leong for cause, his statement that the death penalty was not appropriate unless "it's a serious killing" was entirely consistent with the law. Moreover, when the death-inclined jurors expressed a strong preference for the death penalty, the court took care to explain that the law would required them to consider additional evidence, to present hypothetical examples of such evidence, and to obtain their assurance that they would follow the law and consider that evidence in determining the appropriate penalty. In stark contrast, when Mr. Leong – as well as Mr. Froyland and Ms. Rutland – expressed the same sentiments but in favor of life, the court did none of these things, but rather concluded its voir dire examination and granted the prosecutor's challenges to excuse them for cause.

As the foregoing demonstrates, the court's application of the Witt standard simply was not even-handed, but rather unfairly favored the prosecution in violation of state law and Matthew's right to due process. (See, e.g., People v. Champion, supra, 9 Cal.4th at p. 908 [application of Witt standard must be evenhanded]; see also Gray v. Klauser, supra, 282 F.3d at pp. 645-648, 651 [trial court's uneven and arbitrary application of legal standard in way favors prosecution over the defense violates due process].) Furthermore, given the

court's inconsistent and unfair application of the Witt standard, its findings that Ms. Madali and Mr. Froyland satisfied it, and that Juror No. 5 did not, are not entitled to any deference whatever. (See, e.g., People v. Welch, supra, 5 Cal.4th at p. 234; People v. Warner, supra, 20 Cal.3d at p. 683.)

### 2. The prosecutor's exercise of peremptory challenges to excuse the few life-inclined jurors who remained produced a jury from which all such jurors were excluded and violated Matthew's rights to a fair and impartial jury.

Not surprisingly, following the court's rulings on the challenges for cause, there were few life-inclined venirepersons remaining and certainly a disproportionate number of life-inclined and death-inclined venirepersons. Of the few that remained, the prosecutor excluded them with peremptory challenges. (RT 1546-1556, 1851, CT 10312 [prospective juror Chryst]; RT 1593-1602, 1820, CT 10860 [prospective juror Gonzalez]; RT 1818, CT 2979 [prospective juror Rodriguez]; RT 1827; CT 5209 [prospective juror Marchant].)

Matthew recognizes that this Court has repeatedly held that a prosecutor's exercise of peremptory challenges to exclude life-inclined jurors, or "death-penalty skeptics," does not offend the federal constitution. (See, e.g., People v. Ochoa, supra, 26 Cal.4th at p. 432 [and authorities cited therein].) However, where, as here, state action – whether on the part of the trial court, the prosecutor, or any combination thereof – results in a jury purged of all those with any scruples against imposing the death penalty, he respectfully submits that blind adherence to these decisions is contrary to clearly established United States Supreme Court precedent. (Adams v. Texas, supra, 448 U.S. at p. 43; Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521.)

In any event, the rationale underlying the Court's refusal to find that the use of peremptory challenges to exclude life-inclined jurors offends the constitution is

that the defense is granted an equal number of peremptory challenges with which it is free to exclude death-inclined jurors. (See, e.g., People v. Ochoa, supra, 26 Cal.4th at p. 432.) Even assuming the correctness of this rationale and its application to some cases – indeed, to most cases – it does not apply to this case. This is so because the defense and the prosecution were *not* on equal footing when they exercised their peremptory challenges. As discussed above, the trial court refused to exclude death-inclined jurors who were disqualified, excused life-inclined who were not disqualified, and otherwise applied the Witt standard inconsistently and unfairly in a manner than benefited the prosecution and resulted in the unjustified exclusion of a disproportionate number of life-inclined jurors. Hence, unlike the prosecutor, many of the defense exercise of peremptories had to be directed toward damage control – for instance, by challenging those jurors whom the court should have excused for cause. (RT 1817 [defense exercise of peremptory to Mr. Wesson]; RT 1822 [defense exercise of peremptory to Ms. Illige]; RT 1823 [defense exercise of peremptory to Mr. Labuda].) Hence, the prosecution and the defense did not exercise their peremptory challenges on a level playing field. The pool of remaining jurors was already unfairly skewed toward death due to improper state action. Indeed, the proof is in the pudding: not a single life-inclined juror sat on the jury that decided Matthew should be put to death. Regardless of the vehicle by which the state achieves the result, it is settled that when the state has excluded all such citizens from a capital jury, the "State crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments because "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-522 and n. 20.)

Finally, counsel's failure to object to the prosecutor's exercise of peremptory challenges to purge the panel of the few life-inclined jurors that remained after the court's unfair rulings on the challenges for cause should not be

deemed to have waived the issue for appeal. It is well settled that counsel is not obligated to make futile objections. (See, e.g., People v. Hamilton (1989) 48 Cal.3d 1142, 1189 and n. 27.) As noted above, this Court has consistently rejected claims that a prosecutor's use of peremptory challenges to exclude life-inclined jurors, or "death penalty skeptics" violates the federal constitution. What distinguishes this case from that line of authority is the trial court's erroneous application of the Witt standard to stack the deck against the defense and in favor of the prosecution. Since the trial court had already determined that its application of Witt was correct and appropriate, it is clear that any objection on these grounds would have been futile.

In sum, the combination of the court's inconsistent and fundamentally unfair application of Witt and the prosecutor's exercise of peremptory challenges resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (Adams v. Texas, supra, 448 U.S. 38, 43) and thus "a jury uncommonly willing to condemn a man to die" (Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-521). Therefore, the death judgment imposed by this jury cannot be executed. (Ibid.)

## VIII. THE PENALTY PHASE JUDGMENT MUST BE REVERSED BECAUSE IT IS REASONABLY LIKELY THAT THE JURORS READ THE COURT'S MODIFIED LINGERING DOUBT INSTRCTION TO PRECLUDE CONSIDERATION OF THEIR LINGERING DOUBTS REGARDING MATTHEW'S ROLE IN THE CRIMES, IN VIOLATION OF STATE LAW AND THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

### A. Introduction.

As discussed in Argument I, the evidence that Matthew, rather than Michael, was the actual shooter was extraordinarily close. Given the jurors' determination that the non-shooting aider and abettor did not intend to kill and thus was not even eligible for the death penalty, their resolution of this close question was of monumental importance. While the jurors remarkably determined beyond a reasonable doubt that Matthew was the actual shooter in the guilt phase, any rational human being would have had lingering doubts about that determination.

Accordingly, in the penalty phase, counsel requested a special defense instruction informing the jury that it could consider their lingering doubts that Matthew was the "actual shooter" in determining whether to execute him or spare his life. (CT 755; RT 3571-3572.) The prosecutor objected to the instruction. (RT 3558-3559.) While the court agreed that it would be appropriate to instruct the jury to consider its lingering doubts as to "guilt," it refused to instruct the jury to consider its lingering doubts regarding any specific questions. Hence, the court modified the requested instruction to read: "it may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant." (RT 3699, 3852; CT 783.) Trial counsel emphasized, "I still would request that it be given the way we requested it, but failing that, I'm satisfied with this, your honor."

(RT 3699.) Hence, the court instructed the jury with its modification. (RT 3866; CT 783.)

Unfortunately, as explained below, the modified instruction was, at the very least, potentially misleading because it suggested that the jurors' consideration of their lingering doubts was limited to the question of Matthew's "guilt" for the murders and not to any other issues, such as whether Matthew was the actual shooter and not the non-shooting aider and abettor, whom the jurors had determined did not intend to kill. Because they repeatedly had been told that the identity of the actual shooter was irrelevant to the question of the brothers' "guilt" of the murder and attempted murder charges, that crucial issue was not encompassed in the court's instruction. Furthermore, the heart of the prosecution's penalty phase case was to condemn Matthew for his role and his acts as the actual shooter. The prosecutor repeatedly and emphatically argued that it would be inappropriate for the jurors to "even consider" their lingering doubts regarding this issue and that it was grossly inappropriate for Matthew to continue to "blame his brother" and to ask them to "second-guess" their guilt phase decision. Given the record as a whole, it is reasonably likely that the jurors did not consider or give effect to their lingering doubts that Matthew was the actual shooter, in violation of state law and the Fifth, Eighth and Fourteenth Amendments. Finally, given the enormous importance of the question and the closeness of the penalty phase case, the penalty judgment must be reversed.

### B. The Controlling Legal Principles.

Penal Code section 190.3 mandates that the jury "shall take into account any of the following factors if relevant," followed by a list of 11 factors. Under factor (a), the jury must consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding..." (Pen. Code § 190.3, subd. (a). If relevant, factor (j) requires the jury to consider "whether or not the

defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Factor (k) is a catch-all factor and includes "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code § 190.3, subd. (k).) Pursuant to these provisions, lingering or residual doubts regarding the defendant's guilt of, or his role in, the underlying crime constitutes relevant mitigation that a defendant is entitled to present and have the jury consider. (See, e.g., People v. Jones (2003) 30 Cal.4th 1084, 1125 [lingering doubt that another was actual killer is circumstance of offense under section 190.3, subd. (a) and thus is relevant mitigation]; People v. Earp (1999) 20 Cal. 4th 826, People v. Cox (1991) 53 Cal.3d 618, 676, People v. Kaurish, supra, 52 Cal.3d at p. 706; People v. Hawkins (1995) 10 Cal. 4th 920; People v. Terry (1964) 61 Cal.2d 137, 147.)[30] As the Court has explained, under California law, capital jurors may "conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but ... still demand a greater degree of certainty of guilt for the imposition of the death penalty. . . . . Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (People v. Terry, supra, at pp. 145-146; accord, e.g., People v. Jones, supra, at p. 1125.)

Indeed, lingering doubt is recognized as such a compelling factor in the penalty determination under California law that the Court has consistently recognized that an attorney may reasonably base his entire penalty phase defense

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[30] Other jurisdictions agree: see, e.g. United States v. Davis (E.D.LA 2001) 132 F.Supp.2d 455 [construing federal death penalty statute]; Tennessee v. Teague (Tenn. 1995) 897 S.W.2d 248, 252-253; see also Model Pen. Code § 210.6(1)(f) [categorically precludes a death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt."].)

strategy upon it. (See, e.g., People v. Carter (2003) 30 Cal.4th 1166, 1212; People v. Cox, supra, at p. 660; see also, e.g., Williams v. Woodford (9th Cir. 2002) 306 F.3d 665, 715 [counsel not ineffective for failing to pursue other penalty phase strategies where he relied on "viable lingering doubt defense"]; Tarver v. Hopper (11th Cir. 1999) 169 F.3d 710, 715-716 [counsel's reliance on lingering doubt was more than reasonable given its "'powerful mitigating'" effect, as demonstrated by results of comprehensive studies]; Andrews v. Collins (5th Cir. 1994) 21 F.3d 612, 624 and n.21, cert. denied 513 U.S. 1114 (1995) [rejecting ineffective assistance of counsel claim where counsel's sole penalty phase strategy rested on lingering doubts, a strategy that "has been recognized as an extremely effective argument for defendants in capital cases"]; Stewart v. Dugger (11th Cir. 1989) 877 F.2d 851, 856.) Indeed, as one court has put it, "residual doubt is perhaps the most effective strategy to employ at sentencing." (Chandler v. United States (11th Cir. 2000) 218 F.3d 1205, 1320, n. 28; accord Lockhart v. McCree, supra, 476 U.S. at p. 181 ["residual doubt has been recognized as an extremely effective argument" in mitigation].)

For Eighth Amendment purposes, the United States Supreme Court has defined constitutionally relevant mitigating evidence "in the most expansive terms." (Tennard v. Dretke (2004) 542 U.S. __, 124 S.Ct. 2562, 2570.) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (Ibid., quoting from McKoy v. North Carolina (1990) 494 U.S. 433, 440-441.) Put another way, constitutionally relevant mitigating evidence is evidence that may "serve as a basis for a sentence less than death." (Skipper v. South Carolina, supra, 476 U.S. at p. 4; accord McKoy v. North Carolina, supra, 494 U.S. at p. 441.) Hence, because lingering doubt can "serve as a basis for a sentence less than death" in California, it is also constitutionally relevant mitigating evidence under the federal constitution. "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be

able to consider and give effect to' a capital defendant's mitigating evidence." (Tennard v. Dretke, supra, at p. 2570, quoting from Boyde v. California, 494 U.S. at pp. 377-378 [and authorities cited therein]; Buchanan v. Angelone (1998) 522 U.S. 269, 275.) Certainly, there is no question that consideration of lingering doubt serves the paramount need for heightened reliability in death penalty judgments. (See, e.g., Caldwell v. Mississippi, supra, 472 U.S. at p. 340; Lockett v. Ohio, supra, 438 U.S. at p. 604.)[31]

Moreover, because California law does recognize and give effect to lingering doubts as a basis for a sentence less than death, a capital defendant has a

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[31] To be sure, in 1988, a plurality of the United States Supreme Court questioned – arguably in dicta – whether the Eighth Amendment *requires* states to give effect to residual or lingering doubts regarding the defendant's guilt or innocence because it reasoned that such doubts are not "over any aspect of a defendant's character or record and any of the circumstances of the offense," and therefore are not constitutionally relevant under its prior decisions; the holding of that case, however, was simply that there was no constitutional violation in any event because the jury was not precluded from considering those doubts. (Franklin v. Lynaugh (1988) 487 U.S. 164, 172-174, 176.) As a preliminary matter, the plurality's discussion of the constitutional relevance of lingering doubts is questionable in light of later decisions broadly defining constitutional relevance under the Eighth Amendment, as discussed above. (See, e.g., Tennard v. Dretke, supra, 542 U.S. __, 124 S.Ct. at p. 2570; McKoy v. North Carolina, supra, 494 U.S. at pp. 440-441.) In any event, the issue is distinct from that presented here for at least two reasons. First, because California *does* give effect to lingering doubt as a basis for a sentence less than death, it may serve as a basis for a sentence less than death and therefore becomes relevant under the federal constitution, particularly where the defendant relies on this well settled principle as part of his penalty phase defense. (See Skipper v. South Carolina, supra, 476 U.S. at p. 4; accord McKoy v. North Carolina, supra, 494 U.S. at p. 441; Hicks v. Oklahoma (1980) 447 U.S. 343, 346.) Second, the Franklin plurality questioned the relevance of lingering doubt as to *guilt*, or whether the defendant was culpable or involved at all, ***not*** the relevance of lingering doubt regarding a "guilty" defendant's actual *role* in the crime(s). (See, e.g., Rupe v. Wood (W.D. Wn. 1994) 863 F. Supp. 1315, 1340, affirmed (9th Cir. 1996) 93 F.3d 1434; Tennessee v. Teague, supra, 897 S.W.2d at pp. 252-253.) There is no question that a "guilty" defendant's degree of participation, or role, in the crime is relevant to his

substantial and legitimate expectation that he will not be deprived of his life or liberty unless his jury considers those doubts. Hence, state action precluding a capital jury from considering lingering doubt in determining the appropriate penalty violates the Fourteenth Amendment's guarantee to due process. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346 [although federal constitution does not require states to employ jury sentencing in non-capital cases, once state does so, right it is protected by federal due process because a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion"]; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. denied 513 U.S. 914 (1994); Ballard v. Estelle (9th Cir. 1991) 937 F.2d 453, 456.) Similarly, because it a viable penalty phase defense strategy under California law, where counsel attempts to rely on a lingering doubt strategy, state action precluding the jury from considering the defense may violate defendant's Sixth Amendment rights to effective counsel and to present a defense, and Fifth and Fourteenth Amendment rights to a fair trial. (Cf. Conde v. Henry, supra, 198 F.3d at pp. 734, 739-740 [trial court's instructional error and other rulings prevented consideration of primary defense and violated Fifth and Sixth Amendment right to effective counsel, to present a defense, and to a fair trial]; see also Silva v. Woodford (9th Cir. 2002) 279 F.3d 825, 847, ["'we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing'"].)

Finally, the Due Process Clause of the Fourteenth Amendment also entitles a defendant to present evidence relevant to rebut the prosecution's case for death. For instance, even if a defendant's parole ineligibility would not be constitutionally relevant mitigating evidence under the minimum Eighth Amendment standards, a defendant would have an independent due process right to present, and have the jury consider, such evidence if the prosecution relies on

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culpability and thus "constitutionally relevant." (See, e.g., Lockett v. Ohio (1978)

the defendant's future dangerousness as a reason for imposing death. (Simmons v. South Carolina (1994) 512 U.S. 154, 161-163; accord Skipper v. South Carolina, supra, 476 U.S. at p. 5, n.1 [same – adjustment to jail].) Pursuant to this principle, if the prosecution relies on the defendant's role in the charged crime to urge the jury to vote for death, the defendant has a due process right to present and have the jury consider anything that might rebut or undermine the prosecution's theory. (See, e.g., Green v. Georgia (1979) 442 U.S. 95, 97 [evidence that co-participant was the only actual killer "was highly relevant to a critical issue in the punishment phase" in part because prosecutor argued defendant was an actual killer; exclusion from penalty phase violated federal due process]; Rupe v. Wood (9th Cir. 1996) 93 F.3d 1434, 1440-1441 [polygraph test to state's chief witness was relevant to raise doubt as to prosecution's theory regarding defendant's role in crimes, exclusion at penalty phase violated federal due process right to present relevant mitigating evidence]; Mak v. Blodgett, supra, 970 F.2d 614, 622-623 [where defendant's role in offense, or relative culpability, is relevant mitigating factor under state law, and where prosecutor makes it relevant through argument that defendant was ringleader, defendant entitled to present, and have jury consider, evidence relevant to that issue under the Eighth Amendment and the Due Process Clause].)

Nevertheless, the Court has held that trial courts do not have an absolute duty to instruct capital juries that they may consider their lingering doubts in determining the appropriate penalty. (See, e.g., People v. Sanchez, supra, 12 Cal.4th at p. 77 [and authorities cited therein].) Although lingering doubt is highly relevant to the sentencing decision in California, the Court has reasoned that a special instruction ordinarily is not necessary because, *as a general matter*, the language of the standard instructions on factors (a) and (k) is broad enough to encompass the concept of lingering doubt. (Ibid.; see also, e.g., People v. Johnson, supra, 3 Cal.4th at p. 1252 [maj. opn.]; People v. Cox, supra, 53 Cal.3d at

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438 U.S. 586, 694, 608; Bell v. Ohio (1978) 438 U.S. 637, 641-642.)

pp. 677-678; but see People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J. [if there is a reasonable likelihood that jurors will not understand that they may entertain and act upon their lingering doubts in penalty phase, court must provide lingering doubt instruction so as to avoid or correct the error]; People v. Cox, supra, at p. 678 and n. 20 [evidence may require appropriate lingering doubt instruction upon request].) Put another way, the Court has held that nothing on the face of the standard instructions *prevents* the jury from considering lingering doubt as a mitigating circumstance.

At the same time, and as discussed in Argument III, it is well settled that even where the court may not be obligated to instruct on a particular principle, once it does so, it must do so accurately and completely. (See, e.g., People v. Montiel, supra, 5 Cal.4th at p. 942; accord People v. Cummings, supra, 4 Cal.4th 1233, 1337; People v. Malone, supra, 47 Cal.3d 1, 49; People v. Melton (1988) 44 Cal.3d 713, 768.) Hence, although a lingering doubt instruction may not be required, if the court undertakes to instruct on lingering doubt, it must ensure that the instruction is accurate and complete. (Cf. People v. Livaditis (1992) 2 Cal.4th 759, 784 [court is not required to instruct on Davenport principle because language of other instructions broad enough to cover]; People v. Melton, supra, at p. 768 [where court granted defense request to instruct on Davenport principle but modified the requested instruction, its modification was potentially misleading and thus erroneous].) If the court's instructions, or a combination of instructions and argument, create a reasonable likelihood that the jury believed it was precluded from considering their lingering doubt in determining the appropriate penalty, then error has occurred under both state law and the federal constitution. (People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J. [if there is a reasonable likelihood that jurors will not understand that they may entertain and act upon their lingering doubts in penalty phase, court must provide lingering doubt instruction so as to avoid or correct the error]; see also, e.g., Estelle v. McGuire, supra, 502 U.S. at pp. 71-72; Boyde v. California, supra, 494

U.S. at p. 380; People v. Claire, supra, 2 Cal.4th at p. 663; People v. Brown, supra, 45 Cal.3d at pp. 1255-1256.) Unfortunately, this is just such a case.

### C. It Is Reasonably Likely That The Jurors Misunderstood That They Were Precluded From Considering And Giving Effect To Their Lingering Doubts That Matthew Was The Actual Shooter In Deciding Whether To Execute Him Or Spare His Life.

As discussed in Argument I, while the evidence may have been strong that either Matthew or Michael was the actual shooter, the evidence pointing to one over the other as the actual shooter was astonishingly close. Although the jurors' finding on the special circumstance allegation reflects their determination beyond reasonable doubt that Matthew was the shooter, it is inconceivable that they did not have lingering doubts as to that determination. Pursuant to the above authorities, Matthew was entitled under state law and the Eighth and Fourteenth Amendments to have the jurors consider their lingering doubts that Matthew was the actual killer, and the substantial evidence supporting such doubts, in determining whether he should be put to death.

Furthermore, Matthew had an independent due process right to have the jury consider and give effect to their lingering doubts that he was the actual shooter in order to rebut the prosecution's theory. Given the absence of any other aggravating evidence, the heart of the prosecution's penalty phase strategy was to emphasize Matthew's role and actions as the actual killer, to devastating effect. (RT 3652, 3884, 3886-3887, 3890, 3921, 3926-3928.) He referred to Matthew as the "marksman" who deliberately shot as many people as he could before he ran out of ammunition, who would have shot and killed more people if he had not run out of ammunition, who placed the muzzle of his gun "right up against their bod[ies] and fired it "again and again," and who "riddle[d]" Dewayne Arnold "up and down the side with the assault weapon and puts about, what six in him? What does that type of conduct call for?" (RT 3886-3887, 3921.) Hence, Matthew had

an independent due process right to have the jurors consider and give effect to the substantial evidence guilt phase evidence that he was not the actual shooter, which necessarily required them to consider their lingering doubts regarding their contrary guilt phase finding. (See, e.g., Green v. Georgia, supra, 442 U.S. at p. 97; Rupe v. Wood, supra, 93 F.3d at pp. 1440-1441; Mak v. Blodgett, supra, 970 F.2d at pp. 622-623; see also Simmons v. South Carolina, supra, 512 U.S. at pp. 161-163; Skipper v. South Carolina, supra, 476 U.S. at p. 5, n.1.)

Consequently, trial counsel requested an instruction informing the jury that it should consider their lingering doubts as to several issues in determining the appropriate penalty. The requested instruction provided as follows:

> A juror who voted for conviction at the guilt phase may still have a *lingering doubt as to whether the defendant was the actual shooter*, intended to kill, or premeditated and deliberated. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each juror may determine whether any lingering or residual doubt is a mitigating factor and assign whatever weight the juror feels is appropriate. [Citations.] (CT 755, emphasis supplied.)

As noted in the Introduction, the prosecutor objected to the instruction. (RT 3558-3559.) Citing Sanchez, Johnson, and Cox, supra, the court noted that it was not required to instruct "beyond Kaye [*sic* – factor (k)?]." (RT 3572-3573.) At the same time, it recognized that it had the discretion to provide a lingering doubt instruction on the question of "guilt." (RT 3572-3574.) It agreed that a lingering doubt instruction would be appropriate in this case; but it intended to modify the requested instruction because the court was not "comfortable" with the instruction as worded. (RT 3572-3574.) Two court sessions later, the court presented its drafted modification of the instruction to the parties. (RT 3699.) According to the court's modification, the instruction provided only: "it may be considered as a factor in mitigation if you have a lingering doubt as to the *guilt* of

the defendant." (RT 3852, 3866; 3699; CT 783, emphasis supplied.) Trial counsel emphasized, "I still would request that it be given the way we requested it, but failing that, I'm satisfied with this, your honor." (RT 3699.)

While the court's modification regarding lingering doubt as to "guilt" was arguably sufficient to encompass the premeditation and intent to kill issues addressed in the requested instruction, it did not encompass the vital issue of lingering doubts as to Matthew's ***role*** in the crimes – i.e., whether he was the "actual shooter." (CT 755.) To the contrary, from this apparently limiting instruction and the arguments as a whole, there is a reasonable likelihood that the jurors believed that they were precluded from considering their lingering doubts as to that critical issue and thus did not consider or give effect to the evidence pointing to Michael as the actual shooter and Matthew as the non-shooting aider and abettor. Hence, pursuant to the foregoing authorities, Matthew's right to have the jurors consider their lingering doubts regarding that vital issue, guaranteed by state law and the Fifth, Sixth, Eighth, and Fourteenth Amendments, was violated.

**1. The instructions.**

Lingering doubt as to a defendant's "guilt" of murder is often a question entirely distinct from lingering doubt as to his actual role in, or relative culpability for, the crime. (See, e.g., People v. Riel (2000) 22 Cal.4th 1153, 1209-1210.) Certainly, the two questions were distinct in this case, as the jury was well aware. During the guilt phase of trial, the jurors were repeatedly told that the boys' respective roles in the crimes – i.e., whether Matthew was the actual shooter – were irrelevant to the question of their "guilt" of the charged crimes. The instructions and arguments of *all* counsel repeatedly and explicitly informed the jurors that both the actual shooter and the non-shooting aider and abettor were "equally guilty" of the same crimes. (CT 694, 696; RT 3290-3291, 3298, 3308-

3309, 3312-3313, 3338, 3402, 3404, 3457.) Indeed, the jurors found them both "guilty" of the same crimes.

It is true that the jurors also found the special circumstance allegation to be "true" as to Matthew only and Matthew agrees that this reflects their determination under the beyond a reasonable doubt standard that he was the actual shooter. Again, however, and as the jurors were told, the "truth" of the special circumstance allegation was a question entirely separate from the boys' "guilt." (Cf. People v. Davenport (1995) 11 Cal.4th 1171, 1215 [distinction between lingering doubt defense focusing on "special circumstance and not defendant's guilt"].) Hence, Matthew submits that the jurors would correctly have understood that the term "guilt," as used in the court's modified lingering doubt instruction, meant exactly what it had meant throughout the trial – Matthew's guilt of the crimes, without regard to his actual role in them. As the modified instruction referred only to "guilt," and not to Matthew's actual role, or to the "truth" of the special circumstance allegation, it simply did not encompass the relevant penalty phase question of lingering doubt as to Matthew's role in the crimes, as addressed in the instruction as requested. At the very least, the court's modification should have informed the jurors that they would consider their lingering doubts not only as to "guilt," but ***also*** *as to the truth of the special circumstance allegation.* (See People v. Griffin (2004) 33 Cal.4th 536, 589 [approving such an instruction]; People v. Maury (2003) 30 Cal.4th 342, 436 [same]; People v. Cain (1995) 10 Cal.4th 1, 65-66 [same].)

The distinction between lingering doubt as to guilt and lingering doubt as to the defendant's actual role or relative culpability is a critical one. (Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty (1998) 83 Cornell L. Rev. 1557, 1577-1583 [results of empirical study revealed that "[w]hile lingering doubt concerning the defendant's actual innocence appeared to play a very infrequent role in influencing the jury's penalty decision, lingering doubt seemed to play a far more significant role when the

doubt involved the defendant's level of participation in the murder;" jurors did not consider whether there were lingering doubts as to guilt in penalty phase and expressed antipathy toward defendants who ask them to do so; in contrast, jurors were very receptive to considering lingering doubts as to the defendant's actual role in the crimes and such cases frequently resulted in life sentences].) Certainly, there is no doubt that the distinction was vital in this case. Based upon the evidence, particularly when combined with the incomplete and flawed guilt phase instructions regarding the elements of murder and attempted murder (Arguments II-IV, above), it is entirely possible – indeed probable – that the jurors had *no* doubt that Matthew was "guilty" of all of the crimes, *yet **still** had deeply troubling lingering doubts that he was the actual shooter.* (Cf. Tarver v. Hopper, supra, 169 F.3d at p. 716 [emphasizing significance of lingering doubt at penalty phase where, "despite overwhelming evidence that (defendant) or his associate . . . actually killed (the victim), very little evidence made (defendant) a better candidate than (his associate) to be found to be the actual killer"].) And, as the jurors' verdicts reveal, their determination of the penalty turned not on the boys' "guilt," but rather on their respective roles in the shooting. Apparently having found that only the actual shooter intended to kill, they not only determined that death was not an appropriate punishment for the non-shooting aider and abettor, but also that he was not even *eligible* for the death penalty.

The question then becomes whether it is reasonably likely that the jury understood that its consideration of lingering doubt was *limited* to the question of Matthew's "guilt" of the charged murders and attempted murders and *not* as to any other issue. In other words, the question is whether it is reasonably likely that the jurors believed they were precluded from considering their lingering doubts that Matthew was the actual shooter, and the *substantial* evidence supporting such doubts, as a basis for a sentence less than death. (See People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J.; see also, e.g., Estelle v. McGuire, supra, 502 U.S. at pp. 71-72; Boyde v. California, supra, 494

U.S. at p. 380; People v. Claire, supra, 2 Cal.4th at p. 663; People v. Brown, supra, 45 Cal.3d at pp. 1255-1256.) The answer is yes.

It is axiomatic that lay jurors apply logic and commonsense to their reading of instructions. (See, e.g., Boyde v. California, supra, 494 U.S. at p. 381; People v. Coddington, supra, 23 Cal.4th at p. 594.) The maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another, is "a product of logic and common sense" (Alcaraz v. Block (9th Cir. 1984) 746 F.2d 593, 607-608; accord, e.g., People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 522) and a "deductive concept commonly understood" (People v. Castillo, supra, 16 Cal.4th at p. 1020, conc. opn. of Brown, J.). The maxim holds that where specific items are listed, it is assumed that the omission of items similar in kind is intentional and the omitted items are therefore excluded. (Ibid.) Courts consistently apply the maxim in resolving how lay jurors would understand a particular instruction, whether explicitly (see, e.g., People v. Castillo, supra, at p. 1020; People v. Watson (1899) 125 Cal. 342, 344) or implicitly (see, e.g., Hitchcock v. Dugger (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; People v. Dewberry (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser specified first and second-degree murder but did not mention second-degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice]; People v. Salas (1976) 58 Cal.App.3d 460, 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonably probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge].)

Here, the instruction on lingering doubt was specifically directed to only one issue – the question of Matthew's "guilt" of the murders and attempted murders. Applying a common sense reading to that instruction, it is reasonably

likely that the jurors understood that the exclusion of other issues to which they might have had lingering doubts was intentional and meaningful. In other words, it is reasonably likely that the jurors understood that their consideration of lingering doubt was limited to the question of Matthew's "guilt" and not to any other questions. Hence, it is reasonably likely that the jurors understood the instruction to mean that they could *not* consider their "lingering doubts" as to whether Matthew was the actual shooter – an issue they understood to be irrelevant to the question of his "guilt" – in violation of state law and Fifth, Sixth, Eighth, and Fourteenth Amendments. (See, e.g., People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J.; Green v. Georgia, supra, 442 U.S. at p. 97; Rupe v. Wood, supra, 93 F.3d at pp. 1440-1441; Mak v. Blodgett, supra, 970 F.2d at pp. 622-623.)

Unfortunately, the other instructions did nothing to correct or nullify the misleading nature of the instruction. It is true that the jury was instructed on factors (a), (j), and (k) with CALJIC No. 8.85 and that this Court has held that such instructions generally allow consideration of lingering doubt as a mitigating factor, notwithstanding their failure to specifically address lingering doubt. (CT 782; see, e.g., People v. Brown, supra, 31 Cal.4th at pp. 567-568.)[32] However, it is

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[32] The court instructed the jury with a modified version of CALJIC No. 8.85 (the modification appears in italics) as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. *As part of the circumstances of the offense under factor A, you may also consider the testimony offered in this penalty phase portion of the trial concerning the impact of the crimes on the family and friends of the victim.*

well recognized that, in construing how lay jurors would understand a series of instructions, "the more specific charge controls over the general charge." (LeMons v. Regents of University of California (1978) 21 Cal.3d 869, 878 and n.8; accord, e.g., Francis v. Franklin (1985) 471 U.S. 307, 316-320 [viewing instructions as a whole, where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect

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(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

to element, more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; People v. Easley (1983) 34 Cal.3d 858, 877-879 [where one instruction erroneously and specifically told jurors not to consider sympathy, provision of more general instruction – former CALJIC No. 8.84.1 – directing jurors to consider "any other circumstance that extenuates the gravity of the crime" did not cure error]; Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378, 1387 and n.8; Buzgheia v. Leasco Sierra Grove (1997) 60 Cal.App.4th 374, 395; People v. Stewart (1983) 145 Cal.App.3d 967, 975.) Here, of course, the only instruction specifically directed to lingering doubt was the court's misleading instruction. "'It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general.' [Citation.]" (Buzgheia v. Leasco Sierra Grove, supra, at p. 395.) In determining the scope of the lingering doubts that they could consider, it should be presumed that the jurors took their guidance from the specific lingering doubt instruction.

While the instruction on factor (j) (whether or not the defendant was an accomplice or minor participant) was closer to the critical lingering doubt issue than the general instructions on factors (a) and (k), it was nevertheless insufficient to remedy the defect in the specific lingering doubt instruction. The jurors were told to consider only those factors that were "*applicable.*" (CT 782, emphasis supplied.) On its face, the instruction alerts the jurors that it may contain inapplicable factors. (See, e.g., People v. Ghent, supra, 43 Cal.3d at pp. 776-777.) Indeed, the instruction listed obviously inapplicable factors, such as factor (b) (other violent criminal activity). (CT 782.) Without more, factor (j) would clearly appear to be inapplicable in this case, since it was inconsistent with the jurors' guilt phase finding on the special circumstance allegation. Under the circumstances, the only way that the lay jurors would have understood that factor (j) was potentially applicable would have been through understanding that they

could consider their lingering doubts over their contrary guilt phase finding. Indeed, the seeming inapplicability of factor (j) was reinforced when the prosecutor opened his summation by emphasizing, "There's no longer a question about who did what to who[m], it is not about that. That's behind us." (RT 3871.) Certainly, defense counsel never even mentioned factor (j) or explained its connection to the critical lingering doubt issue presented by the case and omitted from the court's instruction.

At the very least, the instructions as a whole were potentially ambiguous and misleading. Of course, as previously discussed, even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (People v. Brown, supra, 45 Cal.3d at p. 1255.) When considered in conjunction with the prosecutor's arguments, there is a reasonable likelihood that the jurors understood that it would be improper for them to consider their lingering doubts as to Matthew's actual role in the crimes in determining whether to execute him. (See, e.g., People v. Claire, supra, 2 Cal.4th at p. 663; People v. Brown, supra, 45 Cal.3d at p. 1255; People v. Lucero, supra, 44 Cal.3d at p. 1031; Hitchcock v. Dugger, supra, 481 U.S. at pp. 397-398 [from instruction and prosecution arguments, jurors likely understood that its consideration of mitigating factors was limited to those listed in instruction and no others].)[33]

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[33] Any argument that counsel waived Matthew's right to challenge the court's erroneous modification should be rejected. Counsel effectively objected to the modification when the court presented it and counsel reiterated his request for the instruction in its unmodified form. (RT 3699.) Furthermore, as set forth in the body of the argument, the court's modification affected Matthew's substantial rights and hence is reviewable even in the absence of an objection. (See Pen. Code § 1259 and Argument IV-D, above.) In any event, as explained in the next section, whatever might be said about the appropriateness of the instruction in isolation and counsel's failure to object to it, it is clear that *subsequent events* – namely, the prosecutor's argument – created a reasonable likelihood that the jurors would misunderstand the law. In light of those subsequent events, the court had an independent duty to clarify the matter. (See, e.g., People v. Johnson, supra,

## 2. The arguments.

In his argument, Matthew's counsel addressed the relevance of lingering doubt in general and specifically urged the jurors to consider their lingering doubts that Matthew was the actual shooter, rather than the non-shooting aider and abettor, in deciding whether he should live or die. (RT 3908-3910.) For his part, the prosecutor did not acknowledge that the jury could consider lingering doubt, but argue that there was none or that it should be given little weight – arguments that he made with respect to other mitigating circumstances and which were entirely appropriate.[34] To the contrary, he repeatedly and vehemently argued that it would be inappropriate for the jurors to "even consider" their lingering doubts and to "second-guess" their decision and that it was grossly inappropriate for Matthew's counsel to ask them do so. (See, e.g., People v. Robertson (1982) 33 Cal.3d 21, 57-58 [prosecutor's argument regarding consideration of sympathy was "seriously misleading" where he "did not limit his argument to factually unsupported sympathy, but repeatedly told the jurors that it should not consider . . . 'sympathy factors'" because they were inappropriate to its decision]; compare, e.g., People v. Cox, supra, 53 Cal.3d at p. 675 [holding refusal to provide instruction on lingering doubt as to role was not error because, *inter alia*, "the

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People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J. ["the court is obligated to give an express instruction (on lingering doubt) when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard. A reasonable likelihood would compel a finding of error. (Citation). Error, of course, must be avoided."].)

[34] For instance, the prosecutor appropriately acknowledged that it was appropriate for the jurors to consider the evidence that Matthew had been a motivated and well-behaved student as a child, but argued that it should be given little weight. He argued, "I mean, the law has to allow you to consider that sort of thing, but again, don't forget the instruction, you assign whatever moral, sympathetic weight you feel the proof is entitled to, if you accept it." (RT 3926.)

prosecutor never suggested that it was not a relevant consideration if the jury found it supported by the evidence"].)

As noted above, the prosecutor opened his summation by emphasizing that "There's no longer a question about who did what to who[m], it is not about that. That's behind us." (RT 3871.) Anticipating the defense's position to the contrary, he argued, "I like to refer to it not as lingering doubt, but malingering doubt. To even consider something like that is an insult to the – not only the burden of proof built into the system, but the careful and attentive way that you approached your job in the first part of the case, and it is an affront to the decision you made." (RT 3889-3890.) He consistently referred to defense counsel's position that Michael was the actual shooter as a guilt phase tactic that "didn't work" and was no longer relevant. (RT 3880-3881, 3888-3889.) Indeed, the prosecutor closed his summation with an impassioned entreaty to the jurors to consider Matthew's inappropriate invitation to "second-guess" their guilt phase determination that he was the actual killer as *aggravating* evidence, because it revealed the absence of even "a shred of remorse" and a young man undeserving of their mercy:

> Finally, if you want the easy way out, look no further than lingering doubt. All you have to do is second guess the decision you've already been put through and use that as a reason not to go forward and finish the job. . . .The defense in this case, again, blaming the brother; that failing, I wasn't there; that failing, blaming the mother. Now they want to put a guilt trip on you and making you fear that ten years from now you will second guess the decision you made and you will feel horrible . . . Does he deserve your mercy? This picture that's been painted of him as a caring, loving, quiet, never ever fought with any of his brothers or sisters . . . .But does he deserve your mercy because that's the way he's been portrayed when he was young? Well, someone that was really that way, they would show remorse. Remorse would be apparent. They would feel bad about what they had done. . . . If time goes by and they apologize, you believe them, they are not just saying it, you believe he is sorry, you know, that's

> the way for you to exercise a little mercy of forgiveness on your own. Do you have an inkling of that here? Has any hint of that been extended here? He's still claiming he wasn't there and *asking you to second guess your decision, deciding that he was. Is that remorse? There's not a shred of remorse*, and without remorse, you're supposed to extend mercy, forgiveness in the face of that? Mercy should be extended out of strength, not weakness. If it is extended out of weakness, it is not mercy at all, by definition. So before you take that way out, think about why you're doing it. (RT 3926-3928.)

Hence, unlike the prosecutor's arguments relating to other mitigating circumstances, not once did the prosecutor acknowledge that it was appropriate to consider lingering doubts; not only would it be inappropriate to consider lingering doubt, but Matthew's request that the jurors do so should be held against him as evidencing an utter lack of remorse. (Cf. People v. Gonzalez (1990) 51 Cal.3d 1179, 1232 [improper to cite "a proffered defense as proof of remorselessness"]; People v. Coleman (1969) 71 Cal.2d 1159, 1168-1169 [improper to argue defendant's failure to admit guilt demonstrates lack of remorse]; Zant v. Stephens (1983) 462 U.S. 862, 885 [improper to attach "aggravating label" to circumstance "that actually should militate in favor of a lesser penalty"].) Hence, the prosecutor both opened and closed his arguments to the jury with an increasingly scathing attack on the propriety of "even consider[ing]" lingering doubt that Matthew was the actual killer. Given the prosecutor's argument, the trial court should have instructed the jury, as counsel had requested, that it was in fact entirely appropriate for the jurors to consider their lingering doubt as to whether Matthew was the actual killer. Absent that instruction, the combined effect of the apparently limiting lingering doubt instruction and the prosecutor's argument created a reasonable likelihood that the jurors labored under a misconception in this regard. (See, e.g., People v. Johnson, supra, People v. Johnson, supra, 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J. ["the court is obligated to give an

express instruction (on lingering doubt) when there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard. A reasonable likelihood would compel a finding of error. (Citation). Error, of course, must be avoided."].)

It is no answer to say that the effect of the misleading instruction and the prosecutor's similarly misleading and impassioned argument was nullified by defense counsel's argument that the jury could consider their lingering doubts that Matthew was the actual shooter. As discussed in Argument III-E, above, it is well recognized that when the defense and the prosecution argue two competing interpretations of the law and the instructions fail to guide the jurors as to which interpretation is the correct one, it is more than reasonably likely that the jury will accept the prosecution's. (See, e.g., Hitchcock v. Dugger, supra, 481 U.S. at pp. 397-398 [jury instruction listed mitigating factors to be considered; defense counsel argued mitigation not limited to listed factors; prosecutor argued to the contrary; likely jurors understood consideration limited to listed factors]; United States v. LaPage, supra, 231 F.3d 488, 492 [in contrast to the prosecutor, "the jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism"]; People v. Taylor, supra, 197 Cal.App.2d at p. 383; People v. Brophy, supra, 122 Cal.App.2d at p. 652; People v. Talle, supra, 111 Cal.App.2d 650, 677.) As the Court has recognized, this is particularly true where, as here, "the prosecutor [does] not adopt or endorse the view expressed by defense counsel," but rather criticizes it. (People v. Edelbacher, supra, 47 Cal.3d at p. 1039 [despite defense counsel's "thorough and forceful explication" of the correct law, prosecutor's contrary argument and potentially misleading instruction created reasonable likelihood jurors misunderstood the law]; compare People v. Johnson, supra, 3 Cal.4$^{th}$ at pp. 1261-1262, conc. opn. of Mosk, J., with Kennard, J., concurring [concurring in majority opinion that refusal to provide lingering doubt instruction was not error in part because defense counsel argued its relevance *and* "the People made no suggestion that such doubt was in any way

immaterial"]; People v. Cox, supra, 53 Cal.3d at p. 675 [holding refusal to provide instruction on lingering doubt as to role was not error in part because "the prosecutor never suggested that it was not a relevant consideration if the jury found it supported by the evidence"].)

Indeed, objective evidence in the record clearly indicates that this jury viewed the representations of this defendant's attorney with skepticism. As a preliminary matter and as discussed in Argument VI, above, the prosecutor explicitly told the jurors that they could not trust Matthew's defense counsel because he had lied to them before. For instance, in his summation, the prosecutor purported to quote from Matthew's counsel's guilt phase argument to the jury suggesting that one of the party guests may have "planted" Rebecca Souza's purse in Esther Dale's trunk after the shooting. (RT 3887.) In truth, the argument the prosecutor quoted at length was *the argument of Michael's counsel, not Matthew's counsel.* (RT 3887, quoting from RT 3372.) The prosecutor then embarked on a lengthy, scathing attack on *Matthew's counsel* as being a liar for supposedly having made that argument: "That's the argument that [Matthew's counsel] got up and made to you. . . . Arguing this to you all the time when he knows that if this thing goes to penalty phase, he's all prepared to put on a woman I was not aware of until the penalty phase, May Ruth Underwood. Remember the woman that came in, she's the one that the defense put on to say that she had to give Rebecca a ride home 36 times because she locked her purse and her keys in Esther's trunk. And yet it is the same guy arguing to you in the guilt phase: how do we know that's how it happened? You know, think about things like that. . . . *Remember that remember Mr. Costain's argument to you in the guilt part when he gets up here and argues lingering doubt as a reason to impose the life without possibility of parole instead of the death penalty.*" (RT 3887-3889, emphasis supplied; see also RT 3887 [castigating Matthew's counsel for allegedly arguing in guilt phase that Joyce Arnold/Victoria Gonzalez's testimony was incredible when in truth the argument from which prosecutor quoted was made by Michael's counsel at RT

3370]; RT 3880-3881, 3886-3887 [suggesting verdicts demonstrate that counsel lied in defending Matthew]; RT 3916-3918 ["Mr. Costain and Ms. Campos want to create divisiveness" in order to obtain a mistrial and are "pandering to racism"]; RT 3921 [castigating counsel for "manufactur[ing]" "phony mitigation"]; RT 3918 ["Mr. Costain's" argument is an "attempt to make your task seem more difficult than it is"].)

As further discussed in Argument VI, the prosecutor's argument that the jury should not believe Matthew's counsel had its desired effect. In their arguments, both of Matthew's attorneys informed the jurors that, regardless of what action they took in the penalty phase, it would have no effect on their guilt phase verdicts ensuring that Matthew would never be released from prison. (RT 3894, 3904.) Nevertheless, during its penalty phase deliberations, the jurors submitted a written question to the court inquiring into the consequences of jury deadlock and specifically whether deadlock would result in reversal of their guilt phase verdicts. (RT 3933; CT 755; see also RT 3934 [in discussing response to jury inquiry, both defense counsel reminded the court that they had answered this question in their summations].) In other words, the jury was unwilling to accept defense counsel's representations of the law without verification from the trial court. On this record, it simply cannot be presumed that the jurors accepted defense counsel's representation that they could and should consider their lingering doubts that Matthew was the actual killer in deciding his fate.

Finally, any remaining question that the lay jurors did not consider and give effect to their lingering doubts that Matthew was the actual killer is surely put to rest by the trial judge's own failure to do so. In ruling on the application to modify the death verdict (Pen. Code § 190.4, subd. (e)), the judge noted that it agreed with the jury's assessment that Matthew was guilty of the underlying crimes and the truth of the special circumstance allegation "beyond a reasonable doubt." (RT 3973.) The judge then specifically addressed and discussed the weight of all of the relevant mitigation, including Matthew's age, his troubled

childhood, and his lack of a record. (RT 3976-3977.) The judge also specifically noted the absence of any other relevant mitigation. (RT 3977-3978.) Strikingly absent from the court's discussion was any acknowledgment of indisputable lingering doubt that Matthew was the actual shooter, or the *substantial* evidence pointing to Michael. (RT 3975-3978.) Given that the judge was careful to note what considerations it did take into account, it seems clear that lingering doubt was not one of them. (Cf. Smith v. McCormick (9th Cir. 1990) 914 F.2d 1153, 1165 [courts' failure to refer to letters as part of defendant's mitigating evidence tended to show that they did not consider that evidence].) If the trial judge failed to even acknowledge those doubts and the substantial evidence supporting them, then it can safely be assumed that the lay jurors also failed to do so.

For all of these reasons, it is reasonably likely that the jurors misunderstood that they were precluded from considering or giving effect to their lingering doubts that Matthew was the actual shooter and the substantial evidence supporting such doubts. Because state law entitled Matthew to have the jury consider those doubts in determining the appropriate penalty, because this was a significant component to his penalty phase defense, and because his actual role in the shooting was constitutionally relevant to the penalty determination, the error violated both state law and Matthew's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments pursuant to the authorities discussed in part B, above.

### D. Reversal Is Required.

Where, as here, error of federal constitutional dimension has occurred, reversal is required unless the Court determines that it was harmless beyond a reasonable doubt. (Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt, supra, 500 U.S. at p. 404; Chapman v. California, supra, 386 U.S. at p. 24; People v. Lucero, supra, 44 Cal.3d 1006, 1032.) For state law violations in the

penalty phase of a capital trial, reversal is required if there is any "reasonable possibility" that the verdict would have been different in the absence of the error. (People v. Brown (1988) 46 Cal.3d 432, 447-448.) Reversal is required under this standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (People v. Ashmus (1991) 54 Cal.3d 932, 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].) Given that the jurors' penalty determination is an individualized, normative one, and the need for heightened reliability in capital cases, the "reasonable possibility" standard is "more exacting" than the Watson standard for reversal applied to guilt phase errors. (People v. Brown, supra, 46 Cal.3d at p. 447; see also People v. Ashmus, supra, 54 Cal.3d at p. 965 [equating reasonable possibility standard under Brown with the federal harmless beyond a reasonable doubt standard].) Under either standard, it is clear that the penalty judgment must be reversed.

Once again, given the evidence outlined in Argument I, any rational human being who heard that evidence would – at the very least – have had lingering doubts that Matthew, rather than Michael, was the actual shooter. Lingering doubt that a capital defendant was the actual killer is powerful mitigation when the jury is permitted to consider it. (See, e.g., Enmund v. Florida (1982) 458 U.S. 782, 794 [discussing reluctance of juries to impose death penalty for accomplice liability]; Tarver v. Hopper, supra, 169 F.3d at pp. 715-716 [and empirical studies discussed therein]; Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, supra, 83 Cornell L. Rev. at pp. 1577-1583.) Certainly, the jury in this case considered the identity of the actual shooter to be an issue of enormous importance. Again, while the jurors found both the shooter and non-shooting aider and abettor equally "guilty" of the crimes, their verdicts reveal a dramatic difference in their assignment of the participants' relative culpability. The record thus amply demonstrates the great weight the jurors would have afforded their lingering doubts as to Matthew's role in the

shooting had they understood they could do so. Given the extraordinary closeness of the penalty phase evidence, there is more than a "reasonable possibility" (People v. Brown, supra, 46 Cal.3d at p. 448) that a juror "could have" (People v. Ashmus, supra, 54 Cal.3d at pp. 983-984) voted differently had the jurors understood that they could consider those doubts in determining the appropriate penalty.

The prosecution's only aggravating evidence related to the circumstances of the offense – the bare facts of the underlying convictions themselves, its theory that Matthew was the actual shooter, and the impact of the crimes on the victims and their families. (See, e.g., People v. Crandell, supra, 46 Cal.3d at pp. 885-886 [penalty phase error required reversal where prosecution's aggravating evidence, based solely on commission of underlying murders, kidnapping, and assault with attempt to commit rape and multiple murder special circumstance, was "not overwhelming" and crimes were "arguably an isolated and aberrant incident"]; Belmontes v. Woodford, supra, 350 F.3d at pp. 906-907 [prosecution's aggravating evidence was "not strong" where based solely on commission of underlying crimes]; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1081, cert. denied 528 U.S. 922 (19990 [aggravating evidence was "scant" where based solely on commission of underlying crimes – two first degree murders and assault with deadly weapon on third person in two separate incidents – along with prior felony conviction and prior violent assault]; Mak v. Blodgett, supra, 970 F.2d at pp. 619-622 [penalty phase error required reversal despite defendant having been convicted of thirteen counts of aggravated first-degree murder].)[35]

While the prosecutor argued that the sheer number of crimes was aggravating, the circumstances of the crimes were also highly mitigating, as

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[35] Furthermore, as discussed in Argument VIII-C, below, much of the prosecutor's argument regarding the aggravating circumstances of the crimes either misstated the evidence presented or purported to refer to evidence that was never admitted.

thoroughly discussed in Arguments II and III, above. Matthew was not motivated by a desire for money or to inflict suffering. He and his brother were motivated by what their own mother represented to have been a brutal assault upon her and by her "hysterical" entreaties to confront her attackers and retrieve her belongings. (RT 2096-2097, 2099, 2101, 2106-2108, 2150, 2155-2156, 2160-2161, 2193-2194, 2203-2204, 2214, 2219.) Nor was Matthew the ringleader. As the prosecutor recognized, the testimony of the percipient witnesses established that his older brother, Michael, was the "leader" and the "one in command" (RT 3292, 3298), which was consistent with the testimony of the boys' family members and friends who described Michael as the leader and Matthew as his "shadow" (RT 3612-3613, 3650, 3755, 3779). (See, e.g., Smith v. Singletary (11th Cir. 1995) 61 F.3d 815, 817 [evidence defendant acted under influence of more dominant accomplice relevant mitigation].)

Furthermore, as discussed in the preceding arguments, the jury's determination that Michael, the leader of the confrontation, did not intend to kill reveals several significant mitigating findings. The verdicts reveal that the jurors convicted Michael of the crimes as the natural and probable consequences of aiding and abetting an assault with a firearm. (CT 697.) In other words, the jurors found that the boys planned to commit an assault with a firearm, *not* to kill. (See, e.g., Belmontes v. Woodford, supra, 350 F.3d at pp.906-907 [instructional error in penalty phase prejudicial in light of "substantial mitigating evidence" which included, *inter alia*, that murder was not pre-planned].) The shooter formed the intent to kill only as an immediate response to the violent chaos that erupted when Dewayne Arnold physically confronted Michael. (See, e.g., Pen. Code § 190.3, subd. (e).) The shooting was committed in an explosion of violence, in response to a suddenly developing situation while both boys were in a state of fear, anger, panic, and intense emotional disturbance. (See, e.g., Pen. Code § 190.3, subds. (d), (f).) Neither Matthew nor his brother tortured anyone, raped anyone, or inflicted or attempted to inflict any degree of suffering greater than that inherent in

the shooting itself. (See, e.g., Jackson v. Herring (11th Cir. 1995) 42 F.3d 1350, 1369 [crime mitigating where defendant committed murder in an "irrational and sudden temper," as compared to "many death penalty cases (which) involve murders that are carefully planned or accompanied by torture, rape, or kidnapping"].) Indeed, as discussed in Arguments II and IV, the state of the evidence raised deeply troubling questions as to whether all of the victims were even shot intentionally. (See, e.g., Jackson v. Calderon (9th Cir. 2000) 211 F.3d 1148, 1164, cert. denied 531 U.S. 1072 (2001) [emphasizing weak nature of evidence to prove elements of offense in guilt phase in concluding penalty phase error prejudicial].) Finally, Matthew voluntarily surrendered to police only a few days after the shooting. (RT 3053-3054; see, e.g., Williams v. Taylor (2000) 529 U.S. 362, 398 [surrendering to police is mitigating].)

Other than his characterization of Matthew as the actual shooter, the prosecutor offered absolutely *no* aggravating evidence relating to Matthew himself. (See, e.g., Wiggins v. Smith (2003) 539 U.S. 510, 535, 537-538 [state's case for death weak where there were no aggravating factors in defendant's background].) The mitigating evidence relating to Matthew, on the other hand, was extraordinarily strong.

Matthew had absolutely no record of any crimes or arrests and no history of violence. (RT 3620, 3639, 3651-3652, 3665, 3672-3673, 3685, 3688, 3835; see, e.g., People v. Lucero, supra, 44 Cal.3d at p. 1032 [penalty phase error required reversal in light of substantial mitigating evidence that, *inter alia*, defendant had no history of criminal violence or felony convictions]; compare James v. Borg (9th Cir. 1994) 24 F.3d 20, 27 ["although only 18 years old, petitioner had already amassed a lengthy criminal record"].) To the contrary, the uncontroverted evidence showed that Matthew had always had an unusually gentle nature and that the crimes were an isolated and aberrant incident wholly out of character for him. Several witnesses reported that Matthew had never been in any kind of a fight – even with his siblings and even when bullied – and that they had never even seen

him become angry or act aggressively. (RT 3620, 3639, 3651-3652, 3665, 3672-3673, 3685, 3688, 3757-3758, 3770, 3778, 3786, 3835.)

Moreover, Matthew was only 18 years old when the crimes were committed – barely more than a child and barely eligible for the death penalty at all. (RT 2180; Probation Report at p. 1; see, e.g., Johnson v. Texas (1993) 509 U.S. 350, 367 [and authorities cited therein-- youth relevant mitigating factor]; Pen. Code § 190.5, subd. (a) [death penalty cannot be imposed on defendants under 18 years old].) As the United States Supreme Court has consistently recognized, "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable in the young. These qualities often result in impetuous and ill-considered actions and decisions." (Johnson v. Texas, supra, at p. 367.)

Even for an 18-year-old, Matthew was unusually inexperienced and immature. (See, e.g., Eddings v. Oklahoma, supra, 455 U.S. 104, 116 [evidence of teenage defendant's emotional development below chronological age highly relevant mitigation]; Bell v. Ohio (1978) 438 U.S. 637, 639-642 [defendant's "emotional immaturity" constitutionally relevant mitigation].) Matthew had never had a girlfriend. (RT 3620, 3650.) He had never had a driver's license. (RT 3620.) His teenage years were unmarked by the usual hallmarks of adolescent rebellion. In addition to his unusually pacifistic nature, friends and family members never saw any signs that he had experimented with drugs or alcohol. (RT 3658, 3735, 3840.) He spent many Saturday nights with his grandmother and other senior citizens rather than with boys and girls in his peer group. (RT 3760-3762.) Indeed, other than absences resulting from his chaotic family life, he had never even been in any trouble at school. (RT 3710, 3716-3717, 3730, 3732-3734, 3744-3745, 3749, 3819, 3822.) Former teachers, family members, friends, and other acquaintances consistently described him as unusually meek, shy, and obedient, particularly compared to others his age. (RT 3639, 3746-3747, 3657-

3658, 3672-3673, 3679, 3685, 3720, 3732, 3737-3738, 3745-3747, 3786,3828-3829.)

While Matthew's family was a loving one for the most part, his childhood (up to and including the time of the crimes) was marked by extreme instability and his alcoholic mother's erratic behavior and neglect. (RT 3610, 3613-3617, 3619-3620, 3686-3687, 3756, 3836-3838.) For instance, at one point, his mother "disappeared" with the children for a year before their father was able to find them. (RT 3616, 3756.) At another, their mother abandoned the children when they were visiting their father for the weekend. (RT 3616-3617.) At yet another, she moved out of state with all of her children except Matthew, whom she left behind. (RT 3613-3614.) Of course, these events deeply affected Matthew. (RT 3613-3617; see, e.g., Wiggins v. Smith, supra, 539 U.S. at p. 534 [difficult childhood and "alcoholic, absentee mother" part of "powerful" mitigating evidence]; Eddings v. Oklahoma, supra, 455 U.S. at p. 115 [where defendant teenager at time of crime, evidence of "difficult family history" is "particularly relevant" mitigation]; Jackson v. Calderon, supra, 211 F.3d at p. 1163 [evidence of defendant's childhood marked by neglect and instability was sufficiently mitigating to require reversal for counsel's failure to present it]; In re Lucas (2004) 33 Cal.4th 682, 735 [childhood abandonment significant mitigating evidence]; Douglas v. Woodford (9th Cir. 2002) 316 F.3d 1079, 1088 [same].) No doubt due in large part to their mother's alcoholic and erratic behavior, Matthew and Michael were very protective of her. (RT 3673, 3758.)

It surely was not lost on the jury that after she set her child on the tragic course that resulted in the charged crimes, Matthew's mother not only again abandoned him – not once visiting him while in custody and even moving out of the state – she testified *for the prosecution* at the guilt phase and did not testify at all at the penalty phase in order to plead for her child's life. Despite having been raised by such a parent and his troubling family environment, Matthew remained a loving, nurturing, and obedient child who had positive relationships with everyone

in his life, and who had avoided any kind of trouble until the commission of the crimes. (RT 3615-3616, 3620, 3638-3639, 3650, 3662-3663, 3665, 3685, 3710, 3716, 3768-3769, 3777-3778, 3780, 3785, 3821, 3828-3829, 3835, 3838; see, e.g., Parker v. Dugger (1991) 498 U.S. 308 [defendant's positive relationships with friends and family appropriate mitigating factor]; Mayfield v. Woodford (9th Cir. 2001) 270 F.3d 915, 918-919, 929-932 [same]; Jackson v. Herring, supra, 42 F.3d at p. 1368 [same].) Until he eventually dropped out of high school at a time that coincided with his mother's reentry into his life, Matthew also overcame his chaotic family life and learning disabilities to be what his teachers consistently described as a good, respectful student who worked hard at his studies. (RT 3607, 3707, 3710, 3707-3709, 3711-3716, 3719-3720, 3722-3724, 3726, 3732, 3734, 3745-3746, 3749-3750, 3817-3819, 3821-3822; see, e.g., In re Lucas, supra, 33 Cal.4th at p. 735 [where aggravating evidence based on crimes in which defendant "brutal[ly]" killed two elderly and "vulnerable" neighbors in their home, and on defendant's prior violent assault, and where there was mitigating evidence regarding "childhood hardship" and "positive human qualities," case was sufficiently close to require reversal of penalty judgment under Strickland standard for counsel's failure to present additional mitigating evidence of "childhood abandonment" and abuse]; Mayfield v. Woodford, supra, 270 F.3d at pp. 918-919, 929-932 [where aggravating evidence based on current crimes in which defendant planned and committed killing of three people in two separate incidents, and on defendant's prior violent assaults, and where there was mitigating evidence regarding childhood illness, drug use, and psychological and social problems, case was sufficiently close to require reversal of penalty judgment under Strickland standard for counsel's failure to present additional mitigating evidence of defendant's positive relationships and otherwise non-violent character]; see also Douglas v. Woodford, supra, 316 F.3d at p. 1090 [and authorities cited therein – "the gruesome nature of (a) killing (does) not necessarily mean that the death penalty (is) unavoidable"].)

Finally, in keeping with his character before the shooting, the uncontroverted evidence showed that Matthew adjusted well to incarceration following his arrest. (See, e.g., Belmontes v. Woodford, supra, 350 F.3d 860, 907 [defendant's adjustment to incarceration part of "substantial mitigation"].) He had enrolled in school, obtained his G.E.D., and was taking classes toward earning his high school diploma. (RT 3791, 3797-3798.) According to his teacher at the jail, he was a good student who completed his assignments well and on time, seemed to enjoy the learning process, and was "a pleasure" to have in class. (RT 3797-3800.)

In sum, the portrait that emerged was of an inexperienced and immature teenager who had never engaged in a single act of violence or any kind of antisocial behavior until he was awakened in the dead of night by his mother, who hysterically recounted a horrific story of having suffered a violent group beating and insisted that her young sons confront her attackers. Matthew's response to his mother's hysteria was no doubt colored by her history of neglect and instability, his resulting need for her love and approval and a desire to protect her, and his chronological and emotional immaturity. (RT 3673, 3758.) As the prosecutor recognized, Matthew's mother directed him to the confrontation (RT 3305-3306), his brother led him to it (RT 3292, 3298), and a third party put a gun in his hands (RT 3453). Of course, the boys' decision to arm themselves was a dangerous and, ultimately, deadly and tragic one. But there is also no doubt that it was a decision born largely of their immaturity and the terrible combination of their family history and the extraordinary set of circumstances in which they found themselves. Intending – as the jurors found – nothing more than to frighten their mother's attackers and retrieve her belongings, the confrontation rapidly escalated into an explosion of violence. The crimes were, in essence, an assault with a deadly weapon, committed by inexperienced and emotionally damaged teenagers whose judgment was clouded by a highly unusual confluence of events, gone horribly wrong. (See, e.g., Belmontes v. Woodford, supra, 350 F.3d at p. 907 [penalty

phase error required reversal where, *inter alia*, the crime, "though shocking and deplorable, was in essence a robbery gone wrong"]; Harris v. Dugger (11th Cir. 1989) 874 F.2d 756, 763-764 [penalty phase error required reversal where, *inter alia*, evidence showed "a burglary gone horribly awry as opposed to one involving murder as the intended goal"].)

That the jurors viewed the case to be a close one is beyond dispute. Although the evidentiary phase of the penalty trial took just over three days (CT 759-760, 765-768), and did not involve particularly complex evidence or issues, such as psychiatric evidence or factual or legal issues relating to prior criminal conduct, the jurors deliberated over the course of *six days*. (CT 771-772, 774, 776-777, 790; RT 3940-3943; see, e.g., Parker v. Gladden (1966) 385 U.S. 363, 365 [finding prejudice from error where "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner"]; Mayfield v. Woodford, supra, 270 F.3d at p. 932 [lengthy deliberations one indication of close case]; Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d 926, 973 [same]; Hamilton v. Vasquez (9th Cir. 1994) 17 F.3d 1149, 1163 ["the jury spent three days deliberating in the penalty phase, suggesting that the California jury saw this as a close case"]; United States v. Kojayan, supra, 8 F.3d at p. 1323 [fact jury deliberated over two days after one and a half day trial indicated close case]; In re Martin (1987) 44 Cal.3d 1, 51 [and authorities cited therein – relatively lengthy deliberations "compels the conclusion" that the case was "very close"]; see also People v. Carpenter (1997) 15 Cal.4th 312, 422 [whether length of deliberations demonstrates close case should be assessed in light of relative complexity of legal issues and complexity and amount of evidence presented]; People v. Cooper (1991) 53 Cal.3d 771, 837 [same].) On the fourth day of their deliberations, the jurors inquired into the results of jury deadlock on the question of penalty, clearly suggesting that the vote was a close one. (CT 775; RT 3933; see Mayfield v. Woodford, supra, 270 F.3d at p. 932 [Court considered jury note inquiring into whether all 12 jurors had to agree on sentence before they returned death verdict in

concluding that penalty phase case was close and error committed therein prejudicial].)

On this record, if the jurors' reasonable doubts that Michael was the actual shooter led them to reject the death penalty as even a *possibility*, there is no question that their lingering doubts that Matthew was the actual shooter would have led them to reject the death penalty as an actuality. Respondent simply cannot prove beyond a reasonable doubt that the error did not contribute to the death verdict. (Chapman v. California, supra, 386 U.S. at p. 24.) The penalty judgment must be reversed.

## IX. THE OMISSION OF, AND AFFIRMATIVE DIRECTION TO DISREGARD, PREVIOUSLY GIVEN EVIDENTIARY INSTRUCTIONS IN THE PENALTY PHASE VIOLATED STATE LAW, MATTHEW'S RIGHTS TO A FAIR TRIAL AND A RELIABLE PENALTY PHASE JUDGMENT UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT.

### A. Introduction.

In the guilt phase of trial, the court provided the jury with standard instructions defining and guiding the jury's consideration of the evidence. (CT 668-691.) In the penalty phase, the trial court affirmatively instructed the jurors to *disregard* all of the guilt phase instructions that were omitted from the penalty phase, an instruction the prosecutor emphasized in his summation. (CT 781; RT 3866; CALJIC No. 8.84.1.) In this regard and contrary to the clear directive in the Use Note to CALJIC No. 8.84.1, the court omitted several vital evidentiary instructions from its penalty phase charge. (CT 780-789.) As discussed below, the combination of this affirmative admonition along with the omission of critical evidentiary instructions during the penalty phase violated state law as well as Matthew's right to a fair sentencing hearing and a reliable penalty phase

determination, as guaranteed by the Fifth, Eighth and Fourteenth Amendments. As respondent cannot prove the error harmless beyond a reasonable doubt, the penalty judgment must be reversed.

### B. The Omission Of, And Affirmative Direction To Disregard, Critical Evidentiary Instructions In The Penalty Phase Violated State Law And Matthew's Rights To A Fair Penalty Phase Trial And A Reliable Penalty Phase Judgment Under the Fifth, Eighth, And Fourteenth Amendments.

As discussed in the preceding arguments, it is well settled under California law that "even in the absence of a request, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (People v. St. Martin, supra, 1 Cal.3d at p. 531; accord, e.g., People v. Marks, supra, 45 Cal.3d at p. 1345; People v. Wickersham, supra, 32 Cal.3d at p. 324.) "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. [Citations.]" (People v. Wilson, supra, 66 Cal.2d at p. 759.) "This includes the duty to instruct on those general principles relating to the evaluation of evidence." (People v. Daniels (1991) 52 Cal.3d 815, 885; see also, e.g., Pen. Code §§ 1093, subd. (f), 1127; People v. Rincon-Pineda (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; People v. Yrigoyen (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; People v. Reeder (1976) 65 Cal.App.3d 235, 241 [expert testimony].)

Of course, jury instructions are of vital importance in every criminal case. (See, e.g., Carter v. Kentucky, supra, 450 U.S. at p. 302.) In capital cases, the need for careful guidance regarding the definition and consideration of evidence is particularly acute given the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'." (Caldwell v. Mississippi, supra, 472 U.S. at p. 340.)

State law and the Fifth, Eighth, and Fourteenth Amendments guarantee that penalty judgments be based solely on the evidence adduced at trial. (See, e.g., Taylor v. Kentucky, supra, 436 U.S. at p. 486 [due process guarantees that judgments be based solely on evidence admitted at trial]; Gardner v. Florida (1977) 430 U.S. 349, 362; People v. Sandoval (1992) 4 Cal.4th 155, 194 ["Penalty determinations are to be based on the *evidence* presented by the parties and the legal instructions given by the court"]; People v. Brown, supra, 45 Cal.3d at p. 1253, citing California v. Brown (1987) 479 U.S. 538, 541-543 ["the Eighth Amendment requires guided sentencing discretion and thus precludes penalty judgments not based on the evidence"]; Sandoval v. Calderon (9th Cir. 2001) 241 F.3d 765, 776, cert. denied 534 U.S. 943 (2001).) In other words, penalty determinations may not be based in any part on extraneous matters, such as counsels' references to alleged facts that are not in evidence or misstatements of facts. (See, e.g., Paxton v. Ward (10th Cir. 1999) 199 F.3d 1197, 1216-1218 [in penalty phase of capital trial, prosecutor's misleading allusion to facts not in evidence deprived defendant of federal constitutional rights to present mitigating evidence, to rebut evidence, and to cross-examination]; Antwine v. Delo (8th Cir. 1995) 54 F.3d 1357, 1362, cert. denied 516 U.S. 1067 (1996) [in penalty phase of capital trial, misleading reference to matters not in evidence violated Eighth Amendment; a decision based on such matters "does not meet the standard of reliability the Eighth Amendment requires"]; Newlon v. Armantrout (8th Cir. 1989) 885 F.2d 1238, 1335-1337 [in penalty phase of capital trial, injection of matters not in evidence violated federal due process]; United States v. Manning (1st Cir. 1994) 23 F.3d 570, 573 [insinuating other inculpatory evidence exists that was never presented].) "Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." (Chandler v. Florida (1981) 449 U.S. 560, 574.) Hence, clear and unambiguous instructions defining and guiding the jury's consideration

of the evidence are essential to protect these constitutional guarantees. (See, e.g., Taylor v. Kentucky, supra, 436 U.S. at pp. 486-490.)

Where standard evidentiary instructions have been provided in the guilt phase of trial but omitted in the penalty phase, this Court has assumed that reasonable and intelligent jurors will both recall those instructions and correctly assume that they apply in the penalty phase, but only in the absence of an instruction to the contrary. (See, e.g., People v. Saunders (1995) 11 Cal.4th 475, 561; People v. Hawthorne (1992) 4 Cal.4th 43, 73; People v. Daniels (1991) 52 Cal.3d 815, 885.) However, where the penalty phase jury is instructed to disregard the guilt phase instructions, this assumption obviously cannot be made. (People v. Carter (2003) 30 Cal.4th 1116, 1219.)

CALJIC No. 8.84.1, as given in this case and revised in 1988, is just such an instruction. (CT 781.) That instruction provides: "You are now being instructed as to all of the law that applies to the penalty phase of the trial. [P] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial.*" (CT 781, emphasis supplied; RT 3866.)

However, recognizing the need to define and guide the jury's consideration of the evidence in making its penalty phase determination, the Use Note to CALJIC No. 8.84.1 clearly explains that the instruction is intended to substitute for CALJIC No. 1.00 (the introductory guilt phase instruction) "and should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." Unfortunately, the trial court in this case failed to follow the Use Note.

In addition to CALJIC No. 8.84.1 and the other standard penalty phase instructions (CALJIC Nos. 8.84, 8.85, and 8.88), the court did provide the following evidentiary instructions: 2.20 (witness credibility), 2.21.1 (discrepancies in witness testimony), 2.21.2 (witness willfully false), 2.27 (testimony of single

witness), and 2.60 (defendant not testifying). (CT 780-789.) However, the court omitted all of the other applicable instructions defining and guiding the jury's consideration of "evidence." (CALJIC Nos. 1.01, 1.02, 1.03, 1.05, 2.00, 2.01, 2.02, 2.09, 2.11, 2.13, 2.22.)

Of course, it must be presumed that the jury follows its instructions, regardless of whether that presumption favors or harms the defendant. (See, e.g., Francis v. Franklin, supra, 471 U.S. 307, 324, n. 9 [recognizing presumption and criticizing position that "would have the degree of attention a juror is presumed to pay to particular instructions vary with whether a presumption of attentiveness would help or harm the criminal defendant"]; People v. Sanchez, supra, 12 Cal.4th at p. 79; People v. Bonin (1988) 46 Cal.3d 659, 699; United States v. Span (9thCir. 1996) 75 F.3d 1383, 1390.) Hence, since the trial court explicitly directed the jurors to do so, it must be presumed that they followed CALJIC No. 8.84.1 and in fact *disregarded* all of the instructions that had been provided in the guilt phase but were not repeated in the penalty phase. (People v. Carter, supra, 30 Cal.4th at p. 1219.) Indeed, the prosecutor opened his summation by pointedly reminding the jurors that they were to disregard all guilt phase instructions that were omitted in the penalty phase. (RT 3871.)

For all of these reasons, and as the Court has recognized, the combination of this affirmative instruction and the omission of applicable evidentiary instructions amounts to error. (People v. Carter, supra, at pp. 1219-1220, 1231.) Furthermore, because the omitted instructions were critical to a fair and reliable penalty phase determination, particularly given the prosecutor's arguments (as discussed in detail below), the error violated Matthew's rights under the Fifth, Eighth, and Fourteenth Amendments.

### C. The Penalty Judgment Must Be Reversed.

As discussed in the preceding arguments, where, as here, error of federal constitutional dimension has occurred, reversal is required unless the court determines that it was harmless beyond a reasonable doubt. (Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt, supra, 500 U.S. at p. 404; Chapman v. California, supra, 386 U.S. at p. 24; People v. Lucero, supra, 44 Cal.3d 1006, 1032.) For state law violations, reversal is required if it is reasonably possible that the errors affected the penalty verdict. (People v. Brown, supra, 46 Cal.3d at pp. 447-448; see also People v. Ashmus, supra, 54 Cal.3d at p. 965 [equating reasonable possibility standard under Brown with the federal harmless beyond a reasonable doubt standard].) Under these standards, the penalty judgment must be reversed.

While the instructions did refer to the "evidence received during the entire trial" (RT 3863), the court omitted – and told the jury to disregard – CALJIC No. 2.00, which defines "evidence." CALJIC No. 2.00, which the court had provided in the guilt phase, defines "evidence" as the "testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact," and explains the difference between direct and circumstantial evidence. (CT 674.) Furthermore, the court omitted – and told the jury to disregard – CALJIC No. 1.02. CALJIC No. 1.02, which the court had provided in the guilt phase, provides:

> STATEMENTS OF COUNSEL -- EVIDENCE STRICKEN OUT -- INSINUATIONS OF QUESTIONS -- STIPULATED FACTS
>
> Statements made by the attorneys during the trial are not evidence. . . .
>
> If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection.

> Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer. Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it. (CT 670.)

The importance of CALJIC No. 1.02 cannot be overstated. Without it, there is a grave danger that the jury will give undue weight to attorneys' statements, particularly when they purport to refer to facts not in evidence or otherwise misstate the evidence presented. (See, e.g., People v. Hill, supra, 17 Cal.4th at p. 828.) Where the attorney making such statements is the prosecutor, the special regard jurors have for prosecutors leads to a virtual inevitability that they will accept his statements as true, and thereby fill evidentiary voids in his case, unless they are instructed otherwise. (See, e.g., Berger v. United States, supra, 295 U.S. at p. 88 People v. Perez, supra, 58 Cal.2d at p. 247; People v. Bolton, supra, 23 Cal.3d at p. 213.) As the Court has recognized, a prosecutor's allusions to alleged facts not in evidence or mischaracterization of the evidence presented tends to make the prosecutor his "own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (People v. Bolton, supra, 23 Cal.3d at p. 213; accord, e.g., People v. Hill, supra, 17 Cal.4th at p. 828; People v. Bell, supra, 49 Cal.3d at pp. 533-534, 539; Douglas v. Alabama (1964) 380 U.S. 415, 419-420.) Indeed, the critical role CALJIC No. 1.02 plays in safeguarding a defendant's constitutional rights to be judged solely on the evidence admitted against him is underscored by the many decisions of this Court and others holding that its provision alone will "cure" the otherwise devastating nature of such statements. (See, e.g., People v. Sanchez, supra, 12 Cal.4th at p. 70 [instruction with CALJIC No. 102 "vitiated the misleading effect of any inaccurate remarks"

by the prosecutor"]; People v. Sandoval, supra, 4 Cal.4th at p. 182 [CALJIC No. 1.02 cured effect of prosecutor's reference in cross-examination to improper matter not in evidence]; People v. Carrera (1989) 49 Cal.3d 291, 319 [same]; People v. Szeto (1981) 29 Cal.3d 20, 33 [same]; see also United States v. Mendoza (9th Cir. 2001) 244 F.3d 1037, 1044 [and authorities cited therein].)

Of course, the harm here is not merely that the court omitted instructions explaining that the statements of the attorneys are "not evidence" and could not be accepted as true without evidentiary support. Again, as the Court has recognized, the jurors presumably remembered that instruction from the guilt phase. (See, e.g., People v. Hawthorne, supra, 4 Cal.4th 43, 73; People v. Daniels, supra, 52 Cal.3d at p. 885.) The harm lies in the court's affirmative direction to *disregard* any guilt phase instructions it had omitted, harm compounded by the prosecutor's pointed reminder to do so. (RT 3871.) Given this affirmative instruction and the presumption that the jurors recalled the guilt phase instructions, the instructions as a whole left the definite impression that the jurors were free to consider the prosecutor's statements as an appropriate source of information on which to make their penalty determination, even those statements without any support from an independent source, such as the "testimony of witnesses, writings, material objects."

In assessing the prejudicial effect of the instructional error, the prosecutor's arguments are obviously of enormous significance. (See, e.g., Taylor v. Kentucky, supra, 436 U.S. at pp. 486-490 [given prosecutor's argument purporting to refer to facts not in evidence and suggesting inference of guilt from issuance of warrant, failure to instruct on presumption of innocence and that indictment is not "evidence" was prejudicial and violated defendant's due process right to a fair trial and to be judged based solely on the evidence adduced at trial]; People v. Wims (1995) 10 Cal.4th 293, 315 [arguments of counsel considered in assessing prejudice from instructional error]; Coleman v. Calderon (9th Cir. 1999) 210 F.3d 1047, 1051 [same – instructional error prejudicial in light of prosecutor's

remarks].) This is so regardless of whether the "prosecutorial comments, standing alone, would rise to the level of reversible error . . . [because] they are relevant to the need for carefully framed instructions designed to assure that the accused be judged only on the evidence." (Taylor v. Kentucky, supra, 436 U.S. at p. 487, n. 14.) If the prosecutor's statements to the jurors were limited to the facts in evidence or otherwise supported by the evidence, for instance, the instructional error that occurred here would likely be harmless. Unfortunately, the prosecutor in this case did not so limit his remarks.

As discussed in the previous argument, the prosecution's aggravating evidence was limited to the crimes themselves and their impact on the victims and their families. The prosecutor persuaded the court to provide a pinpoint instruction that the jury could consider victim impact evidence in aggravation. (CT 753, 782; RT 3563-3564, 3864.) Obviously, victim impact was a critical component of the prosecutor's case.

With regard to this issue and as discussed in Argument VI, the prosecutor argued that although one of the victims, Rodney James, had survived the shooting, Matthew was nevertheless responsible for his death two years later from a heroin overdose because James had turned to heroin as a result of the shooting. In his opening statement at the guilt phase, the prosecutor represented that James "began using heroin very heavily in the two years immediately after" the shooting and died of an overdose. (RT 1871.) In his penalty phase summation, he argued that James "was shot twice, very severely injured, and started intravenously using heroin within a year or so after his release from the hospital. And the death certificate you have in evidence that he didn't die right away, he died a slow death over a couple of years due to intravenous heroin use and eventual overdose. But you can consider that, what he went through because of what someone else did." (RT 3885-3886.) This was a compelling piece of the prosecutor's case for aggravation. Unfortunately, the prosecutor's remarks had utterly no support in the evidence.

As mentioned in Argument Vi, there was no evidence at all that James had ever used heroin. James's death certificate revealed nothing more than that he had died two years after the shooting, that the cause of his death was "pending," and that an autopsy had been performed, but did not reveal its results. (Trial Ex. 35.) In short, there was no evidence that James had died of a drug overdose. Certainly, there was absolutely no evidence to suggest that the shooting and James's death of unspecified causes two years later had any causal connection. (See, e.g., People v. Edwards (1991) 54 Cal.3d 787, 835 [consideration of victim impact evidence "encompasses evidence that logically shows the harm *caused by the defendant*"]; accord, e.g., People v. Brown, supra, 33 Cal.4th at p. 396.) Despite the utter absence of any real evidence to prove these supposed facts, the prosecutor's remarks clearly "suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (People v. Wagner, supra, 13 Cal.3d 612, 619-620.)

Had the court instructed the jurors with CALJIC Nos. 1.02 and 2.00, they presumably would have followed that instruction and disregarded the prosecutor's comments because they were unsupported by the evidence. However, the court affirmatively instructed the jury to disregard those instructions. Given that instruction – which the jurors presumably followed – combined with the high regard juries have for prosecutors, "it is reasonable to assume that . . . the jurors were led to believe that, in fact," the prosecutor's information was true and that they gave it great weight in aggravation, just as the prosecutor intended. (People v. Wagner, supra, 13 Cal.3d at pp. 619-620; see also People v. Powell (1967) 67 Cal.2d 32, 56-57 ["we have seen how important (the evidence was) to the People's case, and 'There is no reason why we should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it'"].)

Much of the prosecutor's portrayal of the shooting as particularly aggravated was similarly without evidentiary support. As mentioned in Argument VI, above, the prosecutor vehemently argued that Matthew, as the shooter, did not

intend merely to kill the five people he shot, but to kill as many people as possible. He was only prevented from killing more victims, the prosecutor argued, because he ran out of ammunition: "What if he hadn't run out of ammunition in that room? Do you think at some point he just thought: I've shot up enough people, I'm going to stop now. He was either going to run out of victims or run out of ammunition, one of the two. Fortunately, it was ammunition." (RT 3921.) Again, this was a powerful depiction of a particularly heinous and cold-blooded shooting spree weighing in favor of death and undercutting the otherwise mitigating inference that three of the victims had been shot unintentionally. (See Argument IV.) Once again, however, there was absolutely no evidence that the shooter emptied his gun at the room of people and ceased shooting only because he ran out of ammunition.

The evidence showed only that 14 rounds of .223 ammunition were fired from the same gun. (RT 2557, 2568-2569.) Because the actual gun was never recovered, there was no direct evidence regarding the amount of ammunition it could carry. Nor was there any circumstantial evidence to support the prosecutor's contention.[36] According to prosecution's own guilt phase evidence, at the time of the shooting, magazines that fired .223 ammunition could hold anywhere from five to "50 or even more" rounds. (RT 2865-2866.) Indeed, magazines carrying 20 to 30 rounds were "fairly common." (RT 2866.) Not a single witness testified that the shooter ever made an unsuccessful attempt to fire the gun. Not a single witness testified to any matter that would support such an inference, such as hearing the sound of a clicking trigger.

Given the trial judge's own remarks in ruling on Matthew's application to modify the death verdict, there can be no doubt that the prosecutor's argument in this regard carried great aggravating weight. In discussing the aggravating evidence warranting the death verdict, the trial judge himself emphasized, and

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[36] Of course, the court also omitted – and told the jurors to disregard – CALJIC No. 2.00, which guides consideration of circumstantial evidence.

gave weight to, the non-existent "evidence" that Matthew did not stop shooting at people until he had run out of bullets. (RT 3975.) If the experienced trial judge was misled by the prosecutor's remarks in this regard and indeed relied on them as evidence in determining that death was warranted, it can safely be assumed that the lay jurors did, as well. (Cf. People v. Crittenden (1994) 9 Cal.4th 83, 151 [and authorities cited therein -- judge's ruling on application to modify death verdict must be based on evidence admitted and presented to jury].)

Continuing his theme of portraying the shooting as deliberative and sadistic rather than reactive and precipitous, the prosecutor emphasized the "powder burns on the victim[s]. Placing the gun up to their body, sending a piece of lead going thousands of feet per second through their body again and again." (RT 3921.) Again, as discussed in Argument VI, there was no evidence that any of the victims suffered powder burns or that the shooter placed the gun against any victim's body and repeatedly fired it. The pathologist explicitly testified that she did *not* find stippling to the skin, or "powder burns," on *any* of the victims. (RT 1950, 1959, 1996, 2012-2103.) In fact, she testified that both Watchman and Arnold "had the appearance of distant wounds" and that Trudell had been shot from a distance of *at least* three feet *or more*. (RT 1951, 1959.) In short, there was no direct or circumstantial evidence that the shooter placed his gun directly against the body of any victim and fired it even once, much less multiple times.

Once again, the trial judge's remarks in ruling on the application to modify the death verdict reflect the weight given the prosecutor's otherwise unsupported remarks. The judge emphasized that "these were particularly cold-blooded shootings; the evidence was uncontradicted and overwhelming that at least one of the fatal wounds was at close range to the head of Leslie Trudell" and pointed to the evidence about "stippling, which shows . . . a shot within two feet of Mr. Trudell to his head." (RT 3975.) Not only was this incorrect as to Trudell, who had been shot from at least a distance of three feet or more and who did not bear any signs of stippling; it was incorrect as to all of the other victims, *none* of whom

had been shot in head at all, much less shot in the head at close range. Once again, if the experienced trial judge was so misled, it is highly likely that the lay jurors were, as well.

While not as explosive as the above remarks, the prosecutor made several other statements referring to or insinuating other matters outside of the evidence in order to bolster his case and weaken the defense. For instance, in response to the mitigating fact that Matthew had no criminal record, the prosecutor took pains to specify that the evidence revealed only the absence of an "*adult felony conviction* record." (RT 3920, emphasis supplied.) In this regard, he strenuously argued, "he couldn't have a long *adult* history for Christ's sake, he was only 18 when he did this. It took him only a few months to get to the top. That's somehow supposed to be mitigation? You're supposed to think that he's somehow less deserving of what he's got coming because of that? I suggest to you that there's no mitigation here." (RT 3920, emphasis supplied.) The prosecutor's implication was obvious that while Matthew did not have an "adult felony conviction record," he may well have had a long juvenile record to which the prosecutor was privy. Significantly, the implication was misleading, as Matthew had absolutely no record at all (Probation Report at p. 6), and served to diminish what was otherwise powerful mitigating evidence. (See, e.g., People v. Lucero, e.g., 44 Cal.3d at p. 1032; compare James v. Borg, supra, 24 F.3d at p. 27 ["although only 18 years old, petitioner had already amassed a lengthy criminal record"]; see also Paxton v. Ward, supra, 199 F.3d at pp. 1216-1218 [in penalty phase of capital trial, prosecutor's misleading insinuation regarding alleged extrajudicial facts violated defendant's right to present mitigating evidence and to rebut the evidence and argument against him].)

Similarly, the prosecutor argued that life without parole would not be appropriate punishment because Matthew would enjoy many facets of life in prison of which he had deprived the victims, such as "get[ting] married and hav[ing] conjugal visits." (RT 3922.) Not only did these remarks refer to alleged

matters not in evidence, they were also false; prisoners sentenced to life without parole are *not* allowed conjugal visits, or overnight family visits. (Pen. Code § 2601 [amended in 1997 to delete language granting prisoners "right" to "personal visits"]; CCR Title 15, section 3177, subd. (b)(2) [prisoners sentenced to life without parole are not entitled to "family visits," defined as overnight visits with family members]; see also, e.g., Paxton v. Ward, supra, 199 F.3d at pp. 1216-1218; People v. Bell, supra, 49 Cal.3d at pp. 538-539 [prosecutor's argument that cocaine makes user "mellow" not only improper referred to alleged matters not in evidence, it was also false].)

Furthermore, the prosecutor seized on the brief statement of one of Matthew's attorneys that executing him would not bring the victims back or ease their families' pain by emphatically arguing, "well, under the law I'm not allowed to ask them that. I have to tell them explicitly ahead of time: that's for the jury to decide. I'm not allowed to ask you that. I think you can imagine what some witnesses would have said were I able, but you can't consider that. But if you think that their answer would have been no, why didn't the defense ask them that?" (RT 3919.) Again, the obvious implication was that the prosecutor was privy to information – the family members' desire that Matthew be put to death – that had not been admitted at trial through any source. (See, e.g., Miller v. Lockhart (8th Cir. 1995) 65 F.3d 676, 685 [reference to family's wish that defendant be executed where no such evidence presented injects improper extrajudicial matters into trial].)

In mitigation, Matthew also presented substantial evidence that he was, and always had been, a talented artist. (RT 3633-3634, 3651, 3664, 3709.) The prosecutor made short shrift of this evidence, arguing that it did not demonstrate his uniqueness as a sensitive human being. This is so, the prosecutor argued, because he had personal knowledge that most death row inmates have artistic ability: "You go to San Quentin in the gift shop out there, there's ton of artwork. Some guys have tattoos like that. If you can draw a rose like that, does that have

any weight at all if you put that on a scale next to what he did in this case?" (RT 3921-3922; see, e.g., People v. Hill, supra, 17 Cal.4th at p. 838 [prosecutor's references to prison conditions based on her own experience outside of evidence]; Miller v. Lockhart, supra, 65 F.3d at p. 683 [prosecutor's reference to matters of personal knowledge based on his experience outside of evidence]; Young v. Bowersox (8th Cir. 1998) 161 F.3d 1159, 1162, cert. denied 528 U.S. 880 (1999) [prosecutor's remark that defendant's crime was coldest he had seen indirectly referred to other crimes not in evidence].)

Furthermore, one of his teachers testified to Matthew's academic efforts and progress in jail as evidence in mitigation. However, in his cross-examination of the teacher and his closing argument, the prosecutor insinuated, again implicitly based on his own experience, that academic progress in jail is a typical capital mitigation ruse and therefore entitled to little if any weight. (RT 3805-3807, 3922-3923; see People v. Hill, supra, 17 Cal.4th at p. 838 [prosecutor's implication that defense arguments were "stock arguments" which should be disregarded].)

Moreover, the prosecutor invoked Biblical doctrine, and thus referred to extraneous matters not in evidence, in arguing "this is not some corny debate about an eye for an eye, this is an eye for an eye three times. He tried to take five eyes. This is not an even trade. But as I said, it is all we can do." (RT 3884; see, e.g., People v. Hill, supra, 17 Cal.4th at p. 836 [argument calling for an "eye for an eye" invokes Biblical doctrine]; People v. Roybal (1998) 19 Cal.4th 481, 520 [invocation of Biblical doctrine injects extraneous matter that is not, and cannot be, evidence on which penalty decision is made]; Sandoval v. Calderon, supra, 241 F.3d at p. 776 [same].) Once again, had the jurors been properly instructed with CALJIC Nos. 1.02 and 2.00, it would be presumed that they disregarded all of the foregoing remarks.

However, given the court's affirmative direction to disregard those instructions, combined with the special regard jurors have for prosecutors, the jurors undoubtedly considered and gave weight to these statements as aggravation

in violation of Matthew's rights under the Fifth, Eighth and Fourteenth Amendments. The closeness of the penalty phase case has already been discussed in Argument VIII, which is incorporated by reference herein. In addition, if the Court determines that the jurors *did* understand that they could consider their lingering doubts that Matthew was the actual killer, then those doubts surely made a close case that much closer. (See, e.g., Sanders v. Woodford (9th Cir. 2004) 373 F.3d 1054, 1066 [penalty phase instructional error required reversal where case was a close one: "there is good reason to believe that the jurors may have had doubts about Sanders role in the murder and that it may thus have been only marginally inclined to impose the death penalty"]; Cargle v. Mullin (10th Cir. 2003) 317 F.3d 1196, 1222 [weakness of guilt phase evidence considered in concluding penalty phase error prejudicial].) On this record and under the standard of prejudice for violations of the federal constitution, respondent cannot prove the error harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.) Under the state law standard, there is more than a "reasonable possibility" (People v. Brown, supra, 46 Cal.3d at p. 448) that a juror "could have" (People v. Ashmus, supra, 54 Cal.3d at pp. 983-984) voted differently in the absence of the error. The penalty phase judgment must be reversed.

## X. THE COURT'S EXCLUSION OF HIGHLY RELEVANT MITIGATING EVIDENCE VIOLATED MATTHEW'S RIGHTS UNDER STATE LAW, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT.

### A. Introduction.

Matthew's relationship with his brother, Michael, was highly relevant to the penalty determination for several reasons. As a general matter, it is well recognized that a defendant's loving relationships with his family members is

relevant mitigating evidence. (Parker v. Dugger, supra, 498 U.S. 308; Mayfield v. Woodford, supra, 270 F.3d at pp. 929-932; Smith v. Stewart (9th Cir. 1998) 140 F.3d 1263, 1270; Jackson v. Herring, supra, 42 F.3d at p. 1368.) Moreover, because the brothers committed the crimes together, it was relevant to explain and mitigate the circumstances of the crimes. Furthermore, it was relevant to rebut the prosecution's ongoing guilt and penalty phase theme of castigating Matthew for "blaming his brother" and urging the jury to infer that any young man willing to trade his brother's life for his own was exactly the kind of young man capable of shooting five people and exactly the kind of young man deserving of the death penalty. (RT 3437, 3889, 3926-3928.)

Unfortunately, as explained below, while counsel was able to present generalized testimony about the loving relationship between the two brothers, the court excluded specific evidence that would have illustrated their relationship not only as a loving one, but also one wherein Michael assumed the leadership and protective role. The court's exclusion of this mitigating evidence violated state law as well as Matthew's rights under the Eighth and Fourteenth Amendments. As respondent will be unable to prove the errors harmless beyond a reasonable doubt, the penalty judgment must be reversed.

### B. The Trial Court's Exclusion Of Highly Relevant Mitigating Evidence Violated State Law As Well As Matthew's Rights Under The Eighth And Fourteenth Amendments.

As discussed in Argument VIII, the Eighth and Fourteenth Amendments entitle a capital defendant to present, and have the jury consider, any relevant mitigating evidence. (See, e.g., Tennard v. Dretke, supra, 542 U.S. ____ 124 S.Ct. at p. 2570.) The High Court has defined relevant mitigating evidence "expansive[ly]" as evidence having "any tendency in reason to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without it." (Ibid., internal quotation marks omitted,

quoting from McKoy v. North Carolina, supra, 494 U.S. at p. 440.) Thus, "'relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' [Citation.]" (Ibid.; accord Smith v. Texas (Nov. 15, 2004) ____ U.S. ___, 2004 U.S. Lexis 7668 at p. 11.) "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." (Tennard v. Dretke, supra, at p. 2570, quoting from Boyde v. California, 494 U.S. at pp. 377-378 [and authorities cited therein]; accord, e.g., Payne v. Tennessee (1991) 501 U.S. 808, 822 ["We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death .... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"]; Hitchcock v. Dugger, supra, 481 U.S. at pp. 397-398; Skipper v. South Carolina, supra, 476 U.S. at pp. 4-5; Eddings v. Oklahoma, supra, 455 U.S. at p. 114.)

Penal Code section 190.3 specifically permits the defendant to present, and requires the jury to consider, evidence relevant to several penalty issues (factors (a) through (j)). Factor (k) permits a capital defendant to present, and requires the jury to consider, "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This section is intended to incorporate the federal constitutional requirement that jurors consider any relevant evidence that may serve as a basis for a sentence less than death. (People v. Boyd, supra, 38 Cal.3d at p. 775; People v. Easley (1983) 34 Cal.3d 858, 878; Belmontes v. Woodford, supra, 350 F.3d at p. 898.) The scope of admissible mitigating evidence under this provision, then, is "very broad." (People v. Harris (1984) 36 Cal.3d 36, 68.)

Here, as noted in the introduction, Matthew's relationship with his brother was critical mitigating evidence for a number of reasons. In order to illustrate that

relationship, counsel offered to present through Matthew's father, Harry Souza, evidence regarding an incident in high school in which Michael got into a fist fight in order to protect Matthew. (RT 3618-3619.) In front of the jurors, the prosecutor objected on relevance grounds. (RT 3619.) Matthew's counsel replied that it was relevant to "family closeness." (RT 3619.) The prosecutor reiterated, "that's not relevant," to which the court responded in front of the jurors, "I will sustain that. That's a bit far afield." (RT 3619.)

The court's ruling was erroneous. First, as noted above and as counsel argued below, it is beyond dispute that a defendant's close relationships with family members is constitutionally relevant mitigating evidence. (Parker v. Dugger, supra, 498 U.S. at p. 314; Mayfield v. Woodford, supra, 270 F.3d at pp. 929-932; Smith v. Stewart, supra, 140 F.3d at p. 1270; Jackson v. Herring, supra, 42 F.3d at p. 1368.) Furthermore, the offered evidence was highly relevant to explain the crimes. If Michael was the leader in the crimes and Matthew the follower, that evidence was highly relevant mitigation relating to the circumstances of the crimes. (See Pen. Code § 190.3, subds. (a), (g), (j), (k).) Evidence of specific prior occasions in which Michael assumed the role of leader and protector of his brother, who was only a year younger than himself, tended to make it "more probable" that Michael also assumed the leadership role in planning and orchestrating the crimes, which was a "fact . . . of consequence to the [penalty] determination . . . ." (Tennard v. Dretke, supra, 124 S.Ct. at p. 2570; accord McKoy v. North Carolina, supra, 494 U.S. at p. 440.)

Moreover, the evidence was highly relevant to the central issue underlying the jury's choice between life and death, to rebut the prosecution's theory that Matthew was the shooter, and to support the lingering doubt defense based on the evidence that Michael was the shooter. Evidence of specific prior instances in which Michael had engaged in violent acts to protect family members while Matthew remained passive certainly tended to undermine the prosecution's theory that Matthew, not Michael, was the actual shooter by showing that its theory was

completely at odds with the boys' past behavior. (See, e.g., Green v. Georgia, supra, 442 U.S. at p. 97 [trial court violated due process by excluding from penalty phase evidence tending to show that co-participant was only actual killer, particularly since prosecutor argued defendant was an actual killer; Rupe v. Wood, supra, 93 F.3d at pp. 1440-1441 [same – exclusion of polygraph test to state's chief witness to rebut prosecution's theory regarding defendant's role in crimes]; Mak v. Blodgett, supra, 970 F.2d at pp. 622-623 [trial court violated due process and Eighth Amendment by excluding evidence tending to show that co-participants were one who planned crimes].) In other words, the excluded evidence had a "tendency in reason to make the existence of any fact that is of consequence to the determination" – Michael's role as the actual shooter and Matthew's role as the non-shooting aider and abettor – "more probable . . . than it would be without it." (Tennard v. Dretke, supra, 542 U.S. __, 124 S.Ct. at p. 2570; accord McKoy v. North Carolina, supra, 494 U.S. at p. 440.) The court's exclusion of this evidence violated state law and Matthew's rights under the Eighth and Fourteenth Amendments. (Ibid; Pen. Code § 190.3, subd. (k).)

In addition, as mentioned in Arguments VIII and IX, Matthew's teacher in the jail's education program testified to his academic progress. (RT 3791-3798.) Through the teacher, counsel moved to admit one of his writing assignments, a short essay entitled, "Someone Who Understands." (RT 3799; Exhibit V.) The essay read:

> We all need someone who understands us. Some people turn to their family or their friends when they need help. I always talk to my brother because I know that Mike who is my brother, really understands me. We've known each other for 22 years. We first met when I was born. At first we didn't always get along, but after a while I learned that my brother was a person I could trust and one who would always stand by me.
> We have had a lot of fun together. I'll never forget the time we would play football together. I guess people understand each other

> best when their [*sic*] faced with bad and good times together? (People's Trial Exhibit V.)

The prosecutor objected to admission of the essay on hearsay grounds. (RT 3799-3800.) The court sustained the objection without allowing argument from counsel. (RT 3800.) At counsel's request, the parties held a sidebar conference, which was unreported. (RT 3800.) At the close of the teacher's testimony, the court attempted to reconstruct the sidebar conference for the record. (RT 3809-3810.) According to the court, at sidebar, counsel pointed out that one of the victim's children had been permitted to read a poem; the court and the prosecutor replied that counsel did not object to the reading of the poem. (RT 3810.) More importantly, the court observed, the poem was relevant because it was victim impact evidence, while Matthew's essay "would not necessarily carry that same relevance, but would be self-serving." (RT 3810.) The court further noted that while counsel also argued the relevance of the evidence to illustrate Matthew's academic progress, the court concluded that it "would not necessarily be relevant to that issue." (RT 3810.) Furthermore, the court noted, the essay's "discussion about his relationship" with his brother "also adds to its inappropriate value as hearsay." (RT 3810.) For these reasons, the court ruled the evidence inadmissible. (RT 3810.) Once again, the court erred.

As to the court's ruling that the evidence was not relevant, it was clearly incorrect. The excluded evidence was highly relevant to several issues. Certainly, the essay indicated Matthew's close attachment to his brother as the primary person he "could trust" and "who would always stand by him." (People's Trial Exhibit V.) This evidence was constitutionally relevant for the reasons discussed above. (See, e.g., Parker v. Dugger, supra, 498 U.S. at p. 314; Mayfield v. Woodford, supra, 270 F.3d at pp. 929-932; Smith v. Stewart, supra, 140 F.3d at p. 1270; Jackson v. Herring, supra, 42 F.3d at p. 1368.)

Moreover, while the school fight evidence tended to show that Michael was the actual shooter, the essay was relevant to contextualize the circumstances of the crimes under the prosecution's theory that Matthew was the actual shooter. The evidence showed that Matthew loved Michael and that Michael played a very significant role in Matthew's life. Of course, the shooting only occurred after Dewayne Arnold attacked Michael and attempted to wrest his gun from him, during which a single shot rang out and a lamp crashed. As discussed in Arguments II and III, it could easily have appeared to Matthew that Michael had been shot or was in imminent danger of being shot or otherwise seriously harmed. The evidence of Matthew's close relationship to Michael provided a critical, mitigating explanation for why Matthew would react to any threat toward his brother with the explosion of violence that occurred. In other words, the evidence tended to make it less likely that Matthew was simply a ruthless, heartless killer, as the prosecution would have the jury believe, and more likely that he was simply a frightened, emotional teenager who fired his weapon in a panic.

At the same time, the evidence helped to rebut the prosecution's theory that Matthew's defense of "blaming his brother" for the actual shooting was false, and that his willingness to falsely shift blame to his own brother demonstrated that he was heartless and without remorse. (RT 3437, 3889, 3926-3928.) It illustrated his deep love for his brother and thus tended to show that he would not cast blame on Michael for the actual shooting unless Michael was, in fact, the actual shooter. While it is true that witnesses testified generally to the loving relationship, the essay was a potent and heartrending illustration of that relationship that the general testimony of outside observers could not capture.

Finally, there is no question that the essay would have humanized Matthew and rebutted the prosecution's efforts to portray him as a heartless killing machine. (See, e.g., People v. Harris (1984) 36 Cal.3d 36, 68-70 [poems defendant wrote while in jail were relevant mitigating evidence]; Mayfield v. Woodford, supra, 270 F.3d at p. 932 ["humanizing" evidence sufficiently mitigating that counsel's

failure to present it amounted to constitutionally ineffective assistance]; Mak v. Blodgett, supra, 970 F.2d at p. 619 [same]; see also Allen v. Woodford (9th Cir. 2004) 366 F.3d 823, 844 ["Defense counsel's use of mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading the jurors that the life of a capital defendant is worth saving"].) It starkly illustrated that Matthew was both loving teenager and touchingly naïve and immature. In short, it showed that he was a boy deserving of the jury's mercy. (See, e.g., Pen. Code § 190.3.) The essay was thus highly, constitutionally relevant to the jury's determination of whether this boy deserved to be put to death.

As to the court's ruling that this constitutionally relevant evidence was inadmissible hearsay, it was also incorrect. To the extent that the essay showed Matthew "was a sensitive individual who expressed his feelings in [writing], regardless of its content," it was not hearsay at all. (People v. Harris, supra, 36 Cal.3d at p. 69.)

To the extent that it showed Matthew's loving relationship with his brother, even if it was hearsay, it was nevertheless admissible under the Due Process Clause (Green v. Georgia, supra, 442 U.S. at p. 97 [exclusion from penalty phase of highly relevant evidence on hearsay grounds violates due process]; Rupe v. Wood, supra, 93 F.3d at p. 1440 [exclusion from penalty phase of highly relevant polygraph evidence because there were doubts about its reliability violated due process]; Paxton v. Ward, supra, 199 F.3d at pp. 1212-1216 [same – exclusion of mitigating polygraph evidence under state evidentiary rules violated Eighth and Fourteenth Amendments]), as well as under the state of mind exception to California's hearsay rule (Evid. Code § 1250; People v. Harris, supra, 36 Cal.3d at pp. 69-70 [to the extent defendant's poems, written in jail, were offered for truth of their content, they fell within state of mind exception to hearsay rule]; Rufo v. Simpson (2001) 86 Cal.App.4th 573, 591-592 [writings expressing fear and loss of love were admissible under state of mind exception to the hearsay rule].)

To be sure, under both provisions, the statement may be excluded if it is unreliable (Rupe v. Wood, supra, 93 F.3d at p. 1440 [while relevant mitigating evidence may not be excluded based on doubts about reliability, exclusion of "wholly unreliable" evidence does not offend due process]) or "made under circumstances such as to indicate its lack of trustworthiness" (Evid. Code § 1252). Here, however, there was nothing to indicate that the sentiments expressed in the essay were unreliable or that it was written under circumstances to indicate its lack of trustworthiness.

Importantly, and contrary to the trial court's apparent understanding, the mere fact that Matthew wrote the essay after his arrest did not establish its unreliability or lack of trustworthiness. (People v. Harris, supra, 36 Cal.3d at p. 69-70.) To the contrary, given the circumstances as a whole, it seems clear that the essay was not written for an improper motive. According to several of his former school teachers, Matthew had always been a good and motivated student. (RT 3607, 3707, 3710, 3707-3709, 3711-3716, 3719-3720, 3722-3724, 3726, 3732, 3734, 3745-3746, 3749-3750, 3817-3819, 3821-3822.) While in jail, he enrolled in school and had completed many assignments. (RT 3791, 3797-3798.) None of his other assignments were offered into evidence nor was there any suggestion that he had ever written anything to garner sympathy in this case. While the prosecutor embarked on a scathing cross-examination designed to paint Matthew's academic progress in jail as nothing more than an attempt to manufacture mitigation, his jail education teacher stood fast in her testimony that Matthew seemed very motivated to learn as compared to other inmates. (RT 3804-3807.) Indeed, based on her knowledge of Matthew, when the prosecutor asked her if it was possible that he was simply "motivated by just the situation presented here to bring you to court and testify on his behalf," she replied, "I don't think that that would even enter his mind." (RT 3806-3807.) Furthermore, the loving sentiments expressed in the letter were corroborated generally by several witnesses. (RT 3612, 3650, 3679, 3755.) Moreover, contrary to the trial court's

observation, there was nothing expressed in the letter that could be construed as "self-serving." (RT 3810.) It did not address the crimes, attempt to exculpate or mitigate his role in them, and did not otherwise express anything obviously intended to garner sympathy. (Compare, e.g., People v. Kraft (2000) 23 Cal.4th 978, 1073-1074 [trial court properly ruled that letters defendant wrote while in jail were unreliable hearsay because they contained self-serving protestations of innocence and correctional officer testified that defendant had expressed statements regarding admission of evidence of other jail conduct in penalty phase].) Given the evidence as a whole, to the extent that the essay was offered for the hearsay purpose of proving the truth of the sentiments expressed therein, it was nevertheless admissible under Evidence Code section 1252 and/or the Due Process Clause. (See People v. Harris, 36 Cal.3d at p. 70 [trial court erred in excluding poems defendant wrote in jail as self-serving "pitch for sympathy" because circumstances as a whole "militate[d] against the possibility of a motive to manufacture self-serving evidence"].) The court's exclusion of the evidence violated Matthew's rights under the Eighth and Fourteenth Amendments.

To be sure, counsel did not invoke the state of mind exception to the hearsay rule. Any argument that counsel therefore waived Matthew's right to challenge the error on appeal must be rejected, however. Once again, it is well settled that counsel is not obligated to make futile objections. (See, e.g., People v. Hamilton, supra, 48 Cal.3d at p. 1189 and n. 27; People v. Abbaszadeh, supra, 106 Cal.App.4th 642, 648.) The court made it abundantly clear that it believed: a) the evidence to be irrelevant, notwithstanding the hearsay rule; and b) that it was "self-serving," meaning unreliable, and therefore would not be admissible under the state of mind exception to the hearsay rule. Hence, even if counsel had invoked the state of mind exception to the hearsay rule, it is clear that it would

have been futile because the court would nevertheless have excluded the evidence.[37]

### C. The Error Require That Matthew's Death Sentence Be Reversed.

Because the court's exclusion of the mitigating evidence violated Matthew's federal constitutional rights, respondent bears the burden of proving the errors harmless beyond a reasonable doubt. (Sullivan v. Louisiana, supra, 508 U.S. at p. 279; Yates v. Evatt, supra, 500 U.S. at p. 404; Chapman v. California, supra, 386 U.S. at p. 24; People v. Lucero, supra, 44 Cal.3d 1006, 1032.) Respondent will be unable to carry its burden.

As already discussed in detail in Argument VIII, the penalty phase case was a remarkably close one. Given the closeness of the penalty phase case and the relevance of the excluded evidence, respondent simply cannot prove beyond a reasonable doubt that the exclusion of the evidence had no effect on the jury's verdict. (See, e.g., Mayfield v. Woodford, supra, supra, 270 F.3d at pp. 929-932 [where defendant murdered three people, two of whom had sworn out a complaint against him and one of whom was a witness to his crime, but where both aggravating and mitigating evidence strong, counsel's failure to present humanizing evidence of defendants' loving relationships was prejudicial under Strickland standard].) The penalty judgment must be reversed.

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[37] As to counsel's failure to cite the Due Process Clause in support of the offered evidence, Matthew reminds the Court that the trial court granted counsel's motion to "federalize" all motions and objections under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. (CT 535.23-535.24; RT 126.)

## XI. THE TRIAL COURT'S PROVISION OF AN INCOMPLETE INSTRUCTION ON VICTIM IMPACT EVIDENCE VIOLATED STATE LAW AND MATTHEW'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR PENALTY TRIAL AND A RELIABLE PENALTY JUDGMENT AND REQUIRES REVERSAL.

### A. Introduction.

Given the dearth of aggravating evidence in this case, the victim impact evidence was a critical component of the prosecution's case for death. The prosecutor requested a special instruction pinpointing the victim impact evidence as a circumstance of the crime under factor (a). (CT 753.) Matthew's counsel objected on the ground that it was an improper pinpoint instruction. (RT 3564, 3698-3699.) The court overruled the objection and incorporated the instruction into CALJIC No. 8.85, which it provided to the jury. (CT 753, 782; RT 3563-3564, 3699, 3864.) The instruction provided, "(a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. *As part of the circumstances of the offense under factor A, you may also consider the testimony offered in this penalty phase portion of the trial concerning the impact of the crimes on the family and friends of the victim.*" (CT 782, emphasis supplied.) As set forth below, the court erred. It should either have refused the instruction outright as an improper pinpoint instruction or it should have provided a complete and accurate instruction on the limitations on, and appropriate use of, victim impact evidence.

### B. The Special Victim Impact Instruction Was Incomplete, Improper, And Permitted The Jury To Consider Improper Evidence In Aggravation In Violation Of State Law And Matthew's Rights Under the Fifth, Eighth, And Fourteenth Amendments.

In Booth v. Maryland (1987) 482 U.S. 496, the United States Supreme Court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. At issue in that case were two types of victim impact evidence: 1) the personal characteristics of the victims and the impact of the crimes on their families; and 2) the family members' opinions and characterizations of the defendant and his crimes, and their view of the appropriate sentence. (Id. at pp. 507-510.)

In Payne v. Tennessee, supra, 501 U.S. 808, the Court partially overruled Booth. The Court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (Payne v. Tennessee, supra, 501 U.S. at p. 827.) However, the Court took care to note that its holding encompassed only the first category of victim impact evidence addressed in Booth, not the second category of evidence relating to the family members' views on the appropriate punishment or characterizations of the defendant and his crimes. (Id. at p. 830, n. 2.) Following Payne, in People v. Edwards, supra, 54 Cal.3d 787, this Court held that although victim impact is not expressly enumerated as a statutory aggravating factor, such evidence is generally admissible as a circumstance of the crime under section 190.3, factor (a). (Id. at p. 833.)

"This holding was not without limits, however, and 'only encompasses evidence that logically shows the harm *caused by* the defendant.' (Ibid.)" (People v. Brown, supra, 33 Cal.4th at p. 396, emphasis supplied; accord Payne v. Tennessee, supra, 501 U.S. at p. 819 [victim impact limited to "harm caused by" defendant].) Furthermore, the use of victim impact evidence is limited by the fundamental principle that penalty determinations must be based on reason rather than emotion or vengeance. (See, e.g., Gardner v. Florida, supra, 430 U.S. at p. 358 ["it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"]; People v. Haskett (1982) 30 Cal.3d 841, 864 [in every capital case, "the jury must face its

obligation soberly and rationally, and should not be given the impression that emotion may reign over reason"]; Drayden v. White (9th Cir. 2000) 232 F.3d 704, 712-713 [punishment is "not to exact revenge on behalf of an individual victim"], cert. denied 532 U.S. 984 (2001).) Finally, as this Court and several others have recognized, that part of the Booth decision prohibiting consideration of the family members' views on the appropriate sentence survived Payne. (See, e.g., People v. Pollock (2004) 32 Cal.4th 1153, 1180; People v. Smith (2003) 30 Cal.4th 581, 622; Hain v. Gibson (10th Cir. 2002) 287 F.3d 1224, 1239 [and authorities cited therein].)

If, as this Court held in Edwards, supra, the statutory language of section 190.3 clearly contemplates consideration of victim impact evidence as a circumstance of the offense under factor (a), then obviously the standard instruction on factor (a) was broad enough to encompass that evidence. Hence, applying this Court's reasoning to other requested penalty phase instructions, the standard instruction was sufficient to encompass victim impact evidence. (See, e.g., People v. Fauber (1992) 2 Cal.4th 792, 865.)

More importantly, however, the victim impact instruction the court provided in this case was "flawed in that it was argumentative – i.e., it merely highlighted certain aspects of the evidence *without further illuminating the legal standards at issue*." (Ibid., emphasis supplied; accord People v. Musslewhite (1998) 17 Cal.4th 1216, 1269; People v. Noguera (1992) 4 Cal.4th 59, 648.) In other words, it merely highlighted the victim impact evidence without further illuminating the legal limitations on the use of such evidence, discussed above. For these reasons, the trial court should have refused the instruction outright as an improper pinpoint instruction.

However, having determined to provide a special instruction on victim impact evidence, the court was at least required to instruct accurately and completely on the legal principles relating to that issue. (See, e.g., People v. Montiel, supra, 5 Cal.4th at p. 942 [once court undertakes to instruct on particular

issue, it must do so accurately and completely]; People v. Melton, supra, 44 Cal.3d at p. 768 [same].) In other words, the court had the duty to ensure that the instruction it provided was not "flawed . . . by merely highlight[ing] certain aspects of the evidence without further illuminating the legal standards at issue." (People v. Fauber, supra, 2 Cal.4th at p. 865; People v. Musslewhite, supra, 17 Cal.4th at p. 1269; People v. Noguera, supra, 4 Cal.4th at p. 648.)

Indeed, other jurisdictions impose a *sua sponte* duty on trial courts to provide complete and accurate instructions on the limitations on, and appropriate uses of, victim impact evidence whenever it is introduced. "Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (Turner v. State (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (State v. Hightower (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (State v. Koskovich (N.J. 2001) 776 A.2d 144, 181; accord State v. Nesbit (Tenn. 1998) 978 S.W.2d 872, 892; Turner v. State, supra, 486 S.E.2d at p. 842; Cargle v. State (Ok App. Ct. 1995) 909 P.2d 806, 829; see also Commonwealth v. Means (Pa. 2001) 773 A.2d 143, 159 [recommending delivery of a cautionary instruction].)

An appropriate instruction in California would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.

> You may only consider harm that was logically caused by the defendant.
>
> You must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed.

The first paragraph of this instruction accurately states the law and duplicates the instruction suggested by the Supreme Court of Pennsylvania in Commonwealth v. Means, supra, 773 A.2d at p. 159. (See, e.g., Gardner v. Florida, supra, 430 U.S. at p. 358; People v. Haskett, supra, 30 Cal.3d at p. 864; Drayden v. White, supra, 232 F.3d at pp. 712-713.) The second paragraph accurately states the law and is taken verbatim from this Court's decisions, cited above. (People v. Brown, supra, 33 Cal.4th at p. 396; People v. Edwards, supra, 54 Cal.3d at p. 835; see also Payne v. Tennessee, supra, 501 U.S. at p. 819.) The last paragraph accurately states the law and is taken from on State v. Koskovich, supra, 776 A.2d at p. 177. (See, e.g., People v. Pollock, supra, 32 Cal.4th at p. 1180; People v. Smith, supra, 30 Cal.4th at p. 622; Hain v. Gibson, supra, 287 F.3d at p. 1239 [admission of family members' desire that death be imposed violated Eighth Amendment].)

Neither the special pinpoint instruction on victim impact evidence, nor any of the other instructions provided, addressed the foregoing principles. None of the instructions told the jurors why victim impact evidence was introduced. None informed the jurors of the critical causation requirement for consideration of victim impact evidence. None cautioned the jurors against utilizing the evidence to arrive at a decision based on emotion or vengeance rather than reason. None warned the jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses. Rather, the court's incomplete and inaccurate instruction simply permitted the jurors to and consider the victim impact evidence without limitation and thus for inappropriate purposes.

That the jurors likely did just that is clearly demonstrated by the prosecutor's argument. As discussed in Argument IX-C, the prosecutor argued victim impact evidence for which there was no causal link to the shooting – Rodney James's death two years after the shooting. (RT 1871, 3885-3886.) Similarly, the prosecutor clearly insinuated that the victims' families wanted Matthew to be put to death. (RT 3919.) Moreover, much of the prosecutor's argument was a call for vengeance (see, e.g., RT 3884 ["this is an eye for an eye three times. He tried to take five eyes. This is not an even trade. But as I said, it is all we can do"]; RT 3886-3887 [jury should impose death penalty on Matthew because he imposed it on victims]; RT 3887, 3884-3885 [value of one life calls for taking of another; giving life is "appropriate" "price" for taking life; one life should "cost" another]) and for emotion to control over reason (see, e.g., RT 3886-3887 [referring to "butchery" and "slaughterhouse"], RT 3892 [Watchman's four "orphans" will have to be told that their mother was "butchered"]).

At bottom, the court should either have refused the special victim impact instruction in its entirety or ensured that the instruction it did provide was accurate and complete. By taking the middle ground and providing an instruction that highlighted the victim impact evidence but failed to explain the limitations on the use of that evidence, the court gave a stamp of judicial approval to unlimited consideration of all of the victim impact evidence and argument, including the improper considerations advanced by the prosecutor. The error thus permitted the injection of improper considerations into the jury's penalty determination in violation of state law and Matthew's rights to a fair penalty phase trial and a fair and reliable capital penalty determination under the Fifth, Eighth, and Fourteenth Amendments. (See, e.g., (Booth v. Maryland, supra, 482 U.S. at pp. 507-510; Hain v. Gibson, supra, 287 F.3d at p. 1239; see also, e.g., Sochor v. Florida (1992) 504U.S. 537, 542; Stringer v. Black (1992) 503 U.S. 222, 230-231; Clemons v. Mississippi (1990) 494 U.S. 738, 752; Sanders v. Woodford (9th Cir. 2004) 373 F.3d 1054, 1066.)

### C. Reversal Is Required.

Because the error violated the federal constitution, respondent bears the burden of proving it harmless beyond a reasonable doubt. (Chapman v. California, supra, 381 U.S. 18, 24.) Respondent cannot carry its burden. Once again, as discussed in Argument VIII, the penalty phase was extremely close. The victim impact evidence was a critical component of the prosecution's otherwise weak case for aggravation and the prosecutor exploited the instructional omission by relying on victim impact that was unsupported by any causal link to the shooting and for other inappropriate purposes. On this record, the error cannot be considered harmless. Matthew's death sentence must be reversed.

## XII. THE CUMLATIVE EFFECT OF THE ERRORS REQUIRE REVERSAL OF THE PENALTY JUDGMENT.

Once again, the prosecution offered no evidence in aggravation apart from the bare facts of the underlying convictions and the effect of the crimes on the victims and their families. In other words, the penalty judgment was based primarily on the jurors' guilt phase verdicts. Under the circumstances, any error in the guilt phase of trial carried over into the penalty phase and requires reversal of the penalty judgment. Certainly, the cumulative effect of all of the errors that occurred throughout the trial was prejudicial, violated Matthew's rights to a fair penalty trial and a reliable penalty judgment as guaranteed by the Eighth and Fourteenth Amendments, and requires reversal.

### A. Reversal Of Any One Of The Convictions Requires Reversal Of The Penalty Judgment.

If the Court agrees that even one of the convictions requires reversal, the penalty judgment must also be reversed even if the Court otherwise affirms the remaining convictions and upholds the true finding on the special circumstance

allegation. This is so because the sheer number of convictions was the heart of the prosecution's case for death. As the prosecutor argued, "aggravating is something over and above the bare essentials to make out the charges. It makes it worse than the bare minimum. And I think that's one thing that leaps right out, is to be a multiple murder, you only have to kill two people and only one has to be murder in the first degree. Here there's three first-degree murders. And it doesn't stop there, he -- you found that he attempted to murder two other people and his attempt was willful, deliberate and premeditated and he used a firearm in each of those offenses, so is this case aggravated?" (RT 3890.) Indeed, "he's been convicted of murdering two more people than Richard Allen Davis, for Christ's sake." (RT 3920.) Of course, because all of the convictions constituted "circumstances of the crimes," the jurors were required to consider them all in determining the appropriate penalty. (Pen. Code § 190.3, subd. (a).)

That the number of convictions was critical to the penalty phase judgment is amply demonstrated by the trial judge's discussion of the relevant aggravating factors. In denying the application to modify the death verdict, the trial judge emphasized the fact that Matthew had been convicted of three first-degree murders, the third of which was "an incredibly strong aggravating factor beyond the normal circumstances that the special circumstance would require." (RT 3974.) Furthermore, "the attempt to kill at least two other human beings beside the three who were killed is a strong aggravating factor." (RT 3975.)

Hence, each conviction was offered and relied upon as an aggravating factor or circumstance. If the Court determines that any of those convictions is invalid and must be reversed, then its use as an aggravating circumstance at the penalty phase violated the Eighth Amendment. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578, 585 [it would violate Eighth Amendment to allow "death sentence to stand although based in part on a reversed conviction"]; Saunders v. Woodford (9th Cir. 2004) 373 F.3d 1054, 1058-1067 [and authorities cited therein – in weighing states like California, reliance on any one invalid aggravating

circumstance violates Eighth Amendment; where state court set aside two special circumstance findings, jurors' consideration of them at penalty phase – which was required under Penal Code section 190.2, subdivision (a) – thus violated the Eighth Amendment; violation was not harmless despite the existence of two remaining, valid special circumstance findings, and hence the penalty judgment required reversal].) Given the wealth of mitigating evidence, the dearth of aggravating evidence, and the prosecutor's reliance on all of the convictions in aggravation, respondent will be unable to prove the error harmless beyond a reasonable doubt. (Saunders v. Woodford, supra, at pp. 1062-1064 [and authorities cited therein – respondent bears burden of proving consideration of invalid aggravating circumstance under California death penalty statute harmless beyond reasonable doubt].) Hence, reversal of any one of the convictions requires reversal of the penalty judgment.

### B. The Errors Committed In The Guilt Phase Require Reversal Of The Penalty Judgment Even If They Do Not Require Reversal Of Any Of The Convictions.

For the same reasons, if the Court agrees that errors occurred in the guilt phase, as set forth in Arguments I through VI, but concludes that they do not warrant reversal of any of the convictions, they nevertheless had a prejudicial impact on the penalty judgment. Even assuming, for instance, that the jurors would not have had reasonable doubt regarding Matthew's guilt of the crimes in the absence of those errors, they surely would have had lingering doubt regarding his guilt in their absence. For example, had the jurors received complete and accurate instructions on heat of passion and provocation and their relationship to malice and premeditation, it is more than reasonably possible – at the very least – that they would have had lingering doubts that he was "guilty" of premeditated murder and attempted murder, for all of the reasons discussed in Arguments II and

III. Similarly, had the jurors received clear and accurate instructions requiring separate findings that Matthew intended to kill each individual victim, it is more than reasonably possible that they would have had lingering doubts of his "guilt" of all of the crimes, for the all of the reasons discussed in Argument IV. Had the brothers been tried separately, it is more than reasonably possible that the jurors would have had lingering doubts that Matthew was the actual killer, for all of the reasons discussed in Argument I. The cumulative effect of the guilt phase errors thus severely undercut the power of the mitigating circumstances of the case, not only in terms of lingering doubt, but also as to other mitigating factors relating to the circumstances of the crimes (factor (a)), whether or not Matthew committed the crimes while under the influence of an emotional disturbance (factors (d) and (k)), whether or not Matthew committed the crimes under circumstances which he believed extenuated his conduct, such as his reasonable belief that the victims engaged in provocation by brutally beating his mother (factors (f), (e), and (k)), and whether or not Matthew was an accomplice to the crimes (factor (j)). At the same time, the cumulative effect of the guilt phase errors artificially inflated the circumstances in aggravation, such as the allegedly "cold-blooded" nature of the crimes (RT 3925, 3975), Matthew's alleged role as the actual shooter (RT 3652, 3884, 3886-3887, 3890, 3921, 3926-3928), Matthew's alleged intent to shoot and kill all of the victims and more (RT 3920-3921), and the commission of the crimes for an allegedly trivial motive based on what actually occurred, without regard to what Matthew actually believed had occurred (RT 3886).

The cumulative effect of the guilt phase errors thus violated Matthew's state and federal constitutional rights to a fair penalty phase trial and a reliable penalty phase verdict. (See, e.g., Arizona v. Fulminante (1991) 491 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; In re Marquez (1992) 1 Cal.4th 584, 605, 608 [error was harmless in guilt phase but prejudicial in penalty phase]; Smith v. Zant (11th Cir. 1998) 855 F.2d 712, 721-722 [erroneously admitted

confession harmless in guilt phase, but prejudicial on question of penalty]; see also People v. Brown, supra, 46 Cal.3d at p. 466 [error occurring at guilt phase requires reversal of penalty judgment if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; People v. Hamilton (1963) 60 Cal.2d 105, 136 [recognizing that error in guilt phase which is not prejudicial may prejudice penalty determination]; U.S. Const., Amend. V, VIII, XIV.) Matthew's death judgment must be reversed.

### C. The Cumulative Effect Of The Guilt And Penalty Phase Errors Requires Reversal Of The Penalty Judgment.

Finally, given the closeness of the case discussed in Argument VIII, the cumulative effect of any combination of guilt and/or penalty phase errors violated Matthew's right to a fair penalty phase trial and a reliable penalty judgment. (See, e.g., Chambers v. Mississippi, supra, 410 U.S. 284 [cumulative effect of errors violated defendant's right to fair trial]; People v. Hill, supra, 17 Cal.4th at pp. 844-847 [same]; Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862, 883, 893 [same – "'in those cases in which the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors'"]; Mak v. Blodgett, supra, 970 F.2d at pp. 622-625 [same – penalty phase].) Matthew's death sentence must be reversed.

## XIII. MATTHEW'S DEATH SENTENCE IS CRUEL AND/OR UNUSUAL BECAUSE IT IS GROSSLY DISPROPORTIONATE TO HIS PERSONAL CULPABILITY.

The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. Similarly, Article 1, section 17 of the California Constitution prohibits the imposition of cruel or unusual punishment. Although it is the function of the legislative branch to define crimes and prescribe punishments (People v. Navarro (1972) 7 Cal.3d 248, 258), the power to prescribe punishment "remains ultimately circumscribed by the constitutional provision

forbidding the infliction of cruel or unusual punishment . . . ." (In re Lynch (1972) 8 Cal.3d 410, 414.) "It is the difficult but imperative task of the judicial branch, as coequal guardian of the Constitution, to condemn any violation of that prohibition." (Ibid.; accord People v. Anderson (1972) 6 Cal.3d 628, 640.) A punishment violates these proscriptions not only when it is inflicted in a cruel or unusual manner, but also if it is "grossly disproportionate to the offense for which it is imposed." (People v. Dillon (1983) 34 Cal.3d 441, 478; see also In re Lynch, supra, 8 Cal.3d at p. 424; Harmelin v. Michigan (1991) 501 U.S. 957, 1004-1005, conc. opn. of Kennedy, J.; Solem v. Helm (1983) 463 U.S. 277, 292; Enmund v. Florida (1982) 458 U.S. 782, 787; Ramirez v. Castro (9th Cir. 2004) 365 F.3d 755.)

In determining whether imposition of the death penalty is cruel or unusual, this Court has held it will not engage in "intercase" proportionality review by comparing the sentence to other capital cases because such review is not required by the Eighth Amendment. (See, e.g., People v. Mincey, supra, 2 Cal.4th at p. 476, citing Pulley v. Harris (1984) 465 U.S. 37, 51-54; but see Argument XVIII-C-7, below.) However, the sentence is subject to "intracase" review to determine whether the death penalty is disproportionate to the defendant's personal culpability. (See, e.g., People v. Cole (2003) 33 Cal.4th 1158, 1234; People v. Weaver (2001) 26 Cal.4th 876, 989; People v. Clark (1993) 5 Cal.4th 950, 1039; People v. Mincey, supra, 2 Cal.4th at p. 476.)

In making this determination, a reviewing court must examine the nature of the offense, not only in the abstract, but how it was actually committed. (People v. Dillon, supra, 34 Cal.3d at p. 479; In re Foss (1974) 10 Cal.3d 910, 919; Solem v. Helm, supra, 463 U.S. at p. 292; Enmund v. Florida, supra, 458 U.S. 782.) This inquiry must address "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (People v. Dillon, supra, at p. 479; In re Lynch, supra, 8 Cal.3d t p. 425 ["nonviolence or absence of a victim" is not "a prerequisite to a

finding of disproportionality"].) In addition, a reviewing court must examine the offender to determine whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (Ibid.; accord In re Rodriguez (1975) 14 Cal.3d 639, 655; In re Foss, supra, 10 Cal.3d at p. 918, 923.)

Under this analysis, the Court in People v. Dillon, supra, held that imposition of a life with the possibility of parole term for first-degree murder constituted cruel and unusual punishment when imposed on a 17-year-old white defendant. In Dillon, the defendant and several friends decided to steal marijuana from the victim's field. When he and his companions went to the barricaded and guarded field, they encountered the armed victim, who ordered them off of his property and warned them that he would shoot them if they came back. (Id. at p. 451.) His friends left, but the defendant stayed behind and hid. When he emerged, the victim saw him, aimed the shotgun at him, and ordered him to leave his property. This time, the defendant left. (Ibid.)

Undeterred, however, the defendant returned a few weeks later with his brother. After hearing a shotgun blast, they left the property. (People v. Dillon, supra, 34 Cal.3d at p. 451.)

A few weeks later, the defendant gathered a group of friends and constructed a more organized plan for returning to the victim's property and assaulting and robbing him. (People v. Dillon, supra, 34 Cal.3d at p. 451.) Initially, they discussed binding the victim and hitting him over the head. (Ibid.) On the date of the planned robbery, the defendant met his companions with a .22 caliber semi-automatic rifle and a map of the area. Several of the other young men were armed with shotguns, baseball bats, and knives. (Ibid.) They also brought bindings with which to tie up the victim and his guards. (Ibid.)

When the young men arrived at the victim's field, they saw one of the guards tending to the plants and waited for an opportune time to act. (Id. at p.451.) Eventually, some of the young men left, but the defendant remained

behind with others. As one of his friends was returning, he accidentally discharged his shotgun twice. (Id. at pp. 451-452.) While the young men were discussing their next move, the victim approached them with a shotgun. (Id. at p. 452) When the defendant saw him approach, he began rapidly firing his rifle at the victim, shooting him nine times and killing him. (Ibid.) The defendant was convicted of attempted robbery and first-degree felony murder and sentenced to life with the possibility of parole. He appealed on the ground, *inter alia*, that the life term was cruel or unusual as applied to him. Based on its prior decisions as well as those of the United States Supreme Court, this Court agreed. (Id. at pp. 479-487.)

The Court first acknowledged that robbery felony-murder is a dangerous crime. (People v. Dillon, supra, 34 Cal.3d at p. 479.) Nevertheless, turning to the manner in which the crime was committed, the Court observed that the picture that emerged from the trial testimony was that the defendant's state of mind evolved from "youthful bravado" to "fear," to "panic" (Id. at p. 482.) As to the defendant himself, the Court emphasized that he was only 17 years old, unusually immature even for a 17-year-old, and had no prior record. (Id. at pp. 482-483.) The Court concluded that the crime "was a response to a suddenly developing situation," the defendant was a teenager who "was not the prototype of a hardened criminal who poses a grave threat to society," and the punishment equated defendant's crime with "a carefully planned murder executed in cold blood after calm and mature deliberation." (Id. at pp. 487-488.) On these grounds, the Court concluded that the life with possibility of parole sentence for first-degree felony murder was grossly disproportionate to the defendant's individual culpability and reduced his conviction to second-degree murder. (Ibid.)

This Court has consistently adhered to the teachings of Dillon and has never suggested that it was wrongly decided. (See, e.g., People v. Cole, supra, 33 Cal.4th at p.1234; People v. Weaver, supra, 26 Cal.4th at p. 989; People v. Clark, supra, 5 Cal.4th at p. 1039; People v. Mincey, supra, 2 Cal.4th at p. 476.)

Matthew's case presents an even more compelling case of disproportionality than Dillon.

Matthew, unlike the defendant in Dillon, did not coolly and carefully construct a plan to go the victims' home armed with weapons, do violence to them, and rob them. To the contrary, as discussed in Arguments II and III, his motive to go to the victim's home armed with weapons was born in an intense emotion provoked by his hysterical mother's exaggerated stories of having been brutally assaulted and her insistence that he confront her attackers and retrieve her belongings. (See, People v. Dillon, supra, 34 Cal.3d at p. 479 [motive or lack thereof relevant to cruel and unusual punishment determination].)

Moreover, as further discussed in Argument II, the jury's verdicts reflect a finding that the boys did *not* go to the apartment intending to kill. (People v. Dillon, supra, 34 Cal.3d at p. 482 [jury's determination of facts regarding defendant's state of mind at time of offense considered an important factor in determining 25-yar-to-life sentence for first-degree felony murder cruel and unusual based on nature of offense as committed and offender].) Like the defendant in Dillon who formed the intent to kill only when the victim advanced on him and his companions with a shotgun, but only after they had entered the victim's property armed with guns and fired them, the shooter in this case formed the intent to kill only when Dewayne Arnold engaged in a physical confrontation with Michael, grabbed his gun, and a shot rang out. Like the Dillon defendant, the shooter's mental state evolved from one of youthful bravado to fear to panic; like the Dillon shooting, the instant shooting was a "response to a suddenly developing situation."

To be sure, Matthew recognizes that, unlike the Dillon jury, his jury found that he premeditated the shootings. However, it is equally true that there were several crucial considerations regarding Matthew's culpability that the jurors in his case either never entertained or about which they were misled.

Significantly, the Dillon jury convicted the defendant of felony-murder and rejected a finding of premeditation *only after it had received instructions on voluntary manslaughter*. (Id. at pp. 462.) Indeed, during their deliberations, the Dillon jury specifically inquired into whether it could return a verdict of second-degree murder or manslaughter if it found that the killing occurred during the course of an attempted robbery. (Id. at p. 484.) Of course, the trial judge replied that it could not. (Ibid.) Here, in stark contrast and as discussed in Arguments II and III, the jurors were given no instructions at all on voluntary manslaughter; they were given flawed and incomplete instructions regarding heat of passion and provocation, what those concepts mean, and how they relate to malice and premeditation; and the prosecutor distorted the meaning of the flawed and incomplete instructions that the jurors were provided.

Furthermore, Matthew's jurors were painted a distorted, or at the very least completely one-sided, picture of the manner in which the shooting was committed. Throughout his arguments in both the guilt and penalty phases, the prosecutor twisted and misstated the evidence to portray Matthew as a cold-blooded predator who moved about the room taking careful aim and shooting each victim, intending to kill them all, and who would have killed more if only he had not run out of ammunition. Regrettably, defense counsel did little if anything to marshal and argue the substantial evidence that would have corrected this picture, or at the very least would have provided the jurors with a reasonable and far less aggravating alternative scenario.

As discussed in Argument II-C-2, the evidence – largely ignored by counsel in their arguments – strongly suggested that the shootings of Trudell, James, and John were the unintentional byproducts of the explosion of violence directed toward Arnold and Watchman, whose conduct was certainly no less provocative than the victim's in Dillon. Once again, by all accounts and according to the photographs of the scene, the room in which the shooting occurred was extremely small and crowded. (RT 2035, 2235, 2304-2305; People's Trial Exhibits A-L.)

Trudell, John, and James were all located directly behind the couch on which Arnold and Watchman were seated and at which the gunfire was directed. (RT 2052-2053, 2266, 2269-2270, 2330, 2362-2366, 2330, 2434, 2437, 2523-2525, 2529-2530, 2744-2745, 2786-2787, 2809-2812, 3109-3110, 31903140, 3160-3161; People's Exhibit 33; Deft. A's Exhibit A.) While Arnold was shot seven times and Watchman shot three times, Beulah John and Rodney James were each shot only once and Leslie Trudell, who was closest to the couch, was shot only twice and virtually in the same spot. (RT 1956-1957, 2270, 2437, 2523, 2437; People's Exhibit 33.)

As further discussed in Argument II, while the prosecutor made much of the locations of the bloodstains "all around the room" to argue that the shooter must have intentionally aimed at and shot each individual victim (RT 3283-3284, 3444), in truth, the locations of the bloodstains, and the witness testimony, corresponded to the victims having been located directly behind the couch, in the firing line of Arnold and Watchman, when they were shot. (People's Exhibits 31 and 33; Deft. A' Exhibit H; RT 2348, 2523-25254, 2529-2530, 2693-2694, 2745; Deft. A's Ex. A.) Similarly, while the prosecutor argued that all of the victims had been shot in vital spots rather than in their extremities (RT 3441), in truth, Beulah John was shot in the leg and Rodney James was shot in the arm or shoulder (RT 2270, 2437, 2523, 2744-2745). While the prosecutor argued that John and James were each shot twice (RT 3292, 3441-3442), in truth, each was shot only once (RT 2270, 2437, 2523, 2557, 2568-2569). In fact, contrasted with the number and locations of the gunshot wounds to Arnold and Watchman, the number and locations of the wounds to the other victims supported rather than undermined the inference that they were shot unintentionally in the course of shooting Arnold and Watchman.

Similarly, while it is true that the jurors found that Matthew was the actual shooter, Matthew submits that this finding should be entitled to little weight in the Court's assessment of whether the death penalty is cruel and unusual in this case.

As discussed in Argument I, the evidence pointing to Michael as the actual shooter was even stronger than that pointing to Matthew. Hillary Leonesio actually saw Michael fire his gun about three times and shoot Arnold. (RT 3109-3110, 3139-3140, 3160-3161.) Similarly, Lea Coss simultaneously saw a flash and heard a shot from Michael's position, while Matthew was still standing several feet away, and testified at the preliminary hearing that Michael had shot Dewayne Arnold. (RT 2809-2812.) Raymond Douglas was standing only a few feet from Michael when he heard a shot and saw a flash from his position, while Matthew was still standing several feet away. (RT 2266, 2362-2366.) *None* of the witnesses claimed to have seen the second gunman, later identified as Matthew, fire his weapon or to have seen flashes or heard shots from his position. The *only* evidence undermining the eyewitness testimony that Michael was the shooter was the testimony of Martin Jones and Raymond Douglas describing his gun as a shotgun. (RT 2043, 2285, 2318.) However, even that testimony was weak – certainly too weak to put a young man to death.

While Martin Jones claimed that he was certain Michael's gun was a shotgun, he was just as certain that a shotgun had been fired in that room because he was familiar with the sound and smell. (RT 2044, 2046-2047, 2049, 2477-2478, 2500, 2508.) Of course, despite his expression of certainty in this regard, the ballistics evidence established that a shotgun was never fired in that room. (See, e.g., RT 2587, 2590-2591, 2884.) Similarly, Raymond Douglas's description of Michael's gun as a shotgun was inconsistent with his testimony suggesting that Michael fired his gun. Under the circumstances, the most reasonable explanation for the jury's determination that Matthew was the shooter was not the strength of the evidence, but rather the joinder of the brothers' trials, the tandem accusations of the prosecutor and Michael's counsel, and Michael's counsel's consistent, pervasive efforts to twist and misstate the evidence, as discussed in Argument I. In any event, even accepting the jury's determination

that Matthew was the actual shooter, Dillon makes clear that even a life with parole sentence may be disproportionate to the culpability of an actual killer.

There is no question that the result of the shooting was horrific and tragic. But the result of the shooting should not blind the Court – as it evidently blinded the jury – to the cause of the shooting or to the value of Matthew's life. "The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available . . . But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis." (Austin v. United States, supra, 382 F.2d at pp. 138-139.)

As to Matthew himself, much like the Dillon defendant, he was only 18 years old at the time of the crimes. (See, e.g., People v. Dillon, supra, 34 Cal.3d at pp. 482-483 [defendant's youth and immaturity critical factors underlying Court's determination that life without parole sentence for first-degree murder cruel or unusual]; In re Rodriguez, supra, 14 Cal.3d at p. 655 [that defendant was "only" 26 years old at time of crime one factor considered in concluding penalty for recidivist child molester was cruel or unusual under state constitution]; Cooper v. State (Fla. Sup. Ct. 1999) 739 So.2d 82, 86 [fact defendant only 18 years old at time of murder among criteria considered in concluding death penalty disproportionate].) As the Supreme Court and social scientists recognize, "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." (Thompson v. Oklahoma (1988) 487 U.S. 815, 835 [citing studies].)

To be sure, the Legislature has determined that an 18-year-old may be executed. (Pen. Code § 190.5, subd. (a).) While this reflects the conclusion that it is never appropriate to execute someone *under* the age of 18, it does not support the inverse conclusion that it is always appropriate to execute someone who is 18. As Justice Brennan observed in his dissenting opinion in Stanford v. Kentucky:

> Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact a "conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." Brief for American Society of Adolescent Psychiatry, et al., as Amici Curiae (citing social scientific studies). (Stanford v. Kentucky (1980) 492 U.S. 361, 396, dis. opn. of Brennan, J..)

(Accord In re Stanford (2002) 537 U.S. 968, 969-970, opn. of Stevens, J., joined by Souter, Ginsberg, and Breyer, JJ., dissenting from denial of petition for writ of habeas corpus [quoting above passage and observing "Today, Justice Brennan's observations are just as forceful and correct as they were in 1989"]; see also Logan, W. Proportionality And Punishment: Imposing Life Without Parole On Juveniles (1998) 33 Wake Forest L. Rev. 681 and n.136 ["growing evidence supports the view that even older adolescents, those fourteen to eighteen years of age, lack the developmental awareness of adults"]; Ongerth, S., Deference to the Majority: Why Isn't the Supreme Court Applying the Reasoning Of Atkins v. Virginia to Juveniles? (2003) 37 Loy. L.A. L. Rev. 483, 510 and ns. 213-216 [based on neuroscientific research, "teenage brain is a work in progress" and "evidence is constantly emerging that brain development continues beyond the age of eighteen"].) Indeed, this is why cruel or unusual punishment analysis must look beyond mere chronological age to the particular defendant's level of maturity, especially when the defendant is a teenager. (See, e.g., People v. Dillon, supra, 34 Cal.3d at pp. 482-483 [although Legislature had determined that 17-year-olds may be tried, convicted, and sentenced for murder as adults, adult murder sentence for this 17-year-old defendant was cruel or unusual in part because he was "unusually immature" for his age]; see also, e.g., State v. Koskovich, supra, 776 A.2d at pp. 210-212, conc. opn. of Zazzali, J. [same -- New Jersey statute permitting execution of 18-year-olds does not reflect determination it is always appropriate;

court must determine whether it is proportionate to particular 18-year-old based upon his relative maturity and development]; Williams v. State (Fla. 1998) 707 So.2d 683, 684 [18-year-old defendant's youth among criteria in concluding death penalty disproportionate]; Livingston v. State (Fla. 1988) 565 So.2d 1288, 1292 [in concluding death penalty disproportionate, Court observed that defendant's "youth, inexperience, and immaturity also significantly mitigate his offense"]; see also Eddings v. Oklahoma, supra, 455 U.S. 104, 116 [evidence teenage defendant's emotional development below chronological age highly relevant mitigation]; Bell v. Ohio, supra, 438 U.S. at pp. 639-642 [defendant's "emotional immaturity" constitutionally relevant mitigation].)

Here, the developmental deficits inherent in being a teenager were even greater for Matthew. Similar to the defendant in Dillon and as discussed in the preceding arguments, the uncontroverted evidence showed that Matthew was unusually inexperienced, unsophisticated, and immature, even as compared to other 18-year-old boys. (RT 3620, 3639, 3650, 3657-3658, 3672-3673, 3679, 3685, 3710, 3716-3717, 3720, 3730, 3732-3738, 3744-3747, 3749, 3760-3762, 2786, 3819, 3822, 3828-3829, 3840.)

Furthermore, Matthew had no criminal record, like the Dillon defendant. (People v. Dillon, supra, 234 Cal.3d at pp. 482-483; Probation Report at p. 6.) Indeed, the undisputed evidence revealed that before the crimes, he had no history of violence and was unusually pacifistic. (RT 3620, 3639, 3651-3652, 3665, 3672-3673, 3685, 3688, 3757-3758, 3770, 3778, 3786, 3835; see, e.g., People v. Dillon, supra, 34 Cal.3d at p. 384 and n. 35; In re Reed (1983) 33 Cal.3d 914, 935 [lack of record criteria considered in concluding penalty cruel or unusual]; In re Rodriguez, supra, 14 Cal.3d at p. 644 and n. 6 [defendant's minor prior record of sexual offense arrests considered in concluding penalty for recidivist child molestation was cruel or unusual based in part on nature of offender]; People v. Vargas, supra, 53 Cal.App.3d at p. 535 [defendant's "minimal criminal record" among criteria considered in concluding penalty cruel and unusual based in part on

nature of offender]; Solem v. Helm, supra, 463 U.S. at pp. 289-290, 303 [non-violent nature of defendant's six prior felony convictions considered in concluding prison term for recidivist felony offender cruel and unusual]; see also Ray v. State (Fla. Sup, Ct. 2000) 755 So.2d 604, 612-613 [insignificant record among criteria considered in concluding death penalty disproportionate for murder of police officer]; Cooper v. State, supra, 739 So.2d at p. 86 [same].)

Furthermore, Matthew overcame the emotional damage inflicted by his mother to have deep and loving relationships not only with family, but also with friends. He was consistently described by various witnesses as a "extra-special" and unusually loving and nurturing. (RT 3620, 3669, 3672, 3755, 3778, 3880, 3785, 3787, 3838; see, e.g., Ray v. State, supra, 755 So.2d 604 [defendant's loving familial relationships among factors considered in concluding death penalty disproportionate].)

And, as previously discussed, in keeping with his gentle and obedient nature, he was a model prisoner following arrest. He enrolled in school, obtained his G.E.D., and, in the words of his teacher, was a "pleasure" to have in class. (RT 3791, 3797-3798, 3800; see, e.g., Williams v. State (Fla. Sup. Ct. 1998) 707 So.2d 683, 684 [facts that defendant was 18 years old, a model jail inmate, and had obtained G.E.D. while awaiting trial among criteria in considered death penalty disproportionate].)

Moreover, like the Dillon defendant's sentence, Matthew's death sentence equates his moral culpability with defendants convicted of far more blameworthy crimes. (See People v. Dillon, supra, 34 Cal.3d at p. 487 and n. 38.) For example, defendants who intentionally kill their victims by blowing them apart with a bomb, through the infliction of torture, or in the course, of brutal and ongoing sexual assaults are subject to the same penalty; indeed their lives may even be spared. (Pen. Code §§ 190.2(a)(4) and (a)(18); see, e.g., People v. Padayao (1994) 24 Cal.App.4th 1610 [defendant convicted of torture murder sentenced to life without parole]; People v. Marlow (1995) 48 Cal.App.4th 740 [defendant

convicted of kidnapping, raping, and murdering two women sentenced to 73 years, eight months in prison]; People v. Castro (1994) 27 Cal.App.4th 578, 581 [defendant who committed crime spree with companion in which, *inter alia*, they raped and murdered one woman and attempted to murder elderly man with an ax before robbing him received life without parole sentence].) Whatever else may be said about the tragic results of the shooting, Matthew's moral culpability simply is not the same as that of the fully mature, adult defendant who tortures or rapes a victim to death.

Furthermore, although his brother was the ringleader and at least as likely to have been actual shooter as Matthew, notwithstanding the jury's verdict, he was ordered to serve only a single term of 25 years to life *with* the possibility of parole for the same crimes of which Matthew was convicted. (2/5/99 RT at p. 5.)

For all of these reasons, Matthew's case is not only strikingly similar to Dillon in several critical respects. It presents an even more compelling case of disproportionality and stands in stark contrast to those cases wherein the Court has rejected claims of disproportionality under Dillon. (See, e.g., People v. Cox (2003) 30 Cal.4th 916, 970 [rejecting claim where defendant brutally, with premeditation, and without any suggestion of emotional disturbance, murdered three teenage girls on separate occasions]; People v. Weaver, supra, 26 Cal.4th at p. 989 [rejecting claim where defendant picked up young couple stranded on highway, killed young man in sneak attack with pipe, raped young woman more than once over the course of several hours before killing her, as well, previously had attempted to kidnap another woman by striking her, and previously picked up another young couple, directed acquaintance to kill the male, and committed forcible sex crimes against 15-year-old female]; People v. Webb (1993 6 Cal.4th 494,536 [rejecting claim where defendant committed planned robbery and killing of two people, which involved "prolonged torment" of victims, and where he had previously committed four other killings]; People v. Hines (1997) 15 Cal.4th 997, 1078 [rejecting claim where defendant and companion bound and gagged 15-year-

old girl, brutally beat her mother, shot each victim four times, to ensure death shot each victim execution style, behind the ear at close range, after which they drove around in victim's stolen car and showed it off to their friends]; People v. Karis (1988) 46 Cal.3d 612, 649 [rejecting claim where defendant and committed planned kidnapping, rape, and murder of two women, and where he had previously been convicted of rape].)

In sum, like the defendant in Dillon, Matthew was an inexperienced teenager with no prior record, who "was not the prototype of a hardened criminal who poses a grave threat to society." (People v. Dillon, supra, 34 Cal.3d at pp. 487-488.) While the results of the shooting were horrific, the shooting itself was committed in response to "a suddenly developing situation (Ibid.) and clearly was an isolated and aberrant event in an otherwise blameless life. To execute Matthew declares that there is no hope whatever for rehabilitation of this human life – that his life is not worth saving. Nothing could be further from the truth. His death sentence is grossly disproportionate to Matthew's individual culpability and violates the cruel and/or unusual punishment clauses of the state and federal constitutions.

## XIV. THE TRIAL COURT'S REFUSAL TO PROVIDE AN INSTRUCTION CLEARLY GUIDING THE JURY'S CONSIDERATION OF THE SCOPE AND PROOF OF MITIGATING CIRCUMSTANCES VIOLATED MATTHEW'S RIGHTS UNDER STATE LAW, AS WELL AS THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND REQUIRES THAT HIS DEATH SENTENCE BE REVERSED.

In addition to the lingering doubt instruction discussed in Argument VIII, Matthew's counsel requested only one other special instruction. (CT 755-756; RT 3567-3571.) That instruction provided:

> The mitigating circumstances that I have read for your consideration are given merely as examples of factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
>
> A juror may also consider any other circumstances relating to the case or the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> Any mitigating circumstance may outweigh all of the aggravating factors.
>
> A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor. (CT 756.)

The court refused the instruction on a number of grounds. First, the court believed that the statement that a mitigating circumstance may be found to exist "no matter how weak the evidence" was not a correct statement of the law. (RT 3568-3569.) As to the rest of the instruction, the court did not disagree that it contained correct statements of the law, but reasoned that "some if it is redundant" and others did not to be "highlighted." (RT 3569-3571.) If they did need highlighting, the court told counsel that he could do so in argument. (RT 3571) Counsel (quite correctly) responded, "this jury has shown a disinclination to believe me." (RT 3571.) The court replied that co-counsel could argue those factors to the jurors. (RT 3571.) Hence, the court refused the instruction. (RT 3571, 3700.) The court erred. While Matthew recognizes that this Court has rejected claims of error with respect to the refusal to provide similar instructions

(see, e.g., People v. Smith (2003) 30 Cal.4th 581, 638 People v. Bonillas (1989) 48 Cal.3d 757, 789-790), he respectfully requests reconsideration for the reasons below. In addition, he raises the issue here in order to preserve the error for federal review.

A criminal defendant is entitled upon request to instructions which pinpoint his theory of defense. (See, e.g., People v. Kraft, supra, 23 Cal.4th at p. 1068; People v. Adrian (1982) 135 Cal.App.3d 335, 338; People v. Rincon-Pineda, supra, 14 Cal.3d at p. 865; People v. Sears (1970) 2 Cal.3d 180, 190; see also Pen. Code § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."].) The right to such instructions applies at both the guilt and penalty phases of a capital trial. (See, e.g., People v. Benson (1990) 52 Cal.3d 754, 806; People v. Davenport, supra, 41 Cal.3d at pp. 281-283.) "[I]n considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Of Jud. Admin., § 5.)

To be sure, a trial court is not required to give instructions that are argumentative or contain incorrect statements of law. (See People v. Sanders, supra, 11 Cal.4th at p. 560.) However, the requested instruction was neither.

Indeed, contrary to the court's understanding, the instruction's statements of the law were entirely accurate. As to the first, second, and fourth paragraphs of the instruction, the United States Supreme Court has made clear that all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (Tennard v. Dretke, supra, 124 S. Ct. at p. 2571.) Mitigation is not limited to enumerated factors in section 190.3, but includes any mitigating information that may convince the jury to vote for a sentence less than death. (See, e.g., Blystone v. Pennsylvania (1990) 494 U.S. 299, 308.) Furthermore, "[t]he jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate

penalty." (People v. Brown, 40 Cal.3d at p. 540.) Indeed, the jury may reject the death penalty even in the complete absence of mitigating evidence. (See, e.g., People v. Duncan (1991) 53 Cal.3d 955, 978-979; People v. Nicolaus (1991) 54 Cal.3d 551, 590-591.)

As to the third paragraph of the instruction, this Court has held that mitigating circumstances need not be proven beyond a reasonable doubt or by a preponderance of the evidence. (People v. Carpenter, supra, 15 Cal.4th at pp. 416-417.) To the contrary, a jury may find a mitigating circumstance to exist if there is any evidence – as opposed to substantial evidence – to support it. (People v. Bonillas, supra, 48 Cal.3d at pp. 789-790.) At bottom, the federal constitution requires the jury be allowed to consider a mitigating circumstance "no matter how strong or weak the evidence is." (People v. Wharton, supra, 53 Cal.3d at pp. 600-601, emphasis supplied.)

As to the fifth paragraph of the instruction, it is well settled that mercy, sympathy, and sentiment are relevant mitigating factors. (See, e.g., People v. Easley, supra, 34 Cal.3d at pp. 874-880.) Indeed, a capital jury has the right to reject the death penalty based solely on sympathy for the accused. (See, e.g., Peole v. Lamphear, supra, 36 Cal.3d at p. 157; People v. Robertson, supra, 33 Cal.3d at pp.57-58 [Lockett and Eddings "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it"]; People v. Brown, supra, 40 Cal.3d at p. 536 ["The jury must be free to reject death ... on the basis of any constitutionally relevant evidence ..."]; People v. Haskett, supra, 30 Cal.3d at p. 863.) Furthermore, the jurors may consider sympathy in determining what weight to give other factors. (See, e.g., People v. Easley, supra, at pp. 874-880.)

The proposed instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death. (Cf People v. Sanders, 11Cal.4th at 557 [noting with

approval instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors." (People v. Sanders, supra, 11 Cal.4th at p. 557, quoting People v. Cooper, supra, 53 Cal.3d at p. 845.) This Court has indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process ...." (Id. at p. 557; see also People v. Anderson (2001) 25 Cal.4th 543, 599-600 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death].)

Of course, as noted above, the Court has also held that it is not error to refuse to give an instruction embodying these correct principles of law if the instructions the jury receives on mitigation are otherwise correct. (See, e.g., People v. Smith, supra, 30 Cal.4th at p. 638; People v. Bonillas, supra, 48 Cal.3d at pp. 789-790.) However, this rationale ignores the critical distinction between the failure to give an accurate requested instruction and the giving of an erroneous one. In fact, the rationale runs afoul of California law, which entitles a defendant to have a requested instruction given if it correctly states applicable law. That right is not contingent on the court giving other erroneous instructions on the issue. Of course, if the trial court gives an erroneous instruction, the defendant can argue that error. But no general principle of California law mandates that establishing such error is a prerequisite to showing error in failing to give a requested instruction. Indeed, the law is just the opposite. (People v. Kane (1946) 27 Cal.2d 693, 698, 700 [although jury given correct instructions defining robbery and reasonable doubt, trial court committed prejudicial error by refusing pinpoint instruction directing jury to acquit if victim gave defendant permission to take property: "'It is true that the instruction given stated the law correctly, but it was brief, general, and colorless in comparison with the instruction asked, and had the

effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.'"]; People v. Mayo (1961) 194 Cal.App.2d 527, 536-537 [although court's instructions regarding elements of offense were generally correct and adequate, it prejudicially erred in refusing specific instructions pinpointing theory of defense]; People v. Sears, supra, 2 Cal.3d 180, 190 [citing Kane and Mayo with approval in recognizing that defendant is entitled to pinpoint instructions upon request; refusal to give reasonable doubt instruction pinpointing theory of defense erroneous despite generally adequate reasonable doubt instruction]; People v. Thompkins (1987) 195 Cal.App.3d 244, 256-257 [error to refuse "instructions [because] they were allegedly incomplete and duplicated standard CALJIC instructions . . . if the defendant offers 'pinpoint' instructions intended to supplement or amplify more general instructions"].)

Certainly, there is no sound reason *not* to instruct the jury on legally correct principles that bear on vital issues in a capital case. The requested instruction here simply and correctly explained the law applicable to the consideration of mitigating circumstances. Ordinarily, the integrity of the judicial process is impaired when the jury is not told about rules of law that govern the ultimate decision it must make. The guiding principle should be to explain, not to conceal, the applicable rules.

Indeed, the trial court seemed to appreciate this fact when it came to the *prosecution*'s requests for special instructions. In the guilt phase of trial, the court granted the prosecution's request to provide additional instructions on the meaning of premeditation. (RT 2945-2946, 3181, 3262-3263; CT 560-561, 704; see also Argument IV.) In the penalty phase, the court granted the prosecution's request to instruct the jurors that victim impact evidence could be considered under factor (a). (CT 753, 782; RT 3563-3564, 3864; see also Argument XI.) Despite the fact that the standard instructions defining premeditation and describing factor (a) were generally correct and adequate, the court nevertheless granted the prosecutor's requests and provided the jury with those instructions. If the otherwise correct and

adequate nature of the standard instructions was not sufficient ground for the court to refuse the prosecutor's requests, then it should not have been ground to refuse the defense request. (See RT 3569-3571.) To the contrary, "there should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (People v. Moore (1954) 43 Cal.2d 517, 526-527; see also Gray v. Klauser, supra, 282 F.3d at pp. 645-648, 651 [and authorities cited therein -- a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates federal due process]; cf. Wardius v. Oregon (1973) 412 U.S. 470, 474 [Due Process Clause "does speak to the balance of forces between the accused and his accuser," and "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense].) The court's inconsistent application of the law to grant the prosecutor's requests for special instructions and refuse the defense requests for similar instructions was fundamentally unfair in violation of Matthew's right to due process. (Ibid.)

Furthermore, the court's refusal to provide the defense request denied Matthew his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (see, e.g., Skipper v. South Carolina, supra, 476 U.S. at p. 4; Lockett v. Ohio, supra, 438 U.S. at p. 604), and to make an individualized determination whether he should be executed, under all the circumstances (see, e.g., Zant v. Stephens, supra, 462 U.S. at p. 879.) At the very least, the court's refusal to provide the instruction violated state law for all of the reasons set forth above.

Given the closeness of the case, discussed in Argument VIII, there is a reasonable possibility (People v. Brown, supra, 46 Cal.3d at pp. 447-448) that the verdict would have been more favorable to Matthew if the court had given the requested instruction. At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout Matthew's trial violated his state and

federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., Chambers v. Mississippi, supra, 410 U.S. 284; People v. Hill, supra, 17 Cal.4th at pp. 844-847; Alcala v. Woodford , supra, 334 F.3d at pp. 883, 893; Mak v. Blodgett, supra, 970 F.2d at pp. 622-625; see also Argument X, above.) The penalty judgment must be reversed.

## XV. THE PROVISION OF CALJIC NO. 8.85, WHICH INCLUDED INAPPLICBLE FACTORS AND FAILED TO SPECIFY WHICH FACTORS COULD BE MITIGATING ONLY, VIOLATED MATTHEW'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT.

The jury was instructed with CALJIC No. 8.85, the standard instruction regarding the factors in aggravation and mitigation which may be considered in determining whether a sentence of death or life without the possibility of parole should be imposed.[38] (CT 782.) Matthew respectfully submits that CALJIC No. 8.85 violates the Fifth, Sixth, eighth, and federal Constitution. Once again, he recognizes that this Court previously has rejected similar contentions (see, e.g., People v. Carpenter (1999) 21 Cal.4th 1016, 1064 People v. Benson (1990) 52 Cal.3d 754, 802), but he requests reconsideration for the reasons given below. In addition, he raises the issue to preserve it for federal review.

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. (See Cal. Penal Code § 190.3, subds. (b)-(j).) Yet, the trial court did not delete those inapplicable factors from the instruction. (CT 782.) Moreover, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be

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[38] The full text of CALJIC No. 8.85, as provided in this case, is set forth in Argument VIII-C-1, footnote 32, above.

either aggravating or mitigating depending upon the evidence. Including inapplicable statutory sentencing factors, and failing to specify which factors were aggravating and which factors were mitigating, was harmful in a number of ways.

First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See, e.g., People v. Gurule (2002) 28 Cal.4th 557, 660; People v. Montiel, supra, 5 Cal.4th at pp. 944-945.) The factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – were relevant solely as a possible mitigators. (See, e.g., People v. Hamilton, supra, 48 Cal.3d at pp. 1184; People v. Edelbacher, supra, 47 Cal.3d at p. 1034.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against Matthew. In other words, without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate Matthew's sentence upon the basis of nonexistent and/or irrational aggravating factors, in violation of the Eighth and Fourteenth Amendments. (See, e.g., Stringer v. Black, supra, 503 U.S. at p. 235; Mills v. Maryland (1988) 486 U.S. 367, 373-375; Zant v. Stephens, supra, 462 U.S. at p. 879; Woodson v. North Carolina, supra, 428 U.S. at p. 304.) Indeed, the need for such instructions in this case was particularly acute, and their omission particularly prejudicial, because the prosecutor argued that the facts that Matthew was *not* intoxicated or otherwise impaired (factor (h)), that the crimes were *not* justified (factor (f)), that Matthew had *not* expressed remorse by "apologizing," and that Matthew's family was *not* physically abusive, were aggravating in that they all made his crimes and his culpability even "worse." (RT 3891-3892, 3923-3924,3926-3928.)

Although this Court has held that no reasonable juror would misconstrue these factors as aggravating (see, e.g., People v. Benson, supra, 52 Cal.3d at p. 802), that assumption has been severely undermined by subsequent empirical

research showing how these factors are actually understood. In a study of jurors who sat on capital trials in California, it was found that jurors actually believed, despite instruction to the contrary, that the absence of mitigation evidence supported a sentence of death. (See Haney, Sontag, & Costanzo, Deciding to Take A Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death (1994) 50 Journal of Social Issues 149, 169; see also C. Haney and M. Lynch, Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions (1994) 18 Law and Human Behavior 411 [in study involving upper-level college students, large percentage were unable to accurately identify factors listed in CALJIC No. 8.88 as aggravating or mitigating].) In the face of such evidence, this Court can no longer so blithely assume that jurors in fact understood what is commonly--but erroneously--believed to be the "plain" meaning of the instruction's language. (See, e.g., People v. Benson, supra, 52 Cal.3d at p. 802.) In any event, the only logical conclusion is that jurors would consider the absence of mitigation to be aggravating, since the instruction expressly tells the jurors to "consider" if any of these factors is "not" present. Once again, jurors are presumed to follow instructions. (See, e.g., Francis v. Franklin, supra, 471 U.S. at p. 324, n. 9; People v. Holt (1997) 15 Cal.4th 619, 662.)

Moreover, permitting--indeed, mandating--the penalty jurors to be instructed on irrelevant matters makes it likely that their focus will be diluted and their attention distracted from the difficult task at hand. These dangers were heightened by the trial court's failure to clearly explain which factors were aggravating and which were mitigating.

Furthermore, failing to delete factors for which there was no evidence at all not only served to artificially inflate the case for aggravation, but also tended to diminish the mitigating evidence that was presented. The jury was effectively invited to sentence Matthew to death because there was evidence in mitigation for "only" one or two factors, whereas there was either evidence in aggravation or no

evidence at all with respect to all the rest. In so doing, the instruction undermined the right to heightened reliability in the penalty determination, all in violation of the Sixth, Eighth, and Fourteenth Amendments. (See Ford v. Wainwright (1986) 477 U.S. 399, 411, 414; Beck v. Alabama, supra, 447 U.S. at p. 637.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (Tuilaepa v. California (1994) 512 U.S. 967, 973, quoting from Gregg v. Georgia, supra, 428 U.S. at p. 189) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, supra, 455 U.S. at p. 112.)

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has stated that trial courts have a duty to screen out factually-unsupported theories, "either by appropriate instruction or by not presenting them to the jury in the first place." (People v.

Guiton (1993) 4 Cal.4th 1116, 1131; see also People v. Michaels (2002) 28 Cal.4th 486, 531 ["Instructions should not be unnecessarily complicated by telling the jury that a defense unclaimed by the defendant and excluded by the other instructions is inapplicable."].) Unlike other instructions which are required to be modified or edited to delete potentially misleading or confusing language (see, e.g., People v. Jennings (1991) 53 Cal.3d 334, 389-390 [penalty-phase jury instruction to consider all of the evidence at all phases of trial should have been tailored to exclude evidence relating to charges of which defendant was acquitted]), or deleted altogether if unsupported by the evidence (see People v. Guiton, supra, 4 Cal.4th at p. 1131), CALJIC No. 8.85 is treated differently--to a capital defendant's considerable disadvantage. In a situation where the law requires heightened, not lessened, scrutiny (see Ford v. Wainwright, supra, 477 U.S. at pp. 411, 414), this Court has incongruously sanctioned irrelevant or inappropriate instructional language in violation of Matthew's Eighth and Fourteenth Amendment rights to equal protection and a reliable penalty determination (see Johnson v. Mississippi (1988) 486 U.S. 578, 585 [a death judgment cannot be predicated on factors that are totally irrelevant to the sentencing process]).

For all of these reasons, the instruction violated Matthew's rights to an individualized sentencing determination based on permissible factors relating to him and the crime, to a fair trial by jury, to due process, and to a reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Given the closeness of the case and the magnitude of the error, reversal is required regardless of the standard of prejudice applied. (See Johnson v. Mississippi, supra, 486 U.S. at pp. 584-590; Chapman v. California, supra, 386 U.S. at p. 24; People v. Brown, supra, 46 Cal.3d at p. 448.) At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout Matthew's trial violated his state and federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., Chambers v. Mississippi,

supra, 410 U.S. 284; People v. Hill, supra, 17 Cal.4th at pp. 844-847; Alcala v. Woodford, supra, 334 F.3d at pp. 883, 893; Mak v. Blodgett, supra, 970 F.2d at pp. 622-625.) The death judgment must be reversed.

## XVI. THE PROVISION OF CALJIC NO. 8.88 DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION, VIOLATED MATTHEW'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT.

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

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

> determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (CT 789.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated Matthew's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI, XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII, XIV), and require reversal of his sentence. (See, e.g., Mills v. Maryland, supra, 486 U.S. at pp. 383-384.) Matthew recognizes that the Court has rejected similar challenges to CALJIC No. 8.88 (see, e.g., People v. Coffman and Marlow (2004) 34 Cal.4th 1, 124), but nevertheless raises the issue here in order for the Court to reconsider those decisions and to preserve it for federal review.

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

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on Matthew hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 789.) "So substantial," however, is an impermissibly vague phrase which bestowed intolerably broad discretion on the sentencing jury.

To pass constitutional muster, a system for imposing the death penalty must

channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (Maynard v. Cartwright (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death penalty sentencing scheme must adequately inform the jurors of "what they have to find in order to impose the death penalty ...." (Id. at pp. 361-362.) A death penalty scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth and Fourteenth Amendments. (Ibid.)

The phrase "so substantial" violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in Furman v. Georgia ...." (Maynard v. Cartwright, supra, 486 U.S. at p. 362.)

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

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the

> imposition of the death penalty compels a different result. (Arnold v. State, supra, 224 S.E.2d at p. 392.)[39]

Matthew acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [Arnold] and this case are obvious." (People v. Breaux (1991) 1 Cal.4th 281, 316, n. 14.) However, Breaux's summary disposition of Arnold does not specify what those "differences" are, or how they impact the validity of Arnold's analysis. Of course, Breaux, Arnold, and this case, like all cases, are factually different, but their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

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

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

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[39] The United States Supreme Court has specifically recognized the portion of the Arnold decision invalidating the "substantial history" factor on vagueness

step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (Godfrey v. Georgia (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See Stringer v. Black, supra, 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII, XIV), the death judgment must be reversed.

### B. The Instruction Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment

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

Those two determinations are not the same. A rational juror could find in a

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grounds. (See Gregg v. Georgia, supra, 428 U.S. at p. 202.)

particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (Id. at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (Id. at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is far different than the finding the jury is actually required to make: that death is an "especially suitable," fit and proper punishment, i.e., that it is appropriate.

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

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

CALJIC 8.88, as provided in Matthew's case, is also defective because it implied that death was the only available sentence if the aggravating evidence was

"so substantial in comparison with the mitigating circumstances...." However, it is clear under California law that a penalty jury may always return a verdict of life without possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (People v. Brown, supra, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed mitigation. (See People v. Peak (1944) 66 Cal.App.2d 894, 909.) The failure to properly instruct the jury on this crucial point deprived Matthew of his right to have the jury given proper information concerning its sentencing discretion (People v. Easley, supra, 34 Cal.3d at p. 884), deprived Matthew of an important procedural protection that California law affords capital defendants in violation of due process, and made the resulting verdict unreliable in violation of the Eighth and Fourteenth Amendments.

In sum, the crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const. amend. VIII, XIV) and denies due process (U.S. Const. XIV; Hicks v. Oklahoma, supra, 447 U.S. at p. 346), and must be reversed.

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

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

Penal Code § 190.3.)[40] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See Boyde v. California, supra, 494 U.S. at p. 377.)

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

The misleading nature of the instruction was exacerbated in this case by the trial court's refusal to give the requested defense instruction described in Argument XIV. (CT 756; RT 3567-3571.) Without it, reasonable jurors would not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction given to Matthew's jury violated due process. (See Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

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

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[40] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (People v. Duncan, supra, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The Duncan opinion cites no authority for this proposition, and Matthew respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., People v. Moore, supra, 43 Cal.2d at pp. 526-529; People v. Costello (1943) 21 Cal.2d 760; People v. Kelley (1980) 113 Cal.App.3d 1005, 1013-1014; People v. Mata (1955) 133 Cal.App.2d 18, 21; see also People v. Rice (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; Reagan v. United States (1895) 157 U.S. 301, 310.)[41]

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the jury regarding its role, and disallowed it. (See People v. Brown, supra, 40 Cal.3d at 544, n. 17.)

[41] There are due process underpinnings to these holdings. In Wardius v. Oregon, supra, 412 U.S. 470, 473, n. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also Washington v. Texas (1967) 388 U.S. 14, 22; Gideon v. Wainwright (1963) 372 U.S. 335, 344; Izazaga v. Superior Court (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure (1960) 69 Yale L. J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," Wardius held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (Wardius v. Oregon, supra, 412 U.S. at p. 474.) Though Wardius involved reciprocal discovery rights, the same principle should apply to jury instructions. (Cf. Gray v. Klauser, supra, 282 F.3d at pp. 645-648, 651 [and authorities cited therein -- a trial court's unjustified or uneven application of legal

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

> It is true that the instructions do not incorrectly state the law, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows .... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (People v. Moore, supra, at pp. 526-527.)

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

It is well settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See, e.g., People v. Glenn (1991) 229 Cal.App.3d 1461, 1465; Conde v. Henry, supra, 198 F.3d at p. 739; Bashor v. Risley, supra, 730 F.2d at p. 1240; Bradley v. Duncan, supra, 315 F.3d at pp. 1098-1099; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 871-876.) The denial of this fundamental principle in Matthew's case deprived him of due process. (See Evitts v. Lucey (1985) 469 U.S. 387, 401; Hicks v. Oklahoma, supra, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the

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standard in a way that favors the prosecution over the defense violates due process].)

determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants - if not more entitled - to the protections the law affords in relation to prosecution-slanted instructions. Indeed, Matthew can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const. Art. I, §§ 7 & 15; Plyler v. Doe (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See Zemina v. Solem (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd 573 F.2d 1027, 1028 (8th Cir. 1978); cf. Cool v. United States (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated Matthew's Sixth Amendment rights as well. Given the closeness of the case discussed in detail in the preceding arguments and the critical errors in the instruction, respondent cannot prove the errors harmless beyond a reasonable doubt. At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout Matthew's trial violated his state and federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., Chambers v. Mississippi, supra, 410 U.S. 284; People v. Hill, supra, 17 Cal.4th at pp. 844-847; Alcala v. Woodford , supra, 334 F.3d at pp. 883, 893; Mak v. Blodgett, supra, 970 F.2d at pp. 622-625.) Reversal of Matthew's death sentence is required.

## XVII. THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT.

The only special circumstance alleged and found true was under Penal Code section 190.2, subdivision (a)(3), the so-called "multiple murder" special circumstance. (CT 486-749.) For the reasons explained below, this special circumstance violates the Eighth Amendment. While Matthew recognizes that the Court has rejected similar challenges to the multiple murder special circumstance (see, e.g., People v. Sapp (2003) 31 Cal.4th 240, 286-287; People v. Coddington, supra, 23 Cal.4th at p. 656), he raises the issue here in order for the Court to reconsider its previous decisions and in order to preserve the claim for federal review.

In order to satisfy the Eighth Amendment, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'", (Lowenfield v. Phelps (1988) 484 U.S. 231, 244, quoting Zant v. Stephens, supra, 462 U.S. at p. 877), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'" (People v. Edelbacher, supra, 47 Cal.3d at p. 1023, quoting Furman v. Georgia (1972) 408 U.S. 238, 313, conc. opn. of White, J.). It must do so, furthermore, "in an objective, evenhanded, and substantially rational way...." (Zant v. Stephens, supra, 462 U.S. at p. 879.)

Under the California scheme -- in which the special circumstances set forth in Penal Code section 190.2(a) are supposed to satisfy the foregoing demands (People v. Edelbacher, supra, 47 Cal.3d at p. 1023; People v. Bacigalupo, supra, 6 Cal.4th at pp. 467-468) – "each special circumstance" – not just all of the special circumstances considered in the aggregate – must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (People v. Green (1980) 27 Cal.3d 1, 61.)

The special-circumstance at issue in this case -- multiple murder, Pen. Code sec. 190.2(a)(3) -- fails to distinguish "in an objective, evenhanded, and substantially rational way" (Zant v. Stephens, supra, 462 U.S. at p. 879), between those deserving of death and those who are not.

"Narrowing is not an end in itself, and not just any narrowing will suffice." (United States v. Cheely (9th Cir. 1994) 36 F.3d 1439, 1445.) To narrow in "an evenhanded ... and substantially rational way," the special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (Ibid.)

At issue in Cheely were federal statutes dealing with mail bombs. (18 U.S.C. §§ 844, subd. (d), 1716, subd. (a).) The statutes declared that anyone who, with the intent to injure property or life, causes a death by knowingly placing in the mail an explosive device, is eligible for the death penalty. The Ninth Circuit held the statutes were unconstitutional: "[T]hey create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants...." (United States v. Cheely, supra, 36 F.3d at p. 1444.)

Under the statutes, the court observed, one jury could sentence to death a person who accidentally killed while intending to damage property, while a second jury could vote to spare a mail-bomber who deliberately assassinated an NAACP official. "The narrowing" principle on which the statutes rest thus fails to "foreclose ... the prospect of ... 'wanton or freakish' imposition of the death penalty." (United States v. Cheely, supra, 36 F.3d at p. 1445.

This is equally true of the multiple murder special circumstance in the California statute. Thus the multiple murder special circumstance applies to the white racist who deliberately kills several black children in separate incidents. It also applies to the black man who, in the course of a robbery, accidentally kills one white woman and her 9-week old fetus, which the defendant did not know the woman was carrying. (See, e.g., People v. Davis (1994) 7 Cal.4th 797, 810 [person responsible for death of 8-week old fetus may be convicted of murder]; People v. Anderson (1987) 43 Cal.3d 1104, 1149-1150 [intent to kill not required

for multiple murder special circumstance]. Under the statutory scheme, one jury could sentence the black defendant to death while another could spare the life of the white killer. "The prospect of such 'wanton and freakish' death sentencing is intolerable under Furman and the cases following it." (United States v. Cheely, supra, 36 F.3d at p. 1444.)[42] In short, the multiple-murder special circumstance establishes unconstitutionally overbroad criteria for death-eligibility.

As noted above, Matthew recognizes that the Court has rejected this challenge to the multiple murder special circumstance. (See, e.g., People v. Sapp, supra, 31 Cal.4th at pp. 286-287; People v. Coddington, supra, 23 Cal.4th at p. 656.) In Sapp, the Court distinguished Cheely on the ground that the mail-bomb statute permitted individuals to be sentenced to death even if no "serious bodily harm or death were intended" and the defendants did not have the "mens rea of murderers". (People v. Sapp, supra, 31 Cal.4th at p.287.) The flaw in the Court's analysis is that it overlooks the example given above, the man who accidentally kills during the course of a robbery did not harbor malice -- the mens rea of a murderer – and did not intend either "serious bodily harm or death". He is guilty of first-degree murder only because of the felony-murder rule. The mail-bomb statute at issue in Cheely likewise created a category of felony murder and allowed anyone who fell within it to be sentenced to death. Both it and Penal Code section 190.2, subdivision (a)(3) create "a broad class, composed of persons of many different levels of culpability." Allowing juries "to decide who among them deserves death" is what creates "the possibility of aberrational decisions as to life or death" and violates the Eighth Amendment. (United States v. Cheely, supra, 36 F.3d at p. 1445.)

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[42] An appellant may challenge the constitutionality of the statutory scheme even if the particular unfairness described may not have occurred in his case. (United States v. Cheely, supra, 36 F.3d at p. 1444, n. 11.) A scheme that allows for the sort of arbitrary sentencing described in the text also allows for it in individual cases, albeit in more subtle forms that are not readily visible to those not participating in the deliberations.

In Coddington, the Court noted that the United States Supreme Court Supreme Court held that multiple murder is a constitutionally proper narrowing category in Lowenfield v. Phelps (1988) 484 U.S. 231. (People v. Coddington, supra, 23 Cal.4th at p. 656.) Not so. In Lowenfield, the question presented was whether, in a non-weighing state, an aggravating circumstance on which death maybe imposed may duplicate an element of a capital crime or, put another way, a special circumstance creating death eligibility (there, intentional murder with intent to kill more than one person). The Supreme Court held that such duplication was constitutionally permissible because, while the capital murder element, or special circumstance finding, accomplished the narrowing required by the Eighth Amendment, the question in the penalty phase was whether mitigation outweighed aggravation. (Id. at pp. 241-246.) The Court was simply not presented with the question whether the multiple-murder special circumstance adequately narrowed the class of persons eligible for the death penalty. That issue was neither raised by the defendant nor discussed by the Court.

For all of these reasons, Matthew respectfully requests that the Court revisit the merits of this argument. If it does, the special circumstance finding must be stricken, which shall render the judgment of death void. (See Godfrey v. Georgia, supra, 446 U.S. at pp. 422-33 [death sentence vacated where Supreme Court finds sole eligibility factor unconstitutionally broad]; Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312, 1322 [invalidation of sole special circumstance requires per se reversal].)

## XVIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MATTHEW'S TRIAL, VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ITS APPLICATION TO MATTHEW'S TRIAL REQUIRES REVERSAL OF THE PENALTY JUDGMENT.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Matthew presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that Matthew's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural

protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

### A. Matthew's Death Sentence Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As this Court has recognized, "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (Furman v. Georgia (1972) 408 U.S. 238, 313-314 (conc. opn. of White, J.); accord Godfrey v. Georgia (1980) 446 U.S. 420, 427 (plur. opn.).)" (People v. Edelbacher, supra, 47 Cal.3d at p. 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty: "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (Zant v. Stephens, supra, 462 U.S. at p. 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that

"[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (People v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Matthew the statute contained twenty-six special circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7," emphasis added.)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon, supra, 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court

has construed so broadly as to encompass virtually all intentional murders. (See People v. Hillhouse, supra, 27 Cal.4th at pp. 500-501, 512-515; People v. Morales (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first-degree murder that would not be capital crimes under section 190.2. (Shatz & Rivkind, The California Death Penalty Scheme: Requiem for Furman? (1977) 72 N.Y.U. L.Rev. 1283, 1324-1326.) It is quite clear that these theoretically possible noncapital first-degree murders represent a small subset of the universe of first degree murders. (Ibid.) Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In People v. Stanley (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in Pulley v. Harris (1984) 465 U.S. 37, 53. Not so. In Harris, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which

Matthew was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (Pulley v. Harris, supra, 465 U.S. at p. 52, n. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

### B. Matthew's Death Sentence Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (People v. Dyer (1988) 45 Cal.3d 26, 78.) Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance

on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence (People v. Walker (1988) 47 Cal.3d 605, 639 and n.10), or had a "hatred of religion" (People v. Nicolaus (1991) 54 Cal.3d 551, 581-582), or threatened witnesses after his arrest (People v. Hardy, supra, 2 Cal.4th at p. 204), or disposed of the victim's body in a manner that precluded its recovery (People v. Bittaker (1989) 48 Cal.3d 1046, 1110 and n. 35).

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California, supra, 512 U.S. at pp. 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue, as illustrated by this case, that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

> a) Because the defendant struck many blows and inflicted multiple wounds or because the defendant killed with a single execution-style wound[43];

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[43] See, e.g., People v. Morales, No. S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No.S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT160-61 (same). Compare, e.g., People v. Freeman, No.S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT 3026-27 (same).

b) Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification) or because the defendant killed the victim without any motive at all[44];

c) Because the defendant killed the victim in cold blood or because the defendant killed the victim during a savage frenzy[45];

d) Because the defendant engaged in a cover-up to conceal his crime or because the defendant did not engage in a cover-up and so must have been proud of it[46];

e) Because the defendant made the victim endure the terror of anticipating a violent death or because the defendant killed instantly without any warning[47];

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[44] See, e.g., People v. Howard, No.S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60(sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge). Compare, e.g., People v. Edwards, No.S004755, RT 10,544 (defendant killed for no reason); People v. Osband, No.S005233, RT 3650 (same); People v. Hawkins, No. S014199, RT 6801 (same).

[45] See, e.g., People v. Visciotti, No.S004597, RT 3296-97 (defendant killed in cold blood). Compare, e.g., People v. Jennings, No.S004754, RT 6755 (trial court finding that defendant killed victim in savage frenzy).

[46] See, e.g., People v. Stewart, No.S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No.S004464, RT 4192 (defendant did not seek aid for victim). Compare, e.g., People v. Adcox, No.S004558, RT 4607 (defendant freely informed others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[47] See, e.g., People v. Webb, No.S006938, RT 5302; People v. Davis, No.S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623. Compare, e.g.. People v. Freeman, No.S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

f) Because the victim had children or because the victim had not yet had a chance to have children[48];

g) Because the victim struggled prior to death or because the victim did not struggle[49];

h) Because the defendant had a prior relationship with the victim or because the victim was a complete stranger to the defendant[50].

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a) The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

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[48] See, e.g., People v. Zapien, No.S004762, RT 37 (Jan 23, 1987) (victim had children). Compare, e.g., People v. Carpenter, No.S004654, RT 16,752 (victim had not yet had children).

[49] See, e.g., People v. Dunkle, No.S014200, RT 3812 (victim struggled); People v. Webb, No. S006938, RT 5302 (same); People v. Lucas, No. S004788, RT 2998 (same). Compare, e.g., People v. Fauber, No.S005868, RT 5546-47 (no evidence of a struggle); People v. Carrera, No.S004569, RT 160 (same).

[50] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish (1990) 52 Cal.3d 648, 717 (same). Compare, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly[51];

b) The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire[52];

c) The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all[53];

d) The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

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[51] See, e.g., People v. Deere, No. S004722, RT 155-56 (victims were young, ages 2 and 6); People v. Bonin, No.S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); People v. Kipp, No. S009169, RT 5164(victim was a young adult, age 18); People v. Carpenter, No. S004654, RT 16, 752 (victim was 20), People v. Phillips, No. 21374 (26-year-old victim "in the prime of his life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345(61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No.S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was "elderly").

[52] See, e.g., People v. Clair, No.S004789, RT 2474-75 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S010723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

[53] See, e.g., People v. Howard, No.S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61(sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3544 (avoid arrest); People v. McLain, No.

circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day[54];

e) The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location[55].

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright, supra, 486 U.S. at p. 363 [discussing the holding in Godfrey v. Georgia, supra, 446 U.S. at p. 420].)

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S004370, RT 31 (revenge); People v. Edwards, No.S004755, RT 10544 (no motive at all).

[54] See, e.g., People v. Fauber, No.S005868, RT 5777 (early morning); People v. Bean, No. S004387, RT 4715 (middle of the night); People v. Avena, No. S004422, RT 2603-04 (late at night); People v. Lucero, No. S012568, RT4125-26 (middle of the day).

[55] See, e.g., People v. Anderson, No.S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787(same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41

### C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

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(city park); People v. Carpenter, No. S004654, RT 16,749-50 (forested area); People v. Comtois, No. S017116, RT 2970 (remote, isolated location).

### 1. Matthew's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated.

Matthew's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

These omissions were consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the United States Supreme Court's decisions in Apprendi v. New Jersey, supra, 530 U.S. 466 [hereinafter Apprendi]; Ring v. Arizona, supra, 536 U.S. 584 [hereinafter Ring]; and Blakely v. Washington (2004) 542 U.S. ___, 124 S.Ct. 2531 [hereinafter Blakely].

In Apprendi, the High Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (Apprendi v. New Jersey, supra, 530 U.S. at p. 478.)

In Ring, the High Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Ring v. Arizona, supra, 536 U.S. at p.

593.) The Court acknowledged that in a prior case reviewing Arizona's capital sentencing law (Walton v. Arizona (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id. at p. 598.) The Court found that in light of Apprendi, Walton no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Last year in Blakely, the High Court considered the effect of Apprendi and Ring in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (Blakely v. Washington, supra, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (Ibid.) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (Id. at p. 2543.)

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

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in Apprendi, Ring, and Blakely, and violates the federal constitution.

### a. In the wake of Apprendi, Ring, and Blakely, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[56] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a

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[56] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603(Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., §17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann.Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La.Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev.Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, §701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C.Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified LawsAnn., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex.Crim. Proc. Code Ann., § 37.071(c) (West 1993); State v. Pierre (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

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

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (People v. Fairbank, supra, 16 Cal.4th 1223; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), which was read to Matthew's jury (CT 789),"an aggravating factor is any *fact*, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88, emphasis supplied.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating facts must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[57] These factual determinations are essential prerequisites to death-eligibility, but do

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

not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[58]

In People v. Anderson (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (Pen. Code § 190.2(a)), Apprendi does not apply. After Ring, this Court repeated the same analysis in People v. Snow (2003) 30 Cal.4th 43 [hereinafter Snow], and People v. Prieto (2003) 30 Cal.4th 226 [hereinafter Prieto]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), Ring imposes no new constitutional requirements on California's penalty phase proceedings." (People v. Prieto, supra, 30 Cal.4th at 263.) This holding is based on a truncated view of California law. As section 190, subdivision (a), indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in Ring. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected the state's argument: "This argument overlooks Apprendi's instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' (Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151)". (Ring, supra, 124 S.Ct. at p. 2431.)

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[58] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown, supra, 40 Cal.3d at p. 541.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first-degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ring, supra, 530 U.S. at p. 604.) Section 190, subdivision (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither life without parole nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a mitigating circumstance. (See People v. Hernandez (2003) 30 Cal.4th 835 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency, while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances. There is no meaningful difference between the processes followed under each scheme. As such, this Court's reasoning in Snow and Prieto is faulty.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it –

must be found by a jury beyond a reasonable doubt." (Ring, supra, 530 U.S. at p. 604.) In Blakely, the High Court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (Blakely, supra, 124 S.Ct. at p. 2551.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is yes.

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

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

death sentence. And Blakely makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In Prieto, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (Tuilaepa v. California (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (People v. Prieto, supra, 30 Cal.4th at p. 263.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, e.g., People v. Duncan (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See State v. Ring (Az. 2003) 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."]; accord State v. Whitfield (Mo. 2003) 107 S.W.3d 253; State v. Ring, supra, 65 P.3d 915; Woldt v. People (Colo. 2003) 64 P.3d 256; Johnson v. State (Nev. 2002) 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements,

but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in Apprendi, Ring, and Blakely. In Blakely itself the State of Washington argued that Apprendi and Ring should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, Matthew submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The High Court rejected the state's contention, finding Ring and Apprendi fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (People v. Blakely, supra, 124 S.Ct. at p. 2538.) Thus, under Apprendi, Ring, and Blakely, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[59]

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[59] In People v. Griffin (2004) 33 Cal.4th 536, in this Court's first post-Blakely discussion of the jury's role in the penalty phase, the Court cited Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424,432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (People v. Griffin, supra, 33 Cal.4th at p. 595.) In Leatherman, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights? (Leatherman, supra, 532 U.S. at p. 429.)

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

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

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.' [Citation.] The

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This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in Blakely. Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the Court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (Id. at PP. 437, 440.) Leatherman thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the United States Constitution.

> notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.' (Ring, supra, 122 S.Ct. at p. 2442, quoting with approval Justice O'Connor's Apprendi dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the High Court stated in Ring, supra, 122 S.Ct. at pp. 2432, 2443:

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

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

**b. The requirements of jury agreement and unanimity.**

Matthew recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See People v. Bacigalupo, supra, 1 Cal.4th at p. 147; see also People v. Taylor (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, Matthew asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious, and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See Ballew v. Georgia (1978) 435 U.S. 223, 232-234; Woodson v. North Carolina, supra, 428 U.S. at p. 305.)[60]

With respect to the Sixth Amendment argument, the Court's reasoning and decision in Bacigalupo - particularly its reliance on Hildwin v. Florida (1980) 490 U.S. 638, 640 - should be reconsidered. In Hildwin, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (Id. at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in Ring makes the reasoning in Hildwin questionable, and undercuts the constitutional validity of this Court's ruling in Bacigalupo.[61]

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

[61] Matthew acknowledges that the Court recently held that Ring does not require a California sentencing jury to find unanimously the existence of an

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

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also People v. Wheeler, supra, 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[62] For example, in cases where a criminal defendant has been charged with

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aggravating factor. (People v. Prieto, supra, 30 Cal.4th at p. 265.) Appellant raises this issue to preserve his rights to further review.

[62] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a)(Michie 1993);

special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Cal. Pen. Code § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see Monge v. California, supra, 524 U.S. at p. 732; Harmelin v. Michigan, supra, 501 U.S. at p. 994) - and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see, e.g., Myers v. Ylst, supra, 897 F.2d at p. 421) - it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

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

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Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat.Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, §4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat.ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art.905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. CodeAnn. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H.Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat.Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op.1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. (Id. at p. 819.)

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

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (People v. Hawthorne, supra, 4 Cal.4th at p. 79; People v. Hayes, supra, 52 Cal.3d at p. 643.) However, Ring and Blakeley make clear that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh mitigating circumstances are prerequisite to considering whether death is the appropriate sentence in a California capital case.

These are precisely the type of factual determinations for which Matthew is entitled to unanimous jury findings beyond a reasonable doubt.

It has been held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (Brown v. Louisiana, supra, 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, supra, 524 U.S. at p. 732; see also Johnson v. Mississippi, supra, 486 U.S. at p. 584), the Sixth, Eighth, and Fourteenth Amendments require, a fortiori, jury unanimity on those factors warranting the death penalty. (But see People v. Taylor (1990) 52 Cal.3d 719, 749; People v. Bolin, supra, 18 Cal. 4th at pp. 335-336.) In the instant case, the jurors were specifically instructed that "[t]here is no requirement that all jurors unanimously agree on any matter offered in aggravation or mitigation." (RT 8127.) This instruction requires reversal of the death verdict. (Sullivan v. Louisiana, supra, 508 U.S. at pp. 278-281.) In any event, given the closeness of the penalty case here, it cannot be shown beyond a reasonable doubt that the error in admonishing against unanimity was harmless. (Chapman v. California, supra, 386 U.S. at pp. 23-24.)

### 2. The Due Process and the Cruel and Unusual Punishment Clauses of the state and federal constitutions require that the jury in a capital case be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty

#### a. Factual determinations.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to

be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (Speiser v. Randall (1958) 357 U.S. 513, 520-521.)

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

**b. Imposition of life or death.**

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (In re Winship, supra, 397 U.S. at pp. 363-364; see also Addington v. Texas (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (In re Winship, supra, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished

by weighing "three distinct factors: . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (Santosky v. Kramer (1982) 455 U.S. 743, 755; see also Matthews v. Eldridge (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," (Speiser v. Randall, supra, 375 U.S. at p. 525, how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See In re Winship, supra, 397 U.S. 364 [adjudication of juvenile delinquency]; People v. Feagley (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; People v. Burnick (1975) 14 Cal.3d 306 [same]; People v. Thomas (1977) 19 Cal.3d 630 [commitment as narcotic addict]; Conservatorship of Roulet (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

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

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed

> to exclude as nearly as possible the likelihood of an erroneous judgment." [citation]. The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (Santosky v. Kentucky, supra, 455 U.S. at p. 755, quoting Addington v. Texas, supra, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in Santosky. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (Santosky v. Kentucky, supra, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (In re Winship, supra, 397 U.S. at p. 363.)

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

The need for reliability is especially compelling in capital cases. (Beck v. Alabama, supra, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See Monge v. California, supra, 524 U.S. at p. 732.) In Monge, the Supreme Court expressly applied the Santosky rationale for the beyond a reasonable doubt burden of proof requirement in the penalty phase of capital trials: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to

exclude as nearly as possible the likelihood of an erroneous judgment.'" (Monge v. California, supra, 524 U.S. at p. 732, quoting Bullington v. Missouri (1981) 451 U.S. 430, 441, quoting in turn Addington v. Texas, supra, 441 U.S. at pp. 423-424) (emphasis added). The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

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

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

> arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment. (State v. Rizzo (Conn. 2003) 833 A.2d 363, 408, n.37.)

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

### 3. Even if proof beyond a reasonable doubt were not the constitutionally required burden of persuasion for finding (1) that an aggravating factor exists, (2) that the aggravating factors outweigh the mitigating factors, and (3) that death is the appropriate sentence, proof by a preponderance of the evidence would be constitutionally compelled as to each such finding

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence

burden of proof. (See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; Murray's Lessee v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (Hicks v. Oklahoma, supra, 447 U.S. at p. 343.)

Accordingly, Matthew respectfully suggests that People v. Hayes, supra, 52 Cal.3d at p. 643 and other cases – in which this Court did not consider the applicability of section 520 – were erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, Matthew's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing Matthew to death without adhering to the procedural protection afforded by state law violated federal due process. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (Sullivan v. Louisiana, supra, 508 U.S. at pp. 281-282.) That should be the result here, too.

### 4. Some burden of proof is required in order to establish a tie-breaking rule and ensure even-handedness

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (People v. Hayes, supra, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (Eddings v. Oklahoma, supra, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (Proffitt v. Florida (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (Mills v. Maryland, supra, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

### 5. Even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (Sullivan v. Louisiana, supra, 508 U.S. 275.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and

each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (Sullivan v. Louisiana, supra, 508 U.S. at pp. 281-282.)

### 6. California law violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating factors.

The Eighth and Fourteenth Amendments guarantee in a capital case the right to meaningful appellate review of a death sentence. (California v. Brown, supra, 479 U.S at p. 543; Gregg v. Georgia, supra, 428 U.S. at p. 195.) Under the California capital system, once a defendant is determined to be death-eligible, the jury has virtually total discretion to weigh aggravating and mitigating circumstances. (Tuilaepa v. California, supra, 512 U.S. at pp. 979-980.) There can be, therefore, no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316.)

Here, Matthew has raised evidentiary and instructional errors that had the

potential or likelihood to mislead the jurors as to the proper scope of their penalty considerations. However, the instructions provided did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived Matthew of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (California v. Brown, supra, 479 U.S. at p. 543; Gregg v. Georgia, supra, 428 U.S. at p. 195.) Without written findings, he cannot obtain a constitutionally adequate appellate review in this case.

To be sure, the Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings. (People v. Fauber (1992) 2 Cal.4th 792, 859.) However, it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (In re Sturm (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id. at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also, e.g., People v. Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen Code § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (See, e.g., Harmelin v. Michigan, supra, supra, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the

Equal Protection Clause of the Fourteenth Amendment (see Myers v. Ylst, supra, 897 F.2d at p. 421; Ring v. Arizona, supra, 536 U.S. 584), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. Thus, in Mills v. Maryland, supra, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (Id. at p. 383, n. 15. ) The mere fact that a capital-sentencing decision is "normative" (People v. Hayes, supra, 52 Cal.3d at p. 643), and "moral" (People v. Hawthorne, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings.

Indeed, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-Furman state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[63] California's failure to require such

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

findings renders its death penalty procedures unconstitutional.

Moreover, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As Ring v. Arizona has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence - including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective factfinding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

### 7. California's Death Penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty

As discussed in Argument XIII, above, California does not provide for intercase proportionality review in capital cases. This failure violates Matthew's Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

As discussed in Argument XIII, the Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence

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Ann., § 39-13-204(g) (1993); Tex. Crim.Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D)(Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (Barclay v. Florida (1976) 463 U.S. 939, 954, plur. opn. [parenthetical in original, quoting Proffitt v. Florida, supra, 428 U.S. at p. 251, opn. of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See Gregg v. Georgia, supra, 428 U.S. at p. 198; Proffitt v. Florida, supra, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In Pulley v. Harris, supra, 465 U.S. 37, the United States Supreme Court ruled that the 1977 California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Id. at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See People v. Farnam (2002) 28 Cal.4th 107, 193.)

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

> [I]n Pulley v. Harris, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" Id. at 53, [], quoting Harris v. Pulley, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in Pulley v. Harris. (Tuilaepa v. California, supra, 512 U.S. at p. 995, dis. opn. of Blackmun, J.)

The time has come for Pulley v. Harris to be reevaluated, since, as this case illustrates, the 1978 California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (Furman v. Georgia, supra, 408 U.S. at p. 313, conc. opn. of White, J.). Comparative case review is the most rational - if not the only - effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[64]

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

Many states have judicially instituted similar review. (See State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433, 444;

The capital sentencing scheme in effect at the time of Matthew's trial was the type of scheme that the Pulley Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Pulley v. Harris, supra, 465 U.S. at p. 51.)

Indeed, even in civil cases, uniformity and reliability of monetary awards by juries are subject to modification by the judge in light of experience with compensatory awards in general. (Consorti v. Armstrong World Industries, Inc. (2nd Cir. 1995) 72 F.3d 1003, 1009, vacated on other grounds in (1996) 518 U.S. 1031.) The same considerations of uniformity and fairness should apply even more strongly in his context where much more than monetary compensation is at stake, and where the Sixth, Eighth and Fourteenth Amendments bar any arbitrariness or unreliability in the determination. (But see People v. Clark (1993) 5 Cal.4th 950, 1039.)

If such a review were undertaken here, it is likely that a disparity would be found. Even a cursory review reveals numerous instances wherein the prosecution did not seek the death penalty, even in cases in which the defendant, like Matthew was tried and convicted of three first-degree premeditated murder charges. (See, e.g., People v. Bobo (1990) 229 Cal.App.3d 1417 [defendant tried and convicted of three first-degree premeditated murder charges with true finding on multiple murder special circumstance, but Sacramento County District Attorney did not seek death penalty]; People v. Son (2000) 79 Cal.App.4th 224 [defendant tried and convicted of multiple murder with special circumstance, but District Attorney for Los Angeles County did not seek death penalty]; People v. Hitchings (1997) 59 Cal.App.4th 915 [same – Humboldt County]; People v. Woods (1993) 12

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People v. Brownell (Ill. 1980) 404 N.E.2d 181, 197; Brewer v. State (Ind. 1980) 417 NE.2d 889, 899; State v. Pierre (Ut 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 890; Collins v. State (Ark. 1977) 548 S.W.2d 106, 121.)

Cal.App.4th 1139 [same – Solano County]; People v. Rupe (1988) 206 Cal.App.3d 1537 [same – Shasta County]; People v. Orienthal J. Simpson, Los Angeles County Super. Ct. No. BA097211.)[65] The failure of the California law to require such a review vitiates the death judgment in this case.

### 8. The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by Matthew's jury

Penal Code section 190.3, factor (d) permits the jury to consider "whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance;" factor (f) permits the jury to consider "whether or not the offense was committed under circumstances which the defendant *reasonably believed* to be a moral justification or extenuation for his conduct" and factor (g) permits the jury the consider "whether or not the defendant acted under *extreme* duress or under the substantial domination of another person." (Emphasis supplied.)

Adjectives such as "extreme" and "reasonably believed" in the list of mitigating factors inform the jury that lesser degrees of duress and mental disturbance, and an unreasonable belief of moral justification cannot be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Tennard v. Dretke, supra, 542 U.S. ____ 124 S.Ct. at p. 2570; Mills v. Maryland, supra, 486 U.S. at p. 367; Lockett v. Ohio, supra, 438 U.S. at p. 586.) These instructions are plainly inconsistent with the federal constitutional requirement that the jury must consider mitigating evidence concerning the offender or the offense (Lockett v. Ohio, supra, 438 U.S.

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65 While there are numerous additional cases in which the prosecution agreed not to seek the death penalty in exchange for some other benefit, such as the

586), and the state law requirement, guaranteed by the federal due process clause (Hicks v. Oklahoma, supra, 447 U.S. at p. 346), that the jury determine whether death is the appropriate penalty (People v. Brown, supra, 40 Cal.3d at p. 512). Such wording also renders these factors unconstitutionally vague, arbitrary, capricious, and/or incapable of principled application. (Maynard v. Cartwright, supra, 486 U.S. at pp. 361-364; Godfrey v. Georgia, supra, 446 U.S. at pp. 420, 433.) The jury's consideration of these vague factors, in turn, introduces impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Cases holding that the word "extreme" need not be deleted (see, e.g., Blystone v. Pennsylvania, supra, 494 U.S. at p. 308; Hendricks v. Vasquez (9th Cir. 1993) 974 F.2d 1099, 1109; People v. Benson, supra, 52 Cal. 3d at pp. 803-804), are based on the assumption that a jury will understand that, despite the reference to "extreme" in factor (f), duress to a lesser degree may be considered under factor (k). Empirical research demonstrates that this assumption is wrong. A survey conducted by Professor Hans Zeisel tested the understanding of the Illinois standard penalty phase jury instructions among a pool of prospective jurors. Seven of eighteen questions concerned mitigating factors other than those listed in the instructions. Between 38.9 and 67.7 percent of the respondents answered these instructions incorrectly, concluding that a juror could not rely on unlisted mitigating factors to vote for a sentence less than death. On most of these questions, more than half of the respondents answered incorrectly. (See United States ex rel. Free v. Peters (1994) 806 F. Supp. 705, 723 (N.D. Ill. 1992), reversed, (7th Cir. 1993) 12 F. 3d 700.) The inclusion of this language thus prevented the jury from considering mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (Tennard v. Dretke, supra, 542 U.S. ____

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defendant waiving jury trial, none of the above-entitled cases involved any such deals.

124 S.Ct. at p. 2570; Mills v. Maryland, supra, 486 U.S. at p. 367; Lockett v. Ohio, supra, 438 U.S. at pp. 604-606.)

### D. Failure To Require Instruction On Presumption Of Life.

In accordance with customary state law practice, the trial court did not instruct the jury that the law presumes that life without parole is the appropriate penalty. In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See Estelle v. Williams (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, California law does not require that the jury be instructed as to the presumption of life. (See, e.g., People v. Arias (1996) 13 Cal.4th 92, 190; see also Note, The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. Delo v. Lashley (1983) 507 U.S. 272.)

Matthew submits that the omission of an instruction that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated his right to due process of law (U.S. Const., Amend. XIV; Cal. Const. art. I, §§ 7, 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. VIII, XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7).

In People v. Arias, supra, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (Id. at p. 190.) However, as the other subsections

of this argument, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

### E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants

As discussed in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v. California, supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

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

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without

showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, supra, 17 Cal.3d 236; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a death sentence more reliable.

In People v. Prieto, supra, 30 Cal.4th 226, as in People v. Snow, supra, 30 Cal.4th 43, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

However, as discussed above, in a capital sentencing context, there is no burden of proof at all, and the jurors need not agree on what aggravating

circumstances apply. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. As further discussed above, unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See People v. Allen (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in Allen that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In Allen, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

First, the Court distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (People v. Allen, supra, 42 Cal. 3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern

of verdicts. (McCleskey v. Kemp, supra, 481 U.S. at p. 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (Coker v. Georgia (1977) 433 U.S. 584) or offenders (Enmund v. Florida, supra, 458 U.S. at p. 782; Ford v. Wainwright, supra, 477 U.S. 399; Atkins v. Virginia, supra, 536 U.S. 304.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (McCleskey v. Kemp, supra, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

The second reason offered by Allen for rejecting the equal protection claim was that the range available to a trial court is broader under the determinate sentencing law than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (People v. Allen, supra, 42 Cal. 3d at p. 1287.) In truth, the difference between life and death is a chasm so deep that we cannot see the

bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation omitted). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright, supra, 477 U.S. at p. 411.) "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina, supra, 428 U.S. at p. 305, opn. of Stewart, Powell, and Stephens, J.J.; see also Reid v. Covert (1957) 354 U.S. 1, 77, conc. opn. of Harlan, J; Kinsella v. United States (1960) 361 U.S. 234, 255-256, conc. & dis. opn. of Harlan, J., joined by Frankfurter, J.; Gregg v. Georgia, supra, 428 U.S. at p. 187, opn. of Stewart, Powell, and Stevens, J.J.; Gardner v. Florida, supra, 430 U.S. at pp. 357-358; Lockett v. Ohio, supra, 438 U.S. at p. 605, plur. opn.; Beck v. Alabama, supra, 447 U.S. at p. 637; Zant v. Stephens, supra, 462 U.S. at pp. 884-885; Turner v. Murray (1986) 476 U.S. 28, plur. opn., quoting California v. Ramos (1983) 463 U.S. 992, 998-999; Harmelin v. Michigan, supra, 501 U.S. at p. 994; Monge v. California, supra, 524 U.S. at p. 732.) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in Allen relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (People v. Allen, supra, 42 Cal.3d at p. 1287.) The distinction drawn by the Allen majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the determine sentencing law on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code §

190.3, subds. (a) through (j) with Calif. Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (Bush v. Gore (2000) 531 U.S. 98, 105-106.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., Atkins v. Virginia, supra, 536 U.S. 304.)

Nor can this fact justify the refusal to require written findings by the jury – the sentencer in death penalty cases (People v. Allen, supra, 42 Cal.3d at p.186) – or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (Ring v. Arizona, supra, 536 U.S. at p. 584.) California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants

violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., Mills v. Maryland, supra, 486 U.S. at p. 374; Myers v. Ylst, supra, 897 F.2d at p. 421; Ring v. Arizona, supra, 536 U.S. at p. 584.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (Monge v. California, supra, 524 U.S. at p. 721.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

### F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. (See Ring v. Arizona, supra, 536 U.S. at p. 618, conc. opn, of Breyer, J.; People v. Bull (Ill. 1998) 705 N.E.2d 824, dis. opn. of (Harrison, J.) And, as the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that

> abolitionist states include all of the major democracies except some of the United States, India and Japan . . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran. (Minister of Justice v. Burns (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91).

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, Matthew raises this claim under the Eighth Amendment as well. (See Atkins v. Virginia, supra, 536 U.S. at p. 316, n. 21; Stanford v. Kentucky, supra, 492 U.S. at pp. 389-390, dis. opn. of Brennan, J.)

**1. International Law.**

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., Art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[66] The United States Court of

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[66] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1). ) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in Frolova v. U.S.S.R. (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty,

Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (United States v. Duarte-Acero (11th Cir. 2000) 208 F.3d 1282, 1284; but see Beazley v. Johnson (5th Cir. 2001) 242 F.3d 248, 267-268.)

Matthew's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on Matthew constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (People v. Ghent, supra, 43 Cal.3d at pp. 778-779; People v. Hillhouse, supra, 27 Cal.4th at p. 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See United States v. Duarte-Acero, supra, 208 F.3d at p. 1284; McKenzie v. Day (9th Cir. 1995) 57 F.3d 1461, 1487, dis. opn. of Norris, J.) Thus, Matthew requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

**2. The Eighth Amendment.**

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky, supra, 492 U.S. at p. 389, dis. opn. of Brennan,

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which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. (See Quigley, Human Rights Defenses in U.S. Courts (1988) 20 Hum. Rts. Q. 555, 581-582).

J.; Thompson v. Oklahoma, supra, 487 U.S. at p. 830, plur. opn.) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[67]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (Miller v. United States (1870) 78 U.S. 268, 315, dis. opn. of Field, J., quoting 1 Kent's Commentaries 1; Hilton v. Guyot (1895) 159 U.S. 113, 163, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (Miller v. United States, supra, 78 U.S. at pp. 315-316, n. 57, dis. opn. of Field, J.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles, supra, 356 U.S. at p. 100. And if the

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[67] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries.")

standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See Atkins v. Virginia, supra, 536 U.S. at p. 316, n. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; Thompson v. Oklahoma, supra, 487 U.S. at p. 830, n. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"]). Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Hilton v. Guyot, supra, 159 U.S. 113; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Matthew's death sentence should be set aside.

## XIX. THE METHOD OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION UPON CRUEL AND UNUSUAL PUNISHMENTS.

## A. Introduction.

In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death by standards established under the direction of the Department of Corrections." (Pen. Code § 3604, subdivision (a).) The 1992 legislation allowed the inmate to select either lethal gas or lethal injection, and provided that if the inmate made no selection, execution would be by lethal injection.[68] Previously, the only method of execution was lethal gas.[69]

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[68] In its entirety, this section now provides as follows:

> (a) The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.
> (b) Persons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. This choice shall be made in writing and shall be submitted to the warden pursuant to regulations established by the Department of Corrections. If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant issued following the operative date of this subdivision, the penalty of death shall be imposed by lethal injection.
> (c) Where the person sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the inmate again shall have the opportunity to elect to have punishment imposed by lethal gas or lethal injection, according to the procedures et forth in subdivision (b).
> (d) Notwithstanding subdivision (b), if either manner of execution described in subdivision (a) is held invalid, the punishment of death shall be imposed by the alternative means specified in subdivision (a).

[69] To date, Matthew has not made an election to be executed by lethal gas. Consequently, the only method available to the State for executing him is by lethal injection. Matthew therefore has standing to challenge his impending execution

California's execution procedures violate the federal constitution in two respects. First, the State has failed to comply with the statutory requirement that standards for lethal injection be established by the Department of Corrections. (Cal. Pen. Code § 3604, subd. (a).) Second, both of the statutory methods of execution constitute cruel and unusual punishment in violation of Matthew's rights under the Eighth Amendment. While Matthew recognizes that this Court has rejected similar Eighth Amendment challenges to the California's execution procedures (see, e.g., People v. Samayoa (1997) 15 Cal.4th 795, 863), he respectfully requests reconsideration and also raises the issue here to preserve it for federal review.

### B. The Department Of Corrections' Failure To Adopt The Regulations Mandated By Penal Code Section 3604 Violates Matthew's Right To Procedural Due Process.

The Fourteenth Amendment guarantees that no person will be deprived of life, liberty, or property without due process of law. (U.S. Const., Amend. XIV.) To establish a violation of the right to procedural due process, the complaining party must show: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. (Bank of Jackson County v. Cherry (11th Cir. 1993) 980 F.2d 1362, 1366.) A capital appellant facing execution has a constitutionally protected interest in life that is not extinguished by his judgment and sentence. (Ohio Adult Parole Authority v. Woodward (1998) 523 U.S. 272, 281; see also Id. at p. 288, conc. opn, of O'Connor, J.) The State of California is plainly attempting to deprive Matthew of

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by this method as a violation of his rights under the federal constitution. The fact that Matthew has the option to choose lethal gas is legally irrelevant. The state

life and must accordingly do so in accordance with procedures which accord with the requirements of due process. As the following discussion demonstrates, the procedures adopted by the state were and are constitutionally inadequate.

When a statute requires a regulatory agency to adopt standards to guide the performance of specified actions, the agency's failure to adopt such standards or to comply with the procedures required for adoption of standards prior to taking those actions violates the guarantee of procedural due process. (See, e.g., Marshall v. Union Oil (9th Cir. 1980) 616 F.2d 1113, 1116.) In California, all regulations and other standards of general application employed by a governmental agency must be adopted pursuant to the procedures set forth in the state Administrative Procedures Act (hereinafter "the Act." (Gov't Code § 11342, subd. (g).) The Act mandates that rigorous procedures be observed prior to the adoption of regulations, including public notice and hearings, legal review, and a public comment period, followed by filing of the regulation with the Secretary of State. (See, e.g., Gov't Code §11346.4, et seq.) Rules adopted without complying with the Act are invalid and may not be enforced. (Gov't Code §11340.5.)

To counsel's knowledge, the Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injections or with the provisions of the Administrative Procedures Act. The only regulation in the California Code of Regulations which even mentions the words "lethal injection" is 15 C.C.R. §3349. This section merely sets forth the procedures and departmental forms required for a Death Row inmate's request for either lethal injection or lethal gas and therefore does not comply with the requirements of section 3604, subdivision (a). The only other information dealing with the subject which is available from the Department of Corrections is a brief document, dated March, 1996, which merely provides a vague description of the Department's lethal injection procedures. The document,

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may not cloak an unconstitutional cruel and unusual punishment in the mantle of

similar in tone to a press release, neither states the source of the information it contains nor refers to any official regulations or rules. In pertinent part, this document states as follows:

> The inmate is connected to a cardiac monitor which is connected to a printer outside the execution chamber. An IV is started in two usable veins and a flow of normal saline solution is administered at a slow rate. [One line is held in reserve in case of a blockage or malfunction in the other.] The door is closed. The warden issues the execution order.
> In advance of the execution, syringes containing the following are prepared:
>
> 5.0 grams of sodium pentothal in 20-25 cc of diluent
> 50 cc of pancuronium bromide
> 50 cc of potassium chloride
>
> Each chemical is lethal in the amounts administered.
> At the warden's signal, sodium pentothal is administered, then the line is flushed with sterile normal saline solution. This is followed by pancuronium bromide, a saline flush, and finally, potassium chloride. As required by the California Penal Code, a physician is present to declare when death occurs. (California Department of Corrections, http://www.cdc.state.ca.us/issues/capital/capital4.htm; see also In re Carpenter, Petition for Habeas Corpus, S083246.)

This document obviously does not comply with the provisions of the Act. No notice appears to have been given to the public prior to its adoption, nor is Matthew aware that any hearing or public comment period preceded its adoption either. The document does not appear to have been published or filed with the Secretary of State, nor does it appear to have been vetted by the Office of Administrative Law. In addition, the document itself does not even purport to be a regulation. By its own terms, it does not prescribe the procedures that must be used during an execution, but rather appears to describe for the press or public in general terms the procedures the department uses.

The foregoing document also fails to establish coherent standards for administering lethal injections. The document is extremely vague and general in

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"choice." (Dear Wing Jung v. United States (9th Cir. 1962) 312 F.2d 73, 75-76.)

its description. For example, it is not clear from the document how far "in advance of the execution" the drugs are prepared. No physical restraints are described. It is not clear how many people are present to conduct the executions, who these people are, what qualifications they must have, or what training they must have undergone.

Most significantly, the document does not define a set of procedures that will ensure that a condemned prisoner will be free from unnecessary suffering. The document's failure to prescribe even a minimal level of training for the personnel involved in administering the lethal injection raises a substantial and unnecessary risk that the subject will undergo extreme pain and suffering before and during his execution. If inadequately trained personnel improperly insert the catheter, the chemicals may be inserted into Matthew's muscle or other tissue rather than directly into his bloodstream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose. There also is the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The document does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the event of an emergency; instead, the document mandates only that a physician be present to declare death. In fact, medical doctors are prohibited from participating in executions pursuant to the ethical principles set forth in the Hippocratic Oath. The American Nurses Association also forbids members from participating in executions. This increases the chances of improper administration which could result in pain, an air embolism, the clotting of the catheter which would prevent injection, and heart failure. Furthermore, the document sets out specific dosages

of three drugs to be administered to all subjects, but different dosages affect different people in different ways, depending upon individual body weight, metabolism, and other medical conditions. Accordingly, there is a risk that the listed dosages may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

The document also does not outline the proper guidelines for the storage or the handling of the chemicals involved. Improperly stored and/or handled chemicals may cause unnecessary suffering. Sodium pentothal wears off quickly; and if not enough is given, it may paralyze the muscles of the prisoner and render him incapable of breathing while still conscious, causing panic and an excruciatingly arduous death.

Plainly, the procedures outlined in the document discussed above were not properly adopted as required by the statute and the Administrative Procedures Act. They are constitutionally inadequate under the Fourteenth Amendment as a violation of Matthew's right to procedural due process and also may not be enforced under state law. (Gov't Code §11340.5.)

### C. California's Lethal Injection Procedure Violates The Eighth Amendment Prohibition Against Cruel And Unusual Punishments.

California's lethal injection procedures also violate the Eighth Amendment ban on cruel and unusual punishments. The Eighth Amendment proscribes punishment that would inflict torture or a lingering death or involve the wanton infliction of pain. (In re Kemmler (1890) 136 U.S. 436, 447; Gregg v. Georgia, supra, 428 U.S. at p. 173; Hudson v. McMillian (1992) 503 U.S. 1.) The Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures. (Estelle v. Gamble

(1976) 429 U.S. 97.) It prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles, supra, 356 U.S. at p. 101.) To discern the "evolving standards of decency," courts look to objective evidence of how society views a punishment today. (Coker v. Georgia, supra, 433 U.S. at pp. 593-597; Enmund v. Florida, supra, 458 U.S. at p. 788-796.) In essence, "no court would approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives." (Furman v. Georgia, supra, 408 U.S. at p. 430.)

Death by lethal gas has been ruled cruel and unusual punishment. (Fierro v. Gomez (N.D. Cal. 1994) 865 F.Supp.1387, aff'd, 77 F.3d 301, 309, vacated & remanded 519 U.S. 918 (1996).) On October 15, 1996, the judgment of the Ninth Circuit was vacated in light of amendments to section 3604. (Gomez v. Fierro (1996) 519 U.S. 918.) In 1996, section 3604 was again amended, to provide that in default of an election by the inmate, the execution would be by lethal injection. However, lethal injection also results in precisely the kind of painful, agonizing, and lingering death which the Eighth Amendment prohibits.

In examining whether a method of execution is "unconstitutionally cruel," the court must examine the "degree of risk" involved in its administration. (Fierro v. Gomez, supra, 865 F.Supp. at p. 1411, discussing Campbell v. Wood (9th Cir. 1994) 18 F.3d 662.) Factors to be considered in this assessment include the amount of pain involved and the immediacy of unconsciousness. (Id. at pp. 1410-1411 [interpreting the authorities cited in Campbell].) The Fierro court interpreted Campbell to suggest that "the persistence of consciousness 'for over a minute' or for 'between a minute and a minute-and-a-half but no longer than two minutes' might be outside constitutional boundaries." (Id. at p. 1411.)

There have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological pain inflicted. (See In re Carpenter, Petition for Writ of Habeas Corpus, S083246.) In Oklahoma in 1992, for example, Robyn Lee Parks finally died after gasping, coughing and gagging

for eleven minutes after the drugs were first administered. One reporter who witnessed Parks' death wrote that the execution looked "painful and ugly and scary." "It was overwhelming, stunning, disturbing -- an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over." ("11-Minute Execution Seemingly Took Forever," Tulsa World, (Mar. 11, 1992) p. A13.) Stephen Peter Morin's execution technicians were forced to probe both of Morin's arms and one of his legs with needles for nearly 45 minutes before they found a suitable vein because of Morin's history of drug abuse. ("Murderer of Three Women is Executed in Texas," N.Y. Times (Mar. 14, 1985) p. 9.) Similarly, after repeated failures in trying to find a suitable vein, Randy Wools, a drug addict, eventually helped the execution technicians find a useable vein. ("Killer Lends a Hand to Find a Vein for Execution," L.A. Times (Aug. 21, 1986) p. 2.) It took nearly an hour to complete the execution of Elliot Rod Johnson due to collapsed veins. ("Addict is Executed in Texas for Slaying of 2 in Robbery," N.Y. Times (June 25, 1987) p. A24.)

In 1988, it took forty minutes after he was strapped to the execution gurney for prison personnel to pronounce Raymond Landry dead. It took twenty-four minutes after the drugs first started flowing into his arms. ("Drawn-out Execution Dismays Texas Inmates," Dallas Morning News (Dec. 15, 1988) p. 29A.) Two minutes after prison personnel administered the drugs, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. ("Landry Executed for '82 Robbery-Slaying," Dallas Morning News (Dec. 13, 1988) p. 29A.) The curtain separating the witnesses from the inmate was then closed, and not reopened for fourteen minutes while the execution team reinserted the catheter into the vein. (Ibid.) A spokesman for the Texas Department of Correction, Charles Brown [sic], said, "There was something of a delay in the execution because of what officials called a 'blowout.' The syringe came out of

the vein, and the warden ordered the (execution) team to reinsert the catheter into the vein." (Ibid.)

Medical staff took more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were kept behind a drawn curtain, but reported hearing Rector utter eight loud moans. During the ordeal Rector helped the medical personnel find a vein. The administrator of State's Department of corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein. The difficulty in finding a suitable vein was later attributed to Rector's bulk and his regular use of anti-psychotic medication. ("Rector, 40, Executed for Officer's Slaying," Ark. Democrat Gazette (Jan. 25, 1992) p. 1; "Rector's Time Came, Painfully Late," Ark. Democrat Gazette (Jan. 26, 1992) p. 1B; Frady, "Death in Arkansas," The New Yorker (Feb. 22, 1993) p. 105.)

Billy Wayne White was pronounced dead some 47 minutes after being strapped to the execution gurney. ("Another U.S. Execution Amid Criticism Abroad," N.Y. Times (April 24, 1992) p. B7.) The delay was caused by difficulty finding a vein; White had a long history of heroin abuse. (Ibid.) During the execution, White also attempted to assist the authorities in finding a suitable vein. (Ibid.)

The execution of John Wayne Gacy provides a similar example. After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that led into Gacy's arm and prohibiting any further passage. Blinds covering the window through which witnesses observed the execution were drawn, and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened and the execution process resumed. It took eighteen minutes to complete. Anesthesiologists blamed the problem on the inexperience of prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error. ("Gacy Lawyers Blast Method:

Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-Times (May 11, 1994) p. 5; "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-Times (May 11, 1994) p. 5; "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Tribune (May 11, 1994) p. 1.)

Seven minutes after the lethal chemicals began to flow into Emmitt Foster's arm, the execution was halted when the chemicals stopped circulating. ("Witnesses to a Botched Execution," St. Louis Post-Dispatch (May 8, 1995) p. 6B.) With Foster gasping and convulsing, the blinds were drawn so the witnesses could not view the scene. (Ibid.) Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. (Ibid.) Because they could not observe the entire execution procedure through the closed blinds, two witnesses later refused to sign the standard affidavit that stated they had witnessed the execution. (Ibid.) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (Ibid.) According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; it was so tight that the flow of chemicals into the veins was restricted. ("Too-Tight Strap Hampered Execution," St. Louis Post-Dispatch (May 5, 1995) p. B1; "Execution Procedure Questioned," Kansas City Star (May 4, 1995) p. C8.)

Richard Townes, Jr.'s execution was delayed for twenty-two minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. ("Store Clerk's Killer Executed in Virginia," N.Y. Times (Jan. 25, 1996) p. A19.)

It took one hour and nine minutes for Tommie J. Smith to be pronounced dead after the execution team began sticking needles into his body because of unusually small veins. ("Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding

Active Role in Execution," Indianapolis Star (July 19, 1996) p. A1.) For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. (Ibid.) The physician made two attempts to insert the tube in Smith's neck. (Ibid.) When that failed, an angiocatheter was inserted in Smith's foot. (Ibid.) Only then were witnesses permitted to view the process. (Ibid.) The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. ("Problem with Veins Delays Execution," Indianapolis News (July 18, 1996) p. 1.)

It took nearly an hour to find a suitable vein for the insertion of the catheter into Michael Eugene Elkins. ("Killer Helps Officials Find a Vein at his Execution," Chattanooga Free Press (June 13, 1997) p. A7.) It took nearly an hour to find a suitable vein for the insertion of the catheter. (Ibid.) Elkins tried to assist the executioners, asking "Should I lean my head down a little bit?" as they probed for a vein. (Ibid.) After numerous failures, a usable vein was finally found in Elkins' neck. (Ibid.)

The risk of such prolonged administration of the lethal injection is increased by California's lack of comprehensive standards in defining the procedures. In McKenzie v. Day, supra, 57 F.3d 1461 the Ninth Circuit held that execution by lethal injection under the procedures which had been defined in Montana was constitutional. The Court of Appeals explained that those procedures passed constitutional muster because they were "reasonably calculated to ensure a swift, painless death." (Id. at p. 1469) Such a statement cannot be made about the procedures in California. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to Matthew in a competent, professional manner by someone adequately trained to do so.

Similarly, in LaGrand v. Lewis (D. Ariz. 1995) 883 F.Supp. 469, aff'd (9th Cir. 1998) 133 F.3d 1253, the district court upheld the written Internal Management Procedures prescribing standards for the administration of lethal

injection because "they clearly indicate that executions are to be conducted under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to be used, and the presence of a physician is required." (Id. at 470.) Such procedures are not found in the California Code of Regulations or in the document released by the California Department of Corrections.

California's use of lethal injection in the administration of the death penalty fails to protect condemned prisoners from unnecessary pain and suffering, violating the Eighth Amendment of the Constitution. The risk of inflicting such cruel and unusual pain is enhanced with the lack of established, comprehensive protocols. (But see People v. Bradford (1997) 14 Cal.4th 1005, 1059.) Accordingly, Matthew's death judgment must be vacated and must not be carried out.

## XX. THE TRIAL COURT'S RESTITUTION ORDERS WERE UNAUTHORIZED AND MUST BE STRICKEN.

The trial court imposed a $10,000 restitution fine under Penal Code section 1202.4. (CT 799, 806.) In addition, the court ordered Matthew to pay a total of $14,178.73 restitution to the Victim/Witness program to reimburse it for compensating the victims' families for their losses resulting from the crimes. (CT 799, 806.) As explained below, the court's restitution orders were unauthorized and must be stricken.

Both the state and federal constitutions prohibit *ex post facto* laws that inflict a greater punishment than authorized when the crime was committed. (U.S. Const., Art. 1, §§ 9-10; Calif. Const., Art. I, § 9; see, e.g., Lindsey v. Washington (1937) 301 U.S. 397; Tapia v. Superior Court (1991) 53 Cal.3d 282, 298.) Restitution is criminal punishment. (People v. Hansen (2000) 23 Cal.4th 355, 357; People v. Zito (1992) 8 Cal.App.4th 736, 741) Accordingly, the *ex post facto* clause applies to restitution fines. (People v. Zito, supra, at p. 741; see also People v. Hansen, supra, at p. 357 [restitution fine is punishment for double jeopardy

purposes].) Therefore, the restitution statutes that existed at the time of the charged December 1993 crimes applied in this case rather than the statutes that existed at the time of the 1999 sentencing hearing. (See People v. Zito, supra, at p. 741.)

In December of 1993, Penal Code section 1202.4, subdivision (a) provided in relevant part as follows:

> (a) In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. Such restitution fine shall be in addition to any other penalty or fine imposed and shall be ordered regardless of the defendant's present ability to pay. However, if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the fine. When such a waiver is granted, the court shall state on the record all reasons supporting the waiver.

Government Code section 13967 provided in relevant part as follows:

> (a) Upon a person being convicted of any crime in the State of California, the court shall, in addition to any other penalty provided or imposed under the law, order the defendant to pay restitution in the form of a penalty assessment in accordance with Section 1464 of the Penal Code and to pay restitution to the victim in accordance with subdivision (c). In addition, if the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than two hundred dollars ($200), subject to the defendant's ability to pay, and not more than ten thousand dollars ($10,000). In setting the amount of the fine for felony convictions, the court shall consider any relevant factors including, but not limited to, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Except as provided in Section 1202.4 of the Penal Code and subdivision (c) of this section, under no circumstances shall the

court fail to impose the separate and additional restitution fine required by this section. This fine shall not be subject to penalty assessments as provided in Section 1464 of the Penal Code.

(b) Except as provided in subdivision (c), the fine imposed pursuant to this section shall be deposited in the Restitution Fund in the State Treasury. Notwithstanding Section 13340, the proceeds in the Restitution Fund are hereby continuously appropriated to the board for the purpose of indemnifying persons filing claims pursuant to this article. However, the funds appropriated pursuant to this section for administrative costs of the State Board of Control shall be subject to annual review through the state budget process.

(c) In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, *in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim*. . . . Notwithstanding subdivision (a), restitution shall be imposed in the amount of the losses, as determined. The court shall order full restitution unless it finds clear and compelling reasons for not doing so, and states them on the record. A restitution order imposed pursuant to this subdivision shall identify the losses to which it pertains, and shall be enforceable as a civil judgment. The making of a restitution order pursuant to this subdivision shall not affect the right of a victim to recovery from the Restitution Fund in the manner provided elsewhere, except to the extent that restitution is actually collected pursuant to the order. Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained by the victim against the defendant arising out of the crime for which the defendant was convicted. . . .

Rather than applying the foregoing statutes, it clearly appears that the trial court applied the law that existed at the time of sentencing. At the time of the 1999 sentencing, Penal Code section 1202.4, cited by the trial court, provided in relevant part as follows:

(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.

(2) Upon a person being convicted of any crime in the State of California, the court shall order the defendant to pay a fine in the form of a penalty assessment in accordance with Section 1464.

(3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following:

(A) A restitution fine in accordance with subdivision (b).

(B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.

(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.

(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor. . . .

(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two-hundred-dollar ($200) or one-hundred-dollar ($100) minimum.

(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the two-hundred-dollar ($200) or one-hundred-dollar ($100) minimum, the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in

> the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required. . . .
>
> (f) In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . .
>
> (2) Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of any third party. Restitution ordered pursuant to this subdivision shall be ordered to be deposited to the Restitution Fund to the extent that the victim, as defined in subdivision (k), has received assistance from the Victim Compensation Program pursuant to Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code. . . .

It is obvious that the court applied Penal Code section 1202.4, as it existed at the time of sentencing and as set forth above, in imposing restitution in Matthew's case. It ordered a restitution fine in the amount of $10,000. (CT 799, 806; Pen. Code § 1202.4, subd. (b)(1).) In addition, the court ordered $14,178.73 restitution to be paid to the Victim/Witness program for the compensation it paid to the victims in various amounts. (CT 799, 806; Pen. Code § 1202.4, subds. (a)(3) & (f)(2).)

The differences between the law that existed at the time of sentencing and the law that existed at the time the crimes were committed were significant. The court's orders exceed the maximum allowed under the statutes that existed at the time of the crimes and otherwise suffer from several flaws under that law.

Under former Government Code section 13967, subdivision (c), the victim witness program presumably qualified as a victim to whom direct restitution could be ordered. (See, e.g., People v. Kwolek (1995) 40 Cal.App.4th 1521, 1528-1535 [direct victim restitution under former Government Code section 13967, subdivision (c) may be made to State Board of Control, which provides funds to crime victims].) However, the total direct restitution order of $14,178.73 exceeded $10,000. Because subdivision (c) permitted direct victim restitution, but only "in lieu of all or a portion of the restitution fine" under subdivision (a), the additional $10,000 *fine* that the court imposed would have to be stricken. (CT 799, 806; see, e.g., People v. Kwolek, supra, 40 Cal.App.4th at p. 1536 [court must offset direct victim restitution under subdivision (c) against restitution fine under subdivision (a)]; People v. Zito, supra, 8 Cal.App.4th 736, 742 [same]; People v. Cotter (1992) 6 Cal.App.4th 1671, 1676 [same].)

Furthermore, the direct victim restitution order was based, in part, upon insufficient evidence. (See Gov't Code § 13967, subd. (c).) The written order reflects victim losses as follows: "$5,500 Regina Watchman; $270 Victoria Gonzalez for Joseph Perodia; $2,446 Merlene Besoni; $2.059.33 Alice Arnold; $663.40 Beulah John; $180 Alice Arnold for Mental Health; $3,060 Victoria Gonzalez for mental health." (CT 799, 806.) With respect to the $5500 reflected loss for Regina Watchman, however, it is a clerical error. The probation report indicates that Watchman's family did not submit any compensation claim. (Probation Report at p. 5.) The report does reflect that *Alice Arnold* claimed a *total* of $5,500 and the court so noted in its oral order. (Probation Report at p. 4 and attachments; RT 3989) However, the court's order *also* reflected loss to Arnold in the amount of $2,059.33, as compensated by the victim witness

program. (CT 799, 806; see also Probation Report at p. 5.) In other words, the order erroneously reflects a $5,500 loss to Regina Watchman; substituting – consistent with the court's oral statements and the evidence – Alice Arnold's name for Watchman's name, the order still erroneously reflects a total loss to Arnold of $7,559.33, when in fact her total claimed loss was $5,500.

On the other hand, the trial court could order a $10,000 restitution *fine* under subdivision (a). If so, however, the court was precluded from ordering additional direct victim restitution under subdivision (c). (People v. Kwolek, supra, 40 Cal.App.4th 1521, 1536; People v. Zito, supra, 8 Cal.App.4th 736, 742; People v. Cotter, supra, 6 Cal.App.4th at p. 1676.)

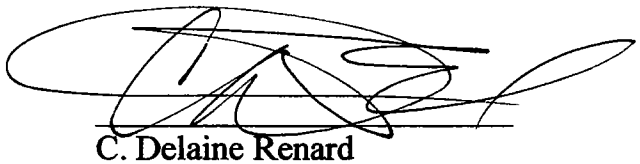
For all of these reasons, the court's restitution orders under the statutes that existed at the time of sentencing violated the ex post facto clauses of the state and federal constitutions, were unauthorized, and must be stricken. (People v. Scott (1994) 9 Cal.4th 331, 354 and n. 17 [unauthorized sentences are not waived for failure to object]; People v. Zito, supra, 8 Cal.App.4th at p. 741 [imposition of restitution in violation of *ex post facto* prohibition is unauthorized and therefore not waived for failure to object].)

## CONCLUSION

For the foregoing reasons, the judgments of conviction and the sentence of death must be reversed.

DATE: January 10, 2005

Respectfully submitted,



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## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 36, subdivision (b)(2), I certify that, according to Microsoft Word's word count program, the attached Appellant's Opening Brief contains 139, 832 words, excluding Tables of Contents and Authorities.

Executed on January 10, 2005, at Berkeley, California.

C. Delaine Renard

CERTIFICATE OF SERVICE

I, C. Delaine Renard, am over 18 years of age. My business address is 2625 Alcatraz Avenue, PMB 247, Berkeley, California 94705. I am not a party to this action.

On January 13, 2005, I served the within:

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true. Executed on January 13, 2005, in Berkeley, California.

C. Delaine Renard