IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ENRIQUE PARRA DUENAS, Defendant and Appellant.	No. S077033 Los Angeles County Superior Court No. BA109664

APPELLANT'S OPENING BRIEF

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

The Honorable Dewey F. Falcone, Judge

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	)	No. S077033
Plaintiff and Respondent,	)	
	)	Los Angeles
	)	County
v.	)	Superior Court
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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Enrique Parra Duenas, (hereinafter "appellant"), in Los Angeles County Superior Court, on January 22, 1998. The appeal is taken from a judgment that finally disposes of all issues between the parties. (CT 959-965; RT 983-984.)

STATEMENT OF THE CASE

On October 30, 1997, Los Angeles County Deputy Sheriff Michael Hoenig was shot to death while on patrol in the city of South Gate. On March 10 and 11, 1998, the Los Angeles County Grand Jury heard evidence that appellant murdered Deputy Hoenig. (CT 1-179.)[1] On March 11, 1998, the Grand Jury issued a one count indictment accusing appellant of murder in violation of Penal Code section 187(a)[2] by willfully and with malice aforethought murdering Deputy Hoenig. The indictment also alleged that appellant murdered Deputy Hoenig for the purpose of avoiding a lawful arrest, within the meaning of Penal Code section 190.2(a)(5), and also alleged that appellant knew that Deputy Hoenig was a peace officer engaged in the performance of his duties at the time appellant murdered him, within the meaning of Penal Code section 190.2(a)(7). The indictment also alleged that in the commission of this offense, appellant personally used a firearm, a .45 semi-automatic pistol, within the meaning of Penal Code sections 1203.06(a)(1) and 12022.5(a)(1), also causing the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). Further, the indictment alleged that in the commission of the offense a principal was armed with a firearm, within the meaning of Penal Code section 12022.(a)(1). (CT 182.)

On March 13, 1998, appellant was arraigned in superior court, and pleaded not guilty to Count 1 of the indictment. Appellant was represented by attorney Richard Leonard. (CT 185; 1 RT 1-2.) A Spanish interpreter was present.

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

[2] Hereinafter, all references to California statutes are to the Penal Code, unless otherwise noted.

Jury selection began on November 4, 1998. (CT 197; RT 102), and concluded on November 13, 1998. (CT 812; 4 RT 1016.) On November 12, 1998, during jury selection, the prosecutor put on the record his dealings with anticipated prosecution witness Nada Watson. Watson was then incarcerated, and the prosecutor stated he had not offered Watson any benefits for her cooperation in appellant's case, other than informing the judge in Watson's present case of her cooperation in appellant's case. (3 RT 896-900.)

Also on November 12, 1998, the prosecution filed a motion in limine to admit a computer-animated reconstruction of the crime. (CT 935-942.) On November 16, 1998, pursuant to the prosecution's "402" motion, the trial court heard testimony and argument on whether the jury should be allowed to view the animation video, which depicted the locations of the shooter in relation to Deputy Hoenig during the times shots were fired at him. (CT 826; 4 RT 1025-1079.) The trial court then granted the prosecution's motion to allow use of the animation videotape. (CT 827; 4 RT 1080.)

That same date the trial court also heard testimony and argument on whether the jury should be allowed to view a police interview of appellant videotaped on the morning of October 30, 1997, at the police station after appellant's arrest. (CT 827; 4 RT 1081-1118.) The trial court then granted the prosecution's motion to allow the jury to view the videotaped statement of appellant, finding that he had been properly *Mirandized* beforehand and there was no substantial lapse of time between the *Mirandizing* and the time the videotape was made. The trial court also found that appellant was competent at all times to understand what the *Miranda* warnings were, and that he was competent to waive his rights. (CT 827; 4 RT 1118.)

The guilt trial began on November 17, 1998. The prosecutor presented his opening argument, and defense counsel Leonard reserved argument. (CT 828; 4 RT 1131-1143.) The prosecution presented twenty-eight (28) witnesses

and concluded its presentation of evidence on November 24, 1998. That same date, the defense rested, without presenting any witnesses. (CT 836; 6 RT 1674.) Outside the presence of the jury, at the request of the prosecutor, the trial court asked appellant whether he understood that he had the right to testify, and was it his own decision not to testify. Appellant answered "Yes" to each question. The trial court stated that given these responses, it accepted appellant's decision not to testify. (6 RT 1675-1677.)

On December 1, 1998, the prosecution presented its closing argument. (CT 842; 7 RT 1747-1785.) Defense counsel Leonard waived closing argument. (CT 842; 7 RT 1785.) The court then instructed the jury, which retired at 3:15 p.m. to begin deliberations. (CT 813; 7 RT 1785-1788.)

On December 2, 1998, the jury resumed deliberations at 9:00 a.m., and returned a verdict at 1:32 p.m. The jury found appellant guilty of first degree murder and found the special circumstance allegations and the armed with a firearm allegation to be true. (CT 925; 7 RT 1792-1795.)

That same date, after the jury had been excused, defense counsel Leonard gave to the court a two-page letter written by appellant entitled "Motion to Remove Court Appointed Counsel for Gross Incompetence, and Conflict of Interest, and for the Court to Grant a Mistrial in the above styled Case." The court, after reading the letter, stated it would have to make some inquiries of appellant, outside the presence of the prosecutor, in effect holding a *Marsden* hearing. (7 RT 1796-1797.) Outside the presence of the jury and of the prosecutor, appellant explained his position to the court as expressed in the letter. (7 RT 1800-1803.) After listening to appellant, and to statements made by defense counsel Leonard, the trial court denied the motion by appellant for a mistrial, and denied the motion to remove counsel. The court found there was "a lack of sufficient showing to justify Mr. Leonard's removal." (7 RT 1811-1812.)

The penalty phase trial began on December 4, 1998. Both parties presented their opening arguments. (CT 926; 7 RT 1814-1819.) On that same date, the prosecution presented victim impact testimony by six (6) witnesses. (CT 926; 7 RT 1820-1916.) The defense called six (6) witnesses in support of appellant's case in mitigation. (CT 926; 7 RT 1918-1949.)

On December 7, 1998, the defense called an additional three (3) witnesses, and rested. (CT 943; 8 RT 1953-1962.) Outside the presence of the jury, the trial court again informed appellant that he had the right to testify regarding anything he felt the jury should consider in deciding the punishment to impose on him. Appellant stated he understood that right and that he did not want to testify. (8 RT 1963-1964.)

That same date, both parties presented their closing arguments and the court instructed the jury. (CT 943; 8 RT 1971-2025.) The jury retired at 2:15 p.m. to begin deliberations. The jury reached a penalty verdict at 3:25 p.m., 70 minutes later. The trial court sealed the verdict for reading on December 8, 1998. (CT 943: 8 RT 2026.) On December 8, the verdict was read. The jury sentenced appellant to death. The jurors were individually polled and confirmed their votes. (CT 950; 8 RT 2027-2028.)

On January 15, 1999, appellant filed a motion to reduce the penalty to life without the possibility of parole. (CT 954-955.) On January 22, 1999, the trial court heard arguments on the defense motion, and then denied the motion to reduce the penalty. (CT 983; 8 RT 2058-2060.) The trial court imposed a sentence of death. (CT 983; 986; 8 RT 2063-2064.) The court filed its order of commitment/judgment of death that same day. (CT 959-965.)

STATEMENT OF THE FACTS

GUILT TRIAL

Introduction

While on patrol in South Gate on October 30, 1997, Los Angeles County Deputy Sheriff Michael Hoenig was shot multiple times and died at the scene. Eyewitness testimony, ballistics and fingerprint evidence, and admissions by appellant were offered to prove that appellant killed Deputy Hoenig by shooting him with a .45 caliber semiautomatic pistol that belonged to appellant's uncle. Investigating officers who observed appellant at length shortly after his arrest believed that appellant was under the influence of methamphetamine at the time he shot Deputy Hoenig. A blood sample taken from appellant shortly after his arrest confirmed this. Appellant himself did not testify, and defense counsel did not make an opening or closing statement or put on any defense witnesses.

Testimony of Eyewitnesses

Nada Watson

Nada Watson, a prostitute, was standing at the intersection of Long Beach Boulevard and Seminole Avenue in South Gate a little after 1:00 a.m. on October 30, 1997, with a date. Deputy Sheriff Hoenig pulled up in his patrol car and Watson went over to talk with him. (5 RT 1185-1186; 1190.) While Watson and Deputy Hoenig were talking, appellant rode by on a bicycle going south on Long Beach Boulevard.[3] Watson had seen appellant a couple of times before, at a "dope house" on Stanford Avenue, including earlier that evening. When Watson saw appellant at that time, he said he had a gun in his

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[3] Watson identified appellant in court as the person who was riding the bicycle. (5 RT 1196.)

belt. Watson thought appellant was "jiving," because he was "nervous and everything." She had left the dope house without seeing a gun. If she had seen appellant with a gun, she would have mentioned this to Deputy Hoenig. (5 RT 1192-1193.)[4]

As appellant rode past Deputy Hoenig's patrol car on his bicycle, Deputy Hoenig looked toward him, and asked him to stop. Appellant was on the other side of the street, on Seminole. He "flipped the finger" toward Deputy Hoenig and said, "Fuck you, cop." He then "took off" on his bicycle. Deputy Hoenig got back inside his patrol car, made a U-turn on Long Beach Boulevard and drove down Seminole Avenue. (5 RT 1194-1196.) Watson got in her date's car and they drove to Martin Luther King Boulevard and then stopped at the corner of Pescadero and Seminole. Watson saw the police lights of Deputy Hoenig's patrol car flashing down the street. She had an argument with her date, who told her to get out of the car. She got out of the car and heard, "Pow, pow, pow." (5 RT 1196-1197; 1199.)

Initially, Watson testified that she was still inside her date's car when she heard the first shot, and she did not see who fired this shot. (5 RT 1197; 1200.) Watson subsequently testified, however, that she saw appellant shoot through the rear window of Deputy Hoenig's patrol car while Deputy Hoenig was inside the car reaching for the microphone on his radio (the prosecution contended was the first shot fired). (5 RT 1204-1206.)[5]

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[4] Watson admitted that she had used drugs earlier that night, before she talked to Deputy Hoenig. She had some beer, and had smoked "some rocks at home" with her sister-in-law at about 9:00 p.m. She claimed, however, this did not interfere with her ability to hear things, or to understand people when they were talking to her, including when Deputy Hoenig was talking to her. (5 RT 1226.)

[5] Defense counsel did not question Ms. Watson about this discrepancy.

Watson was standing outside her date's car and could see Deputy Hoenig's patrol car when she heard a second shot. She saw appellant standing on the driver's side of the car, by the back tire, holding a gun that looked like a 9 mm automatic. (5 RT 1201-1204.) Deputy Hoenig opened the car door and has half inside and half outside the car when appellant shot at him and Deputy Hoenig fell. Appellant then fired two more times at Deputy Hoenig. Appellant was holding the gun in front of him, with both hands clasped together, and his hands raised upward when he shot, as if from a recoil. (5 RT 1204-1208.) After appellant fired the last two shots, he moved around the patrol car to where his bike was on the ground. (5 RT 1208.) Appellant got on his bicycle, and hit a fence. He then got off his bike and started running toward Alameda Street, leaving the bicycle on the ground. (5 RT 1209.) Appellant ran around the corner and Watson walked toward Long Beach Boulevard. She saw police cars coming toward the location, and flagged down a patrol car. She told the officer that she saw the killing of the deputy. The officer in the patrol car took Watson over to where a lot of police were gathered and Watson told an officer what she had seen. (5 RT 1212-1213.)

A little while later, the police asked Watson to go with them to see if she could identify someone. The police took her about a block or two away, and showed her someone. They did not do anything to suggest whether or not this person was the person she had seen shooting the deputy. Watson looked at the person from her place inside the police car, and she recognized him as the man she had seen shooting at Deputy Hoenig. Watson identified appellant in court as the man who shot the deputy. (5 RT 1216-1217.) When Watson saw appellant from the police car, he did not have a hat on. Watson identified People's Exhibit 28, a black hat with a bill on it, as the hat that she had seen appellant wearing when he had been riding his bicycle on Long Beach Boulevard before the shooting. (5 RT 1218-1220.)

Sandra Carranza

Sandra Carranza lived at 3041 Seminole Avenue, and was home asleep with her husband in their upstairs residence on October 30, 1997. At about 1:15 a.m., Carranza heard gunshots and looked out the window. She saw a man near her driveway who appeared to be stumbling. The driveway area was very well lit. The headlights of a police car were on as well. After he stumbled, Ms. Carranza saw the man run westbound on Seminole toward Alameda. The man was wearing dark clothing, oversized pants and sweater, and a really dark or black baseball cap. (5 RT 1281-1285.)

As the man went across her driveway below, Carranza saw flashes around his upper body and heard gunshot sounds. (5 RT 1285-1286.) Carranza thought the man might have originally stumbled at the curb, when he moved from the street to the driveway. (5 RT 1288.) Ms. Carranza lost her view of the man out of the window for a time when her husband pushed her out of the way to see what was going on as well. (5 RT 1290-1291.) Ms. Carranza then called 9-1-1 and told the police what she had seen. She was looking out the window again at this time. (5 RT 1291-1292.)

A lot of police cars arrived, and Ms. Carranza and her husband went down and talked to some officers. She gave them a description of the person she had seen and told them the direction he had run. Later that morning she was asked to get in a patrol car and look at somebody. She was driven over to Montara. Her husband went in a separate police car. On Montara, the police flashed a light on a person, and she told the police that the person was the same man she had seen running below her window earlier. The man's clothes were the same, except that his pants were mangled or shredded, and he did not have on the black baseball cap he had been wearing earlier. (5 RT 1294-1297.) Ms. Carranza identified People's Exhibit 28, a black baseball cap, as

similar in color and shape to the cap she had seen on the man. (5 RT 1298.) Ms. Carranza identified appellant in court as the person she had seen in her driveway. (5 RT 1300.)

Luiz Gomez

Luiz Gomez, Ms. Carranza's husband, heard the sound of shots being fired and looked out his bedroom window. Gomez saw a person tumbling near his driveway below, and then running toward Pescadero Street. Later that morning Gomez was taken in a police car to Seminole and Pescadero and was shown somebody. Gomez recognized the man as the person he had seen in the driveway earlier, but the man was not wearing a sweatshirt or a cap that he had on earlier, and his pants were torn up. (5 RT 1300-1303.) Gomez identified appellant in court as the person he saw in his driveway on October 30, 1997. (5 RT 1304.)

Estrella Reyes

Estrella Reyes lived in the house at the corner of Capistrano and Seminole. At about 1:15 a.m. on October 30, 1997, a shot woke Reyes up from his sleep. He then heard "plenty" more shots from what he thought was a large caliber gun, based on the sound. He heard someone say "Fucking police" in a loud voice from somewhere close to the police car that was stopped in the street. Reyes looked out his window and saw a policeman on the ground to one side of the police car. He called 9-1-1 and the police arrived about two minutes after Reyes heard the shots fired. (5 RT 1404-1408.) Reyes did not see the shooter when he looked out the window, but he did see a bicycle lying on the ground about four feet from the police car. (5 RT 1411-1412.)

Why Deputy Hoenig Attempted to Stop Appellant On His Bicycle

In the months preceding October 30, 1997, there had been numerous burglaries in the South Gate area where the suspects had left the scene on

bicycles. (5 RT 1311-1313.) The patrol supervisor asked the patrol deputies, such as Deputy Hoenig, to therefore conduct field interviews when they came upon bicyclists during their shifts. (5 RT 1313.)[6] It was also a violation of the Vehicle Code to ride a bicycle at night without having an illuminated light on it. (5 RT 1316.) Appellant's bicycle did not have a light on the front of the bike. (5 RT 1367.)

Testimony of First Responders

Sergeant Tim Williams

Sergeant Tim Williams, a South Gate police officer, was on patrol as the shift supervisor on October 30, 1997, when he received a radio call about an assault with a deadly weapon in the area of Capistrano and Seminole at around 1:15 a.m. As he was driving to the scene, the radio dispatcher received information that shots had been fired and someone was down. Sergeant Williams approached the scene southbound on Capistrano with his lights off. He saw a sheriff's black and white patrol car already at the location, and thought another police officer was at the scene already. (5 RT 1253-1256.) Williams drove behind the sheriff's unit and as he pulled in to park, he saw a deputy lying on the ground beside the driver's side of the patrol car. He backed his unit across Capistrano and lit the scene up with the lights on his patrol car. About this time South Gate police officer Frank Mena arrived on the scene. (5 RT 1257.)

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[6] Deputy District Attorney Morrison informed the jury that there was no evidence that appellant was involved in any burglaries in the area, and that the testimony that patrol officers had been advised to conduct field interviews of persons riding bicycles had been offered only to explain the conduct of Deputy Hoenig in telling appellant to stop when appellant rode past Deputy Hoenig on his bicycle. The Court asked the jurors if they understood this. Apparently all the jurors indicated that they did. (5 RT 1313.)

Officer Frank Mena

Officer Mena was on patrol on October 30, 1997, when he received a "shots fired" radio call at about 1:15 a.m. (4 RT 1149-1152.) Mena drove to Seminole and Capistrano, and saw a marked black and white sheriff's patrol car in the street, and a deputy lying on the ground. The patrol car's door was open. (4 RT 1153-1158.) When Mena pulled up, Sergeant Williams was at the corner of Capistrano and Seminole standing by his patrol car. Mena and Williams did not know where the attacker was, so Williams covered Mena with a shotgun and Mena went to check on the deputy lying on the ground. The deputy's left arm was underneath his body and his right arm was extended with his gun in his hand and his trigger finger over the trigger guard. The deputy's right hand had a bullet wound on the top of the palm. Mena also saw blood on the deputy's throat. Mena rolled the deputy over and tried to give him CPR. Mena then was joined by Officer Fernandez, who assisted Mena in giving the deputy CPR. (4 RT 1159-1162.)

Officer Mena stopped giving CPR when the paramedics arrived approximately 10 to 15 minutes later. Mena never got any reaction from Deputy Hoenig. (4 RT 1162-1164.) Mena removed a Beretta 9 mm pistol from Deputy Hoenig's hand before he started giving the deputy CPR. The hammer was down on the weapon, which meant the gun had not been fired. On a semiautomatic pistol such as a Beretta 9 mm, once the first round is discharged, the gun automatically locks the hammer back in preparation to fire the next round. (4 RT 1168-1171.) Mena noticed he was kneeling on a .45 caliber shell casing while he was doing CPR. The shell casing was not moved while he did CPR, because Mena was kneeling on it. After he got up, the shell casing was still there, and Mena later told others there was a .45 shell casing on the ground where he had given the deputy CPR. (4 RT 1172-1173.)

After the paramedics took Deputy Hoenig away, Officer Mena noticed a bicycle in the vicinity of the patrol car. No one did anything to the bicycle while Mena was present at the scene. (4 RT 1175-1176.) Mena also noticed that the passenger side rear window of the patrol car was broken, and he saw damage to the windshield in front of the driver's seat. (4 RT 1177-1178.)

Officer Carlos Fernandez

South Gate police officer Carlos Fernandez had continued giving CPR to Deputy Hoenig until he was relieved by another deputy. After that, Fernandez noticed a gun on the ground and he stood around the gun to make sure it did not get kicked or taken. A fire truck showed up and Fernandez then left to assist the paramedics. (5 RT 1270.)

The Search for the Shooter

After several police cars arrived at the scene, Sergeant Williams was contacted by Ms. Carranza and Mr. Gomez, who lived in the two-story apartment just to the northwest of the crime scene. These witnesses described the shooting suspect as a male wearing a black and white shirt or sweater and possibly a cap. They saw him leaving on foot going west, which would be in the direction of Alameda Street. (5 RT 1258-1259.) Sergeant Williams immediately put this information out on the radio and officers began heading west from his location. Right after that, the dispatcher radioed that a call had been received about suspicious noises at a residence on the 10400 block on Montara, and the police set up a perimeter around the house on Montara, which was the next block north of Seminole. This was the direction the two witnesses had reported the suspect running. (5 RT 1260-1261.)

At 10451 Pescadero Avenue, there was a ladder in the backyard, behind the garage, placed up against the cement block wall that separated the back of that property from the back of the adjacent property on Montara Avenue.

Martha Costa, the resident, had not put the ladder in that position (which was shown in the photos in People's Exhibit 33). (5 RT 1305-1309.)

Felix Charcas and his wife, who lived at 10444 Montara Avenue, the third house north of Seminole on the east side of the street, were awakened by gunshots at about 1:15 a.m. (5 RT 1412-1413.) Shortly thereafter, Charcas heard noises in his backyard, and he immediately called 911. A short while later he heard noises from the police outside his house. (5 RT 1414-1415.)

Los Angeles County Deputy Sheriff Steven Wilkinson was on duty with his canine, Ronnie, on the morning of October 30, 1997. He was called to the location of Deputy Hoenig's shooting to search for a suspect using the canine. The police had received a disturbance call at a residence at 10448 Montara, and he and the canine searched the backyard of the residence. (5 RT 1320-1322.) After searching the area in front of the garage, the canine went around the side of the garage and into the area between the garage and the cement block wall that separated 10448 Montara from 10451 Pescadero. Someone said, "I'm here. You got me." So deputies approached the location. (5 RT 1330-1331.)

Deputy Wilkinson saw a man, subsequently identified as appellant, lying flat on his back, but he could not see appellant's hands and he did not know if appellant had a gun in his hand. At that point, the canine bit appellant on the right thigh and held him. Wilkinson yelled, "Let me see your hands. Put your hands in plain sight so I can see your hands." Appellant refused to do this, so Wilkinson told the canine to extract appellant from the space beside the garage. The dog retrieved appellant, and Wilkinson was then able to see him from the chest up. Wilkinson determined appellant did not have anything in his hands. He ordered the canine to release his hold on appellant, and one of the other officers rolled appellant over on his stomach and handcuffed him.

The officers then stood appellant up and Deputy Wilkinson and the canine left the scene. (5 RT 1333-1336.)

After appellant was brought out by the canine, Deputy Wilkenson did not see anyone strike him or hit him. Appellant was taken into custody routinely. Wilkinson later saw appellant being treated for his dog bite. The dog bit appellant just one time, on his leg. Wilkinson did not see any bruises on appellant's face. (5 RT 1337-1339.)

The Search for the Weapon

Los Angeles County Deputy Sheriff Philip Geisler was part of the search team looking for the shooting suspect on October 30, 1997. When appellant was arrested, he did not have a gun with him, and officers continued searching for the weapon. Geisler located a weapon in the bushes at 10432 Montara, about five houses north of Seminole. The slide of the gun was locked back, indicating that the weapon was possibly empty. Deputy Geisler identified Exhibit 21, a semiautomatic Colt .45 pistol, as the gun he had found in the bushes. (5 RT 1345-1350.)

Los Angeles County Sheriff's Department Homicide Detective Eugene Fines processed the crime scene at 10448 Montara Avenue. (6 RT 1418-1421.) At 10432 Montara Avenue, Det. Fines recovered a .45 caliber pistol. (6 RT 1422-1423.) In the area in back of the garage, Detective Fines also recovered a leather cap with a bill on it. Detective Fines identified People's Exhibit 28 as the hat he found. (6 RT 1421.)

The Gunshot Wounds Suffered by Deputy Hoenig

Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner's Department, conducted an autopsy of Deputy Hoenig on October 31, 1997. (5 RT 1371-1372.) Deputy Hoenig's body was tested for alcohol and drugs, and none were found. (5 RT 1374.) Deputy Hoenig suffered three through-and-through gunshot wounds, and a fourth bullet hit the back of the

deputy's protective vest and was stopped by the vest. (5 RT 1378-1379.) One gunshot wound was to the right backside of Deputy Hoenig's right hand, with the bullet entering near the wrist and exiting out at the base of the long finger. Deputy Hoenig also suffered a gunshot wound on the front side of his left lower leg, with the bullet exiting out the back of the leg. A third bullet struck Deputy Hoenig at the upper mid-front chest just below the throat. The bullet went through the bone of the upper front midline chest, and exited out through the right lower back about two inches away from the spine. This bullet hit the inside of the deputy's protective vest after it exited the deputy's body. (5 RT 1377-1378.)

Deputy Hoenig also had one-half inch wide abrasions on each knee, and a large abrasion on his right lower back that had a gouged out appearance at the center, which was caused by a bullet hitting the protective vest worn by the deputy from the outside. (5 RT 1376-1377.)

The bullet which struck Deputy Hoenig in the leg traveled from front to back, and downward through the leg. (5 RT 1383.) The entry wounds to the deputy's hand and to his leg were large and the bullets went through-and-through, which was not consistent with a small caliber weapon, or a handgun with usual ammunition. The hole in the upper top part of the deputy's chest was of a size Dr. Carpenter rarely saw, and also indicated a large caliber weapon, such as a .45 caliber bullet. (5 RT 1384.) In addition, the bullet went through bone, which was consistent with a large caliber weapon. (5 RT 1386.) This bullet traveled from front to back, going downward and to the right. (5 RT 1387.) The bullet went through the breast plate bone and then through the deputy's aorta about two inches from the heart. This wound caused a massive loss of blood which would have led to a loss of consciousness within ten seconds, and to death within a minute. (5 RT 1388-1390.)

Dr. Carpenter could not say for certain what position Deputy Hoenig's body was in when he sustained these wounds, or in what order the bullets hit Deputy Hoenig. At the time Deputy Hoenig was hit in the back by the bullet which the protective vest stopped, the deputy still had good circulation, because there was bleeding around the abrasion the bullet caused to the deputy's back. There was also good circulation of blood to the hand at the time the deputy sustained that bullet injury, and circulation was also present when the deputy sustained the abrasions to his knees. The knee abrasions were consistent with the deputy falling to the ground on his knees on the asphalt surface after starting to get out of the patrol car. (5 RT 1395-1397.)

If the person who fired the gun was standing to the left side of the police car and was firing the gun approximately horizontally, the trajectory of the bullet that hit Deputy Hoenig in the chest would indicate that the deputy was leaning forward when hit at about a 45 degree angle. (5 RT 1397-1399.) It was also possible that Deputy Hoenig was first shot in the leg, fell to the ground sustaining the abrasions to his knees, and the shooter was close and shot downward at the deputy's chest. (5 RT 1401.)

The Ballistics Evidence

Los Angeles County Deputy Sheriff John Greenwood was part of the team investigating the shooting. His assignment was to catalog evidence at the shooting scene. He made various measurements for the preparation of diagrams showing where things were found and how far away things were from each other.[7] Greenwood also went into Deputy Hoenig's car to gather evidence and catalog the contents of the car. (5 RT 1351-1352.)

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[7] People's Exhibit 4 is a diagram of the scene prepared by the sheriff's department based on measurements that Deputy Greenwood made at the scene.

In addition, Deputy Greenwood catalogued firearms evidence, including expended shell casings (shown in People's Exhibit 6). Greenwood identified People's Exhibit 5 as a series of aerial photos showing evidence cones that Greenwood had placed. Photograph 5-A showed a tree with a bicycle next to it and a fence running along the sidewalk. Greenwood found a shell casing where the sidewalk abutted the dirt underneath the tree (shown in Photograph 6-A). (5 RT 1355-1356.) A shell casing was found on the ground southeast of Deputy Hoenig's gun (shown in Photograph 6-C). Another shell casing was found in the street (shown in Photograph 5-D). The shell casings Greenwood found were labeled evidence items #1, 3, 6, 9, 10, 11, and 12. Greenwood found seven .45 caliber shell casings at the scene. One was by the fence (item #1), three were west of Deputy Hoenig's patrol car (items #10, 11, and 12), and three were in the street on the driver's side of the patrol car (items #3, 6, and 9). (5 RT 1357-1358.) If a person is firing a semi-automatic pistol, the locations of empty shell casings indicate the general location of the shooter when he fired the gun. This is because a semi-automatic pistol ejects the shell casings. (6 RT 1431-1432.)

Investigators also recovered four bullets or bullet fragments in the area around Deputy Hoenig's car. One bullet was found on the ground just below the driver's door of the car. (5 FT 1360-1361.) A bullet fragment was also recovered from the keyboard of the mobile digital console inside Deputy Hoenig's car. A bullet fragment was recovered from the rear of a van parked at the south curb line on Seminole, and bullet fragments were also recovered from the hub cap of a second van also parked at the south curb line on Seminole. (5 RT 1362.)

Los Angeles County Deputy Sheriff Patricia Fant compared shell casings from bullets fired at the crime lab from Exhibit 21 (the .45 caliber pistol recovered from 10432 Montara Avenue) with the shell casings found at

the crime scene. (6 RT 1433; 1444.) Deputy Fant concluded that all seven of the shell casings recovered from the crime scene were fired from Exhibit 21. (6 RT 1445.)

Deputy Fant also examined Deputy Hoenig's semiautomatic pistol (People's Exhibit 53) at the crime scene. Deputy Hoenig's gun was fully loaded. The magazine contained fourteen rounds, a bullet was in the gun's chamber, and the slide of the gun was closed. This indicated that the gun had not been fired. (6 RT 1446-1447.) Deputy Hoenig also carried a five-shot revolver (People's Exhibit 56) as a backup weapon. (6 RT 1450.) When Deputy Fant examined the revolver, it was loaded with five rounds of live ammunition, indicating this gun also had not been fired. Deputy Fant also saw lint inside the barrel, which would not have been present had the gun been fired. (6 RT 1452.)

Deputy Fant also examined Deputy Hoenig's patrol car at the scene, and noted that the rear passenger window had been shot out. It looked like a bullet had traveled through the top of the car's dash and struck the front windshield. Deputy Fant also saw a bicycle on the sidewalk by a tree. The trajectory of the bullet that shot out the rear passenger window of the patrol car was consistent with the shooter being somewhere in the proximity of the bicycle. (6 RT 1462-1464.)

The Blood Spatter Evidence Inside Deputy Hoenig's Patrol Car

Los Angeles County Sheriff's Department criminalist Dean Gialamas examined the blood stain evidence inside Deputy Hoenig's patrol car. The blood stains on the dash and on the front windshield were traveling away from the gear shift area upward to the left. (6 RT 1496.) Gialamas concluded, based on this blood spatter evidence, the bullet trajectory evidence, and the fact that Gialamas found no blood on the gear shift lever itself, that Deputy Hoenig's right hand, the source of the blood, was at or on the gear shift lever

when it was hit by the bullet. (6 RT 1500-1502.) Gialamas was certain that the bullet came from the outside of the patrol car through the rear window and traveled into the front windshield, rather than the other way around, because of the directionality of the blood spatter. The spatter was all toward the dash, so the bullet had to have been fired from the opposite direction. (6 RT 1503.)

The Fingerprint Evidence

An identifiable fingerprint was obtained from the slide of the .45 caliber Colt pistol recovered from 10432 Montara Avenue. One identifiable fingerprint was also lifted from the magazine located inside the gun. (6 RT 1541-1543.) In the opinion of William Leo, a forensic identification specialist with the Sheriff's Department, the latent print taken from the slide of the Colt pistol matched appellant's palm print just below the left index finger. (6 RT 1552-1554.) The latent print taken from the magazine of the gun matched the left thumb print of appellant. (6 RT 1555.) The Sheriff's Department had a policy that when a latent print is identified as belonging to an individual, the latent print and the individual's prints must be examined by two other qualified fingerprint examiners and they must come to the same conclusion before the crime lab will write a report to a detective that the prints match. Thus two other fingerprint examiners had examined the prints that Leo compared, and they also had concluded that the print on the gun and the print on the magazine of the gun matched appellant. (6 RT 1556-1557.)

Testimony Regarding the Gun That Was Used to Shoot Deputy Hoenig

Eliseo Villa lived in Compton and owned a business selling cars. Appellant was a cousin of Villa's wife. Villa bought a handgun in 1991 for protection at his business. He registered the gun at the time (People's Exhibit 20 is a copy of the registration). Villa confirmed that Exhibit 21 (a Colt Mark IV Series 80 semiautomatic pistol, serial number SS44874) was the gun that he had bought in 1991. (4 RT 1145-1148.) In October 1997, Villa was going

to take a trip away from Los Angeles, and he took the gun from his office and put it under the mattress of his bedroom. Appellant stayed at Villa's house sometimes, and he would come in and out. After Villa returned from his trip and found out about appellant's arrest, he got worried and looked for the gun. It was missing. Villa went to the sheriff's station and reported the gun missing. Villa never gave appellant permission to take the gun. (4 RT 1148-1149.)

The Computer Animation of the Shooting

Prosecution witnesses Parris Ward and Dr. Carley Ward both worked for Biodynamics Engineering, a company that consulted on injury-causing events. Parris Ward, whose background was in law and photojournalism, had previously testified in two trials. (4 RT 1031-1033.) Carley Ward specialized in the "bio-mechanics of injury." (6 RT 1591-1594.) Together they created a computer animation (People's Exhibit 1) that portrayed a theoretical reconstruction of where the bullets that struck Deputy Hoenig came from and the order in which they were fired, based on the police reports, the coroner's report, and on measurements made by Parris Ward at the crime scene using a surveyor's precision measuring instrument. (6 RT 1561-1566.)[8]

Parris Ward's measurements were used to create a computerized three-dimensional model of the crime scene, laying out various landmarks and pieces of evidence such as the bicycle, the shell casings, and the positions of the different bullet-pocked vehicles. People's Exhibit 25 was a drawing rendered by computer, looking straight down at the scene from above. (6 RT 1566-1568.)

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[8] Judge Falcone, during a pre-trial hearing, denied appellant's objection to the admission of the animated videotape. (4 RT 1080.)

The animation the Wards prepared did not show movement by the shooter, but depicted the areas from which shots were fired, separated by dissolves, like a slide show. (6 RT 1569.) The computer animation was four minutes long. According to Parris Ward, the animation was not intended to prove that events happened exactly the way shown in the animation, but it was "an illustrative tool for explaining concepts." (6 RT 1570-1571.) It was an aid in presenting to jurors the prosecution's version of events. (6 RT 1571-1573.)

The animation depicted three principal locations from where the gun was fired, based on inferred bullet trajectories from the measurements taken, and from the locations of shell casings. The animation depicted shot "number one" being fired from a location by the tree and near the bicycle, shots number two, three and four occurring in the street, behind the police car and to the left of the driver's side of the car, and shots five, six and seven being fired from a spot to the west, in front of the police car, over toward the curb. The third location was depicted as the firing position for the bullets that struck the vehicles parked across the street from the location of Deputy Hoenig's patrol car. (6 RT 1580-1582.) Parris Ward testified he did not know in what order shots number five, six and seven were fired, so the order depicted in the animation was arbitrary. Ward asserted more confidence in the ordering of shots number two, three and four, however, as that order was based on the statements of the experts and other evidence. Ward then backtracked a bit, stating this ordering was the Wards' "best scenario" for how the shots were fired. (6 RT 1582-1583.)

According to Parris Ward, shot "number one" was the most easily defined shot. The trajectory was well defined because of the location of the shell casing, the broken rear window of the police car, the wound to Deputy Hoenig's right hand, and the damage to the dash and the front windshield. In Parris Ward's opinion, it would not make sense that shots number five, six and

seven, fired from in front of the patrol car, were fired before shot number one. If these shots were fired first, he speculated, Deputy Hoenig would have stopped his car and the shooter would then have had to run around to where the bicycle was located before firing back through the rear window of the patrol car. (6 RT 1583-1587.)

In Carley Ward's opinion, the first shot was the one that hit Deputy Hoenig in the right hand. This was clearly the first shot, she opined, because Deputy Hoenig was still inside the car. This shot was fired from some distance. (6 RT 1598-1599.) Shot number two hit Deputy Hoenig in the leg, as he was exiting the car and had turned to face the shooter. (6 RT 1599-1600.) Shot number three hit Deputy Hoenig in the chest and tore through his aorta. The shooter moved a step or two closer to Deputy Hoenig before firing shot number three, but not so close that there was stippling around the wound. So the shooter was at least two feet away at that point.

In Dr. Ward's opinion, Deputy Hoenig's body was at an angle after he was hit in the leg and fell to the ground on his knees, causing his knee abrasions. (6 RT 1601-1606.) The area around the chest wound was evenly marked, or uniformly damaged around the edge, indicating the shooter was around four to six feet away when this shot was fired. This was also consistent with the shell casing found right by the driver's door. Shot number four, which hit Deputy Hoenig in the back and was stopped by his protective vest, was consistent with Deputy Hoenig already having fallen to the ground and either lying or leaning way over at the time this shot was fired. (6 RT 1606-1609.)

The Jury View of Deputy Hoenig's Patrol Car

Over objection (5 RT 1278-1279), on November 23, 1998, the jury viewed Deputy Hoenig's damaged patrol car in the basement of the courthouse. Appellant waived his presence for the viewing. The Court

instructed the jurors to walk around the car. After all the jurors had the opportunity to inspect the patrol car, the jurors returned to the courtroom. (6 RT 1574-1577.)

Appellant's Methamphetamine Intoxication at the Time of the Shooting

While appellant was being treated for his dog bite at Downey County Hospital on October 30, 1997, the medical staff took a blood sample from him. The blood sample was then turned over to the Sheriff's Department and transported to the crime lab. The blood sample tested negative for the presence of alcohol (6 RT 1515-1518.), but positive for the presence of methamphetamine, a central nervous system stimulant. Appellant's blood sample contained 41 nanograms per milliliter of amphetamine, and 222 nanograms per milliliter of methamphetamine. When methamphetamine is ingested, it metabolizes and breaks down into other products, including amphetamine. (6 RT 1519-1521.)

James Lovas, a senior criminalist with the Sheriff's Department, described signs and symptoms of methamphetamine use. These included euphoria, talkativeness, rapid speech, elevated pulse, elevated blood pressure and elevated body temperature, dilated pupils, lack of appetite, and experiencing of muscle tremors. (6 RT 1518.) Though scientific studies have correlated various concentrations of alcohol in the blood to various levels of impairment or intoxication, for example, the law prohibits driving with a blood/alcohol concentration of .08 percent or greater, to Lovas' knowledge, no such scientific studies had been performed to correlate concentrations of methamphetamine in the blood to levels of impairment or intoxication. Therefore, Lovas could not say anything about the mental or emotional condition of the individual who had the methamphetamine and amphetamine concentrations found in the tested blood sample. (6 RT 1520-1522.)

However, at the request of the prosecutor, Lovas had done a statistical search based on all the cases since 1995 in which blood samples had been tested for the presence of methamphetamine and amphetamine (People's Exhibit 71). Lovas displayed the average concentrations of these drugs in the samples tested for each year. In 1995, based on 126 blood samples analyzed, the average amphetamine reading was 27 nanograms per milliliter. The highest reading was 157 nanograms per milliliter. The average methamphetamine reading was 291 nanograms per milliliter, with the highest reading being 2440 nanograms per milliliter. Compared to the average concentration of methamphetamine in the readings done during the four years between 1995 and November 1998, appellant's reading of 222 nanograms of methamphetamine per milliliter was thirty-three (33) percent lower than the average for those four years. (6 RT 1522-1525.)

Appellant's Post-Arrest Statements

Sergeant Jack Ewell of the Los Angeles County Sheriff's Department, a supervisor of the SWAT team, took appellant into custody on October 30, 1997, after Deputy Wilkinson and his canine located appellant hiding at 10448 Montara Avenue. After appellant was in Sergeant Ewell's custody, no one struck or hit appellant. Appellant said he would lead Sergeant Ewell to where he had thrown the handgun, so they walked north and appellant pointed out where he thought he threw the gun. (6 RT 1613-1617.) Police personnel did recover a gun from that location. (6 RT 1618.)

As Sergeant Ewell was taking appellant to where he thought he had thrown his gun, appellant stated, "Why don't you just kill me. I deserve to die for what I did." This statement was not made in response to anything Sergeant Ewell had said. Sergeant Ewell told appellant he was not going to kill him, and appellant then said, "I don't know why I did that. That cop was writing a ticket and I just started shooting him." Appellant said this in English.

Sergeant Ewell then took appellant to the paramedics for treatment of a dog bite. (6 RT 1617.)

Sergeant Isaac Aguilar of the Los Angeles County Sheriff's Department, a homicide investigator, was called out to the shooting scene on October 30, 1997, and was asked by the lead investigators to do the interviewing of appellant along with his partner, Detective Rodriguez. Aguilar and Rodriguez both spoke Spanish, though neither was fluent. (6 RT 1622-1624.) Sergeant Aguilar first contacted appellant around 4:05 a.m., when he was being treated by paramedics. Sergeant Aguilar took custody of appellant, and advised appellant in English of his constitutional right to remain silent. Aguilar asked appellant whether he understood English, and appellant replied that he did. Aguilar then read the English side of the Sheriff's Department's standard admonition card (People's Exhibit 19) to appellant. He asked appellant if he understood his rights, and appellant stated he did. Aguilar circled "Yes" on the card and then appellant initialed the "Yes" on the card. (6 RT 1624-1627.)

Sergeant Aguilar then asked appellant, with these rights in mind, whether he wished to talk with Aguilar and Rodriguez. Appellant stated "Yes," and Aguilar wrote "Yes" on the admonition card, and appellant initialed the "Yes." Aguilar asked appellant if he wanted an attorney present when he was talking with Aguilar and Rodriguez, and appellant stated "No." Aguilar circled "No" on the admonition card, and appellant initialed the "No." (6 RT 1627-1628.)

Sergeant Aguilar and Detective Rodriguez then transported appellant to Downey Community Hospital. They started asking appellant questions on the way to the hospital. Detective Rodriguez got a tape recorder ready while he was driving, and recorded the questions and answers. Appellant told them that earlier in the evening he had been to an apartment on Stanford Avenue,

close by Seminole and Montara. The deputies asked appellant if he would direct them to the location, and he did. (6 RT 1629-1630.) Appellant also showed them the location on Long Beach Boulevard and Seminole which appellant said was where the initial contact with Deputy Hoenig took place. (6 RT 1631.)

People's Exhibit 77, the audiotape of the questioning during the car ride to the hospital, was played to the jury. (6 RT 1632.) On the audiotape, appellant agreed that he had earlier been advised of his right to remain silent. He stated that had shot Deputy Hoenig seven or eight times. He was "tweaking" when Deputy Hoenig attempted to stop him on his bicycle. He had no lights on the bicycle. He took a Colt .45 gun from under the bed of his uncle, Eliseo Villa, two weeks before, and he had carried it with him in his waistband under his shirt the past three days. He was carrying the gun for protection from gangbangers. He volunteered that he had been thinking about using the gun to rob someone of $5 to $10, because he did not have any money. He had never done this though, and his thinking about this was not why he shot Deputy Hoenig.

Initially appellant said that he had shot at the deputy first, then he said that the deputy shot one to two times at him first. When the deputy attempted to stop appellant on his bike, appellant tried to go around the police car and then he fell down off the bicycle. While he was on the ground, he grabbed the gun out of his waistband. The deputy got out of the police car and pointed his gun at appellant. The deputy fired one or two times and then appellant fired seven to eight times at the deputy. Appellant didn't know where he hit the deputy with his bullets, in fact he was not even aiming. He had never shot a gun before this. When he was asked why he shot the officer, appellant replied, "I was tweaking." (People's Exhibit 77.)

After appellant was treated at the hospital, the detectives interviewed appellant in the Sheriff's Department's station in the City of Commerce. The interview was videotaped. (6 RT 1633-1634.) People's Exhibit 78, the videotape, was played to the jury. (6 RT 1636.) On the videotape, appellant agreed that he understood his right to remain silent and that he was waiving that right. Appellant restated the facts similarly to what he had stated during the vehicle ride to the hospital. He repeatedly stated he was "tweaking" on "speed" at the time he shot at Deputy Hoenig, and because of this, he did not remember exactly what happened. He had been using speed all that day, and the last time was two to three hours before the shooting. He was lying on the ground from falling off his bicycle when he shot at Deputy Hoenig. Deputy Hoenig was lying on the ground at the time too. Deputy Hoenig saw appellant grabbing for his gun and he started shooting at appellant.

Appellant stated no one was with him, he was alone when he shot at the deputy. He was wearing a black baseball type hat at the time. He thought he would go to jail if the deputy caught him with the gun. Asked if he would rather shoot an officer than go to jail, he answered "Yes." Asked what he would have done if he had not been caught, appellant stated he would have gone back to Mexico.

Sergeant Aguilar testified that throughout the videotaped interview, appellant appeared to be alert, awake and responsive, and to understand all the questions asked by the detectives. After the interview concluded, Aguilar picked up the admonition card and appellant asked if the card was also written in Spanish. Sergeant Aguilar stated it was, and appellant asked if he could read it. Appellant then read the card aloud to the detectives. They asked him if he wanted to sign it. He stated yes, and he signed and dated the Spanish side of the card. (6 RT 1639-1643.) Sergeant Aguilar denied that he or Detective Rodriguez ever asked appellant to sign a blank form, ever promised anything

to appellant in order to get him to give up his right to remain silent, or ever threatened appellant in any way. (6 RT 1643-1644.) Appellant said during the videotaped interview that Deputy Hoenig had shot at him first and appellant just shot back. At the time, Sergeant Aguilar did not have any knowledge of whether Deputy Hoenig had fired his weapon or not. (6 RT 1645.)

During cross-examination, Sergeant Aguilar stated that the detectives did not tell appellant during the car ride to the hospital that they were recording his statements. Both detectives were sitting in the front seat, with appellant sitting in the back seat, and Detective Rodriguez had the microphone set up inside his shirt sleeve. (6 RT 1646-1647.) At the Sheriff's station, the detectives did not reread the admonition card to appellant before interviewing him. They did not tell appellant that they were going to videotape the interview. Sergeant Aguilar did not feel he was qualified to be able to state whether appellant appeared to be under the influence of a drug on October 30, 1997, but appellant told Aguilar that he had been "tweaking" that night, meaning he had taken "speed," or methamphetamine. (6 RT 1647-1648.)

Detective Rodriguez testified that he had experience with people who were methamphetamine users. (6 RT 1654-1655.) On the ride to the hospital, appellant directed Rodriguez and Sergeant Aguilar to a building on Stanford Avenue where appellant stated he had been with some friends using methamphetamine prior to his contact with Deputy Hoenig. (6 RT 1657-1658.) At the hospital, Rodriguez heard appellant say to medical personnel, "I think I shot a police officer." (6 RT 1661.) During the videotaped interview at the sheriff's station, appellant told the detectives that he had been "tweaking" on "speed." In Detective Rodriguez's opinion, appellant was in fact under the influence of methamphetamine at the time he said this. (6 RT 1662.)

Detective Rodriguez described his understanding of the effects of being under the influence of methamphetamine. According to Detective Rodriguez, the operation of the brain is speeded up, and movements are rapid, but the reasoning process is usually not distorted. A person is coherent and able to reason. Appellant did not appear to Detective Rodriguez to not understand what either Rodriguez or Sergeant Aguilar said to him. Appellant was aware of what was going on, and responded appropriately to questions that he was asked and to directions given to him. (6 RT 1663-1664.) Appellant appeared to become tired toward the end of the videotaped interview, around 7:00 or 8:00 a.m. According to Detective Rodriguez, the effects of taking methamphetamine usually lasted from four to eight hours, so about the time of the end of the police interview would have been when the effects would be lessening. In Detective Rodriguez's opinion, it would be natural to expect appellant to exhibit fatigue by this time in the morning. (6 RT 1665.) To Detective Rodriguez' knowledge, appellant was not given any medication by medical personnel at the hospital. (6 RT 1668.)

Appellant told the detectives that he had been carrying the gun (Exhibit 21) for at least three days before he was arrested. He told them he had loaded it. He told them several times that he fired seven or eight shots. (6 RT 1665-1666.) Appellant told them the reason he shot the deputy was because he did not want to go to jail. He knew he had his uncle's gun on him and that the deputy would find the gun and take him to jail. (6 RT 1667-1668.)

During cross-examination, Detective Rodriguez opined that meth users could become paranoid and hallucinate, but that this usually occurred when a person had taken too much methamphetamine. A person who was hallucinating would also experience an inability to reason and a loss of coherency. In Rodriguez's opinion, sometimes using methamphetamine would make a person think more clearly, because it speeded up operation of the brain.

In high doses, however, it might cause hallucinating and distort the reasoning process. (6 RT 1670-1671.)

On redirect examination, Detective Rodriguez stated appellant never expressed to him any concerns that he could characterize as paranoid, and appellant never manifested any behavior or said anything that indicated that he was hallucinating. Appellant was very specific in his description of the sequence of events that evening. He even recalled Deputy Hoenig "almost smiling at him" during their initial contact when appellant rode away from Deputy Hoenig on his bicycle. (6 RT 1672-1673.)

PENALTY TRIAL

No Evidence Presented in Aggravation

Appellant had no prior felony arrests or convictions, and the prosecution presented no evidence in aggravation.

Victim Impact Evidence

The prosecution presented extended victim impact evidence through Stephen Hoenig, the victim's younger brother; Teresa Gunnels, Deputy Hoenig's long-time girlfriend; David Hoenig, the victim's older brother; Mary Hoenig, the victim's mother; and Robert Hoenig, the victim's father. (7 RT 1820-1916.) The prosecution also presented extensive exhibits and documents relating to Deputy Hoenig's funeral and his accomplishments during his life.

Evidence Presented in Mitigation

Defense counsel Leonard informed the jury he was going to put on family members as witnesses, but he was not going to offer "any excuses" for appellant's conduct. Leonard stated he had not done so during the guilt phase

because he "knew what the verdict was going to be." According to defense counsel, the only issue in the case, from day one of the trial, was whether the jury was going to give appellant death or life without the possibility of parole. Counsel stated in an overview of the testimony that would follow that appellant's family members would tell the jurors about appellant, showing that he was a young man who basically had never been in trouble before this shooting. He was not a gang member, and he had worked. The family members would testify that they loved appellant, and he loved them. In sum, defense counsel stated, "What [appellant] did that night was terrible, and you are going to hear also that he uses drugs. But you are going to get to know a little bit about Mr. Duenas." (7 RT 1818-1819.)

Counsel proceeded to present mitigation testimony from six family members and one friend, but no testimony by a mental health expert or drug intoxication expert, or by a social historian to explain appellant's psychosocial history or his psychological state in the period leading up to the shooting of Deputy Hoenig.

Juan Parra, appellant's oldest brother, testified he was forty-five years old and had lived in North Montebello for the past nine years. Appellant had lived with Juan in Montebello for about eight months, though he had not been close to appellant more recently. Appellant's father had died, and his mother lived in Mexico. She could not come to the trial because she was ill. (7 RT 1918-1920.) Appellant had six brothers and three sisters. Two sisters and one brother, besides Juan, lived in the United States. The rest of the family lived in Tepic Nayarit in Mexico. When appellant was growing up, he was a good-hearted boy, he liked everybody and played with everyone, and he went to school. He was not violent. Juan did not ever see appellant get in any fights. Juan asked for forgiveness for what happened; he was very sorry about it. (7 RT 1921-1923.)

Luis Navarro, who was married to appellant's sister Blanca, testified that he was twenty-seven years old and had been married to Blanca for seven years. Luis had known appellant since before he married Blanca. Navarro thought appellant was twenty-two or twenty-three years old. Luis and Blanca had two daughters. Navarro had a close relationship with appellant, as he also lived with Luis and Blanca for four or five years. (7 RT 1926.) Navarro worked for RPS Delivery Service as an independent contractor. He had been delivering packages in the downtown area and had gotten time off so he could come to testify. Appellant had worked for Navarro for four and one-half years, starting in 1991, helping him when he needed boxes to be carried and the truck to be loaded and unloaded. Appellant had been a real hard worker, and other coworkers wanted appellant to ride with them also to help. When appellant worked for Luis, he paid appellant directly. Appellant stopped working for Luis in 1995. (7 RT 1923-1925.)

During the time appellant had worked with Luis, Luis had received a plaque from work for providing quality service, and he would not have gotten the plaque without the help he had received from appellant. Appellant was a hard worker especially around the holidays when Luis had to deliver hundreds of packages. During the time appellant had lived with Luis and Blanca, Navarro had never seen appellant become violent, get in trouble with the law, or carry a gun. Navarro did see appellant use drugs, but he did not know specifically what kind of drugs. When appellant used drugs, he definitely acted differently. He would be a "total different person," becoming violent, tense and pushy. (7 RT 1926-1927.) To Navarro's knowledge, however, appellant was not a gang member. (7 RT 1928-1929.)

Maria Villa, who was the daughter of appellant's uncle, Eliseo Villa, from whom appellant had taken the gun used in the shooting, testified she was twenty-three years old and had known appellant for fifteen years. Appellant

had lived off and on with her family. Although appellant was her cousin, she saw him as a brother. He helped her and her family a lot, and gave her family a lot of love. He was a nice person and very respectful. Maria had never seen appellant be violent, or carry a gun. She had not seen him associate with gang members, or be in trouble with the police. (7 RT 1929-1932.) Maria had never seen appellant take drugs, but she had seen him under the influence. He would become paranoid and "scary." Toward the end, before he was arrested, appellant used drugs more. He started using them when his father died, about a year before appellant's arrest. Appellant lost his job because of his drug use. During the period before October 1997, he was using a lot of drugs. (7 RT 1932-1933.)

Maria told the jurors that appellant had a good heart, and she wished the jurors would give him another chance. She was sorry for what happened to the police officer, and for his family. It was very hard for her to know that appellant had killed the police officer, because she loved appellant. (7 RT 1933-1934.)

Fernando Solano testified that he had been a close friend of appellant for about twelve years. He was married and had three children, and worked as a telecommunications technician. He met appellant through appellant's family, and he had done "lots of stuff" with appellant, like cliff diving, fishing, going places and going to parties. Fernando was like a big brother to appellant. He had never seen appellant become violent or hit people. He never saw appellant run with gang members, or get in trouble with the police. He never saw appellant use methamphetamines, but he knew appellant used them, and he had seen appellant under the influence of drugs. When appellant used drugs, he became "erratic, nervous, violent." Fernando could see something in his eyes "that just something would change in him." But he still never saw appellant lash out and get in a fight. (7 RT 1934-1938.)

Solano also testified that appellant was basically a nice person, not a tough guy. Sometimes he tried to act that way, but anyone could easily tell that he was faking or just trying to act that way. At nights, appellant couldn't even be alone, because he was afraid to be alone at nights. Fernando told the jurors that he knew appellant was really sorry for what he did, even though he might not have shown it yet. Fernando thought appellant was confused about what had happened, and did not understand everything that was going on. Solano thought that appellant had so much regret in him about what happened that he just wanted to throw his own life away "just to get it all over with." Fernando was very sorry for what happened, and he was sorry that he was not going to have appellant as a friend as he had been before. Fernando knew that appellant was not a "demon," as appellant had been described in a poem that a prosecution witness had read to the jury. In Fernando's view, the demon was the drugs that appellant took, that made him "that way." Fernando hoped that the jury would not give appellant a death sentence. (7 RT 1938-1940.)

During cross-examination, Solano testified that he knew appellant was using methamphetamines by the way he acted. Appellant would be at Solano's home, just doing nothing, and appellant would leave and come back, and then act "totally different, very paranoid." Once, a couple of weeks before appellant's arrest, appellant was sleeping in Solano's front room on the couch, and Solano and his family came home from the movies. They were laughing about something, and appellant jumped off the couch and jumped in their faces, saying "What's going on? What are you guys laughing about?" Fernando told him to calm down. (7 RT 1940-1942.) Appellant was under the influence of drugs "a lot" during the year before the murder. Fernando told appellant to stop using drugs almost every time he talked to appellant. Appellant wanted to stop, but "he couldn't help it." When appellant was under

the influence, Fernando would tell him to stop and appellant would just say, "I don't care anymore. I don't care if I just die." (7 RT 1942-1943.)

Solano did not think appellant was choosing to keep using drugs. Solano had other friends who had gotten addicted to methamphetamine, and they could not help themselves either. They would "throw everything away for it." Appellant did go into "rehab" in Mexico, and his dad passed away while he was in rehab. When appellant came out of rehab, he stayed off drugs for awhile, then he came back to the United States to try to get his life back together again. A few months later, he started using drugs again. (7 RT 1943-1944.)

Martin Parra, appellant's older brother, testified that he was thirty-five and lived in Mexico, where he had worked for the municipal government for twenty-three years. He was married and had three children. Appellant's mother lived two blocks away and Martin saw her every afternoon. She was too sick to come to the trial. Martin was close to appellant when he was in Mexico. Appellant came to the United States with his mother for a short stay when he was young. After he grew up, he went back to the United States. Three years before the murder, appellant stayed in Mexico for about eight months, living with his mother. Martin never saw appellant become violent when he was in Mexico. (7 RT 1944-1947.) Martin visited his brothers in the United States whenever he had vacations. He never saw appellant violent either in Mexico or the United States. He never saw appellant carry a gun or be under the influence of drugs. (7 RT 1947-1948.)

Martin told the jurors that he had been asked by his mother to be her representative to the jury because she was too ill to come to the trial. She begged for forgiveness from all the members of the victim's family. Martin stated appellant was not a delinquent assassin, and asserted that if appellant did

the killing, "it's because of the dirty stuff that's being sold here." (7 RT 1948-1949.)

Blanca Navarro, appellant's sister, testified she was two years older than appellant. Since she was little, most of the time she had lived with appellant, and they lived together even after she married Luis Navarro. She gave appellant advice and when she scolded him, he never answered her back. He would lower his head and at times he would even cry. When they were children, their mother celebrated their birthdays together, and after the gifts were given, appellant would always give her the preference to go first. (8 RT 1953-1955.) Blanca begged forgiveness from the judge, the jury and mother of the deputy who was killed, in her own name and in her family's name. Blanca asked that the jury give her brother a second chance. (8 RT 1955.)

During cross-examination, Blanca testified that both of her parents loved appellant. Her father was dead, and his death had affected appellant because everyone in the family was able to travel to the funeral except for appellant (who was in rehab at the time). Blanca agreed that her parents taught her the difference between right and wrong. (8 RT 1956-1957.)

Rosa Delgadillo, appellant's oldest sister, testified that she did not want the jury to give appellant the death penalty. She asked for forgiveness from the victim's family "from the bottom of [her] heart." (8 RT 1957-1959.)

Eliseo Villa, appellant's uncle, testified that appellant had lived with Eliseo and his wife and daughter Maria for a month or two prior to the killing. Eliseo had known appellant for fifteen years. He was a humble person, and he worked. Eliseo knew all of appellant's brothers, and his mother. They also seemed to be very humble people, who had a lot of sympathy for other people. Eliseo believed appellant committed this crime because he was using drugs. In his sound mind, appellant would never have committed the crime. Before appellant's arrest, Villa suspected appellant's life was not going well because

he was missing days at work and his boss called for him at Villa's house. (8 RT 1959-1961.)

On one occasion, Villa talked to appellant for twenty-five to thirty minutes, telling him about all the things that were not going well for appellant. Appellant lowered his head and then started to cry. Eliseo reminded appellant that when appellant came to Los Angeles, his father entrusted appellant to Eliseo, and he told appellant he needed to behave better and take care of his job. Villa believed that appellant deserved a second chance. (8 RT 1961.) Villa asked for forgiveness from the judge, the jury and all the persons present at the trial. He believed that when appellant committed this crime, he did not know what he was doing, because he was under the influence of drugs. (8 RT 1961-1962.)

I.

THE TRIAL COURT ERRED IN EXCUSING THREE PROSPECTIVE JURORS FOR CAUSE

The trial court erroneously excused three prospective jurors for cause during voir dire even though each prospective juror had shown that he or she would follow the court's instructions and if warranted by the evidence, could impose a sentence of death against appellant. Excusing these three prospective jurors, singly and together, violated appellant's rights to due process and a fair trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412), and article I, section 16 of the California Constitution, and requires reversal of appellant's conviction for murder and his sentence of death.

The trial court erroneously excluded prospective jurors numbers 4593, 5637, and 6611 for cause. There was no showing as to any of these prospective jurors that the juror's death penalty views would substantially impair his or her ability to serve on the jury as required for exclusion under *Witt*. As a result, appellant's conviction of murder and sentence of death must be set aside.[9]

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[9] Defense counsel did not object to the trial court's excusals of these three jurors. These claims of error are nonetheless properly preserved for appeal. This Court never has required an objection from the defense in order to argue on appeal that the trial court unconstitutionally excused an anti-death penalty juror under *Witherspoon* and *Witt*. "[T]he failure to object does not waive the right to raise the issue" of the erroneous excusal of a juror based on the juror's opposition to the death penalty. (*People v. Cox* (1991) 53 Cal.3d 618, 648 fn. 4; see *People v. Velasquez* (1980) 26 Cal.3d 425, 443 [federal precedents hold *Witherspoon* error not waived by "mere" failure to object], reiterated in its entirety, *People v. Velasquez* (1980) 28 Cal.3d 461.)

A. Appellant's Right to A Death-Qualified But Impartial Jury

The United States Constitution guarantees a criminal defendant a trial by an impartial jury. A prospective juror may not be challenged for cause based on his or her views about capital punishment unless those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 421.) A prospective juror would be "prevented or substantially impaired" in the performance of his or her duties as a juror only if "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* (2004) 33 Cal.4th 425, 447.) Exclusion of even a single prospective juror who is not "substantially impaired" violates the defendant's "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment" (*Uttecht v. Brown* (2007) __ U.S. __, 127 S.Ct. 2218, 2224), and requires automatic reversal of the death sentence (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

This Court stated again in *People v. Wilson* (2008) 44 Cal.4th 758, echoing *Wainwright v. Witt, supra*, "[t]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the court's instructions and the juror's oath." (*Id.* at p. 778-779, quoting *People v. Blair* (2005) 36 Cal.4th 686, 741; interior quotation marks omitted.)

The United States Supreme Court in *Uttecht v. Brown, supra,* deferred to a trial court's ruling on a defense challenge for cause, explaining that "the

finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Thus, when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." (127 S.Ct. at p. 2223; interior quotation marks and citations omitted; bracketed text in original.) The deference accorded a trial judge in a capital case is not limitless, however. "[T]rial courts must, before trial, engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard, thus protecting an accused's right to a fair trial and an impartial jury." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 779; see also, *People v. Heard* (2003) 31 Cal.4th 946, 963-968.)

Thus, before a trial court may grant a challenge for cause concerning a prospective juror, or remove a prospective juror on its own judgment, a trial court "must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties (as defined by the court's instructions and the juror's oath) . . . ." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 785, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 445.) For example, in *Uttecht*, the High Court noted the number of times that the trial judge had explained the seating options, and the opportunities the challenged juror might have had to explain his own views.

Decisions of the United States Supreme Court and of this Court "make it clear that a prospective juror's personal conscientious objection to the death

penalty is not a sufficient basis for excluding that person from jury service in a capital case under [*Wainwright v.*] *Witt, supra*, 469 U.S. 412." (*People v Wilson, supra*, 44 Cal.4th at pp. 785-786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.) In *Lockhart v. McCree* (1986) 476 U.S. 162, the Supreme Court observed that "not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Id.* at p. 176.) Jurors are not to be automatically excused if they merely express personal opposition to the death penalty. "The real question is whether the juror's attitude will 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v Wilson, supra*, 44 Cal.4th at pp. 785-786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.)

Thus, a trial court may not remove a prospective juror for cause only because of a personal opposition toward the death penalty, even an opposition that might predispose the prospective juror to assign greater than average weight to the mitigating factors presented at the penalty phase, "unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Wilson, supra*, 44 Cal.4th at p. 786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.)

Indeed, this Court in *Wilson* reversed the defendant's sentence of death due to the erroneous excusal during penalty deliberations of a holdout juror. The holdout juror, because of his life experience, did assign greater weight to the mitigating evidence than did other jurors, and this Court very forthrightly stated that the juror had not thereby committed misconduct. Therefore, it was error to excuse the juror. (*People v. Wilson, supra*, 44 Cal.4th at p. 841.) Similarly, a trial court errs if it excuses a prospective juror simply because the

prospective juror indicates a predisposition to assign great weight to mitigating evidence.

Put the opposite way, 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." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 786, quoting *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

B. The Trial Court Erred in Removing Prospective Juror #4593 For Cause

The trial court initiated the voir dire of prospective juror #4593, questioning him on answers he had written to three questions on the Juror Questionnaire. In answer to question number three asking for the person's general feelings about the death penalty, prospective juror #4593 had written, "Have mixed feelings. Not sure can decide guilty or not guilty, because it concerns people's life." In answer to question number ten, asking whether the prospective juror would be able to vote to apply the death penalty for another person regardless of the prospective juror's personal views on the death penalty, prospective juror #4593 had written, "Not sure." In answer to question number thirteen, asking whether the prospective juror had any conscientious objections to the death penalty, prospective juror #4593 had written, "Yes." (2 RT 222-224.) Prospective juror #4593 confirmed he had written these answers. The trial court then reviewed for the prospective juror the two phases of a capital trial, guilt and penalty, and the jury's two sentencing options, life without the possibility of parole and death, should there be a penalty trial. After hearing this review of the law, prospective juror #4593 stated he understood the trial procedure and the sentencing options. (2 RT 226.)

The trial court then asked prospective juror #4593 if his Juror Questionnaire answers meant that he would not impose the sentencing option of death. Prospective juror #4593 responded that his conscience would make it "kind of hard" to vote to put the appellant to death. (2 RT 226.) The prospective juror agreed with the court that he had some religious beliefs as well as a personal belief that "would make it hard" for him to impose death. (2 RT 227.) The trial court asked again, "You'd have a hard time imposing the death penalty?" Prospective juror #4593 answered, "Yes, probably I do." (*Ibid.*) At no point in the trial court's questioning of the juror, however, did the court directly ask the prospective juror if he could *not* vote for death. Nor did it ask the prospective juror whether he would fail to follow the court's instructions in that regard.

At this point the court invited defense counsel to question the prospective juror. Defense counsel asked prospective juror #4593 the following question: "Sir, I understand it's hard to impose the death penalty, but the real question is, if this is an appropriate case, and you found my client guilty of killing a police officer in the line of duty and we get to the penalty phase, and you thought the appropriate punishment was death, could you vote for death for my client?" Prospective juror #4593 responded, "If all the factor [sic] really convince me, I do, but I still will feel guilty. Even though I voted yes, but probably later on I would think because my vote I would cause – I would cause a person's death, *but I would still vote, yes.*" (2 RT 228, emphasis added.) Defense counsel thereupon asked again, "Okay. So you could vote death?" Prospective juror #4593 once again answered, "Yes." (*Ibid.*)

The prosecutor then questioned prospective juror #4593 in a lengthy peroration punctuated by mostly brief responses on the prospective juror's part. The prosecutor proposed to the prospective juror a hypothetical similar to the one defense counsel had proposed, and asked "When it comes down to

it you told Mr. Leonard that you could vote death, but you'd feel bad?" Prospective juror #4593 again answered, "Yes." (2 RT 230.) The prosecutor then suggested to the prospective juror that because the death penalty was against the prospective juror's personal value system, and the prospective juror had religious objections as well, the prospective juror would "not want to vote to end another person's life." (*Ibid.*) Here again, the prospective juror was not asked directly whether he would find it impossible to vote for the death penalty, but only if he would not "want" to have to make such a vote.

Prospective juror #4593 agreed with the prosecutor's suggestion that he would not "want" to have to vote for death, but he then elaborated, "But I would think the other way too. Because he [appellant] took – you know, because we already voted guilty, and I can feel he took the other person's life with the – with no reason, or with the – whatever the reason is, and I still can feel – I will feel – because the other person is already dead, and I feel I need to do some justice too . . . " (2 RT 231.) The prosecutor then asked the prospective juror whether, after defense counsel presented evidence in mitigation and the prosecutor presented evidence in aggravation, and the defense argued that life without parole was punishment enough, the prospective juror would agree and say, "Well, that's punishment enough, and that way I don't have to vote for death myself, I don't have to look at Mr. Duenas and say, I condemn you to die according to the law of the State of California." (2 RT 231-232.)

Prospective juror #4593 answered that he did not fully understand the prosecutor's question. The prosecutor explained in more detail the penalty phase process, the trial court's giving of instructions, and the jury's deliberative process, and asked the prospective juror again, "My question to you is, with your beliefs, religious and personal moral values, would you be

able to do that [vote for death], knowing how you are going to feel the rest of your life having done it?" (2 RT 235.).

Prospective juror #4593 responded: "Yes. Yes, I will still give you kind of like an in between answer, because right now – for me right now I have really mixed feeling about that, because I can see it both side [sic] because – but the other side is the – the victim, you know, he died. And maybe because, you know, the cause is – you know, I really feel sorry, or feel, you know, *justice has to be made*. But I will consider because my vote – so, it's really – I thought about it over the weekend, and I really think I still have a mixed feeling right now. So, I probably answer I still cannot make – probably cannot make a decision." (2 RT 235; emphasis added.)

Without further questioning from either party, and without the prosecutor making a formal challenge for cause, the trial court stated it was "going to make a finding that the juror's response demonstrates that his views would substantially impair his performance and duties as a juror in this case, and he would have *difficulty* in accordance with the instructions and his oath. Therefore, the court is going to find cause and excuse this juror." (2 RT 236; emphasis added.)

The trial court erred in excusing prospective juror #4593 on its own judgment for cause after the prospective juror had stated repeatedly that he could vote for the death penalty in this case. The prospective juror had reservations about imposing the death penalty which would make it "hard" for him and he was not looking forward to having to decide whether to vote for death or life, if the situation came to that, but he stated, each time that he was asked, after the court had clarified for him the procedure and process of a capital trial, that he could nonetheless consider voting for death in this case. As this Court stated in *People v. Wilson*, a prospective juror who simply believed it would be "difficult" 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." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 786, quoting *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

The trial court failed to distinguish, as this Court has mandated, between a prospective juror's concern that voting for death would be morally or emotionally difficult, and a prospective juror's showing that he or she simply could not vote for death. That a prospective juror has scruples against imposing a death sentence and therefore "mixed feelings" is materially different from a prospective juror stating he did not know at all whether he could impose a sentence of death. Hopefully, *every* prospective juror goes into a capital trial with "mixed feelings." The purpose of the trial is to sort out those feelings so the juror can reach a decision on guilt and, if required, on penalty. Prospective juror #4593 was only stating in his answers that he had quite appropriately not yet resolved whether he would vote to convict and whether he would vote for life or for death if a penalty trial occurred. He would not be able to make those decisions until he heard the evidence. His answers and the clarifying questions he posed (see, e.g., 2 RT 234:8-11) also demonstrated that he was conscientious in wanting to understand and follow the court's instructions.

Prospective juror #4593 stated that though voting for death might be hard for him, he could do it, because another person had been killed and he recognized that "justice has to be made." (2 RT 235.) The prospective juror provided somewhat equivocal written answers to the Juror Questionnaire questions, but his ability to impose a sentence of death became clear once the trial court, defense counsel and the prosecutor explained the trial process and the juror's sentencing choices more fully to him. As the United States Supreme Court has ruled, a prospective juror's mere hesitancy to sit in

judgment in a capital case is *not* an adequate ground for an exclusion for cause. In *Witherspoon*, the Supreme Court held that a prospective juror was erroneously excluded, where she repeatedly stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515.) Such reluctance is normal: "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Ibid.*) Later, in *Adams v. Texas* (1980) 448 U.S. 38, the Supreme Court explained that mere emotions or feelings, akin to those prospective juror #4593 expressed here, are not sufficient grounds for exclusion under 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." (*Id.* at p. 50.)

This Court also has ruled that a prospective juror's aversion to serving on a capital jury does not justify his exclusion. As the Court explained long ago in *People v. Bradford* (1969) 70 Cal.2d 333, 346-347:

> The venireman herein expressed little more than a deep uneasiness about participating in a death verdict. She complained that a death vote would make her "very nervous" and agreed with the trial court's suggestion that such a vote might have a "great physical effect" on her. It cannot be said from this limited examination that the venireman was physically "incapable of performing the duties of a juror." The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty. (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fns. 8, 9, 88 S.Ct. 1770, 20 L.Ed.2d 776.)

(See also *People v. Lanphear* (1980) 26 Cal.3d 814, 841 ["[A]bhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient"];

People v. Stanworth (1969) 71 Cal.2d 820, 837 ["the mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances"].) "Feelings of reluctance or dislike, like those expressed by Bobbie R., are an impermissible 'broader basis' for exclusion than 'inability to follow the law. . . .'" (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21); see *Clark v. State* (Tex. Cr. App. 1996) 929 S.W.2d 5, 9 [holding that a prospective juror who preferred to let God make the penalty decision was erroneously excluded].)

Prospective juror #4593 was an appropriate candidate for this capital jury, and he gave no answer which disqualified him from sitting in judgment on appellant. Because the trial court did not have grounds to make a finding that prospective juror #4593 held personal views which would prevent or substantially impair him from performing his duties as a juror, the Court must find that the trial court erred in removing prospective juror #4593 for cause, and must reverse appellant's conviction for murder and his death sentence.

C. The Trial Court Erred in Removing Prospective Juror #5637 For Cause

The trial court also initiated the voir dire of prospective juror #5637, asking him about his answers to Juror Questionnaire questions number three, four and six. In answer to question three, regarding his general feelings about the death penalty, prospective juror #5637 had written, "Do not believe in death penalty." (2 RT 327-328.) The trial court asked if the prospective juror had a religious reason for this answer, and prospective juror #5637 stated this was "just a personal belief." (2 RT 328.) The trial court then asked if the prospective juror was "representing to us that under no circumstance would you impose the death penalty?" Prospective juror #5637 answered, "I – right

now I don't think I would." (*Ibid.*) The court then properly asked, "Do you think you could set aside your personal belief and impose the death penalty if you heard evidence that you felt justified the death penalty?" (*Ibid.*)

Prospective juror #5637 answered, "I think I could, yes, your honor." (*Ibid.*) The trial court asked, "You could impose the death penalty even though you don't believe in it?" Prospective juror #5637 responded, "I don't believe in it. I've never been confronted with this situation." (*Ibid.*) The trial court responded that it understood, but now the prospective juror was confronted with that situation. The trial court asked if the prospective juror could look Mr. Duenas in the eye and say, "Yes, I vote for death, could you do that?" (2 RT 329.) Prospective juror #5637 answered, "I don't – until the situation comes up to me, I don't know if I could or not, you know?" (*Ibid.*)

The trial court then asked hypothetically that if appellant were found guilty of the charges, of murdering a police officer, and in the next phase of the trial the prospective juror heard the prosecutor present additional evidence which would justify him arguing that the prospective juror had to impose the death penalty, "Do you think you could impose the death penalty after hearing all that evidence?" (*Ibid.*) Prospective juror #5637 responded, "I think I could, yes, although I don't really believe in the death penalty." (*Ibid.*)

To be sure it understood the prospective juror's answer, the trial court asked the prospective juror again, "Well, you don't believe in the death penalty, but you still think you could impose the death penalty?" (*Ibid.*) Prospective juror #5637 answered again, "I think I could, yeah." (*Ibid.*) The trial court asked, "The facts or scenario I give you, the killing a police – " at which point the prospective juror interjected, "It would have to be, to me, a scenario that's – that's – that is quite bad." (2 RT 329-330.) The trial court then asked, "Well, what about killing a police officer sitting in a police car

wearing his uniform, and there is no reason for killing him?" Prospective juror #5637 answered, "I guess I could, yeah." (2 RT 330.)

The trial court responded that prospective juror #5637's answer was "a little equivocal." The trial court then asked directly, "I've got to have you represent, because I'm going to ask you the opposite side of the coin also. My question to you then, and I need to know, based upon the factual scenario I gave to you, and you heard nothing else, just that he killed a police officer sitting in a police car in uniform, no reason to do so, could you impose the death penalty?" Prospective juror #5637 answered directly, "Yes, I could." (*Ibid.*)

The trial court then asked if the prospective juror could impose a sentence of life without the possibility of parole, and the prospective juror stated he could. (*Ibid.*) The trial court then asked if the prospective juror's answer to Juror Questionnaire question number four[10] was still the same, and the prospective juror stated he could change that answer to "no." Prospective juror #5637 also stated he could change his answer to question number six (whether the prospective juror would always vote against death) to "no." (2 RT 330-331.)

Defense counsel then questioned the prospective juror. He asked the prospective juror if he could consider both the death penalty and life without the possibility of parole. Prospective juror #5637 answered, "Yes, I'd be able to consider both." (2 RT 331-332.)

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[10] Question number four reads, "Are you so strongly against the death penalty that no matter what the evidence shows, you would refuse to vote for guilt as to first degree murder or refuse to find the special circumstance true in order to keep the case from going to the penalty phase where death or life in prison without the possibility of parole is decided?"

The prosecutor then engaged prospective juror #5637 in a lengthy (three-pages in the Reporter's Transcript) monologue, at the end of which he asked the prospective juror to confirm the prosecutor's own summary of the prospective juror's views. He asked, "It [the prospective juror's answers on the Juror Questionnaire] means you are a sincere person that's examined your conscience and you do not – because you don't believe in the death penalty, you couldn't pull the switch. Is that – does that sum up your feelings?" (2 RT 332-333.) Prospective juror #5637 responded, "I think so, sir. Yes." (2 RT 333.)

The prosecutor then asked, "And when the judge is asking the questions, everyone says they are fair and, yeah, both sides but deep down inside, you couldn't do it, could you?" But prospective juror #5637 answered to the contrary, "I guess I could do it, yeah." The trial court asked, "You guess you could do it, did you say?" Prospective juror #5637 answered "Yeah." (*Ibid.*) Undeterred by this forthright answer, the prosecutor then asked, "But it's something you'd really rather not do, right?" Prospective juror #5637 agreed, replying "Well, no, I would rather not, no." The prosecutor asked again, "You really would rather not," and the prospective juror again replied, "I would rather not, no." (*Ibid.*) The prosecutor then admonished, "Only you can look inside yourself, but given everything you've written and thought about and all these people throwing questions at you here, do you think you are the right – a juror to sit on a capital case where the prosecution is seeking the death penalty?" Prospective juror #5637 answered, "No." (2 RT 334.)

The prosecutor then challenged the prospective juror for cause. The trial court ruled, without further questioning by defense counsel, "I'm going to find that juror's responses do demonstrate his views, would substantially impair his performance and duties as a juror in accordance with his oath and

with his instructions by the court. I'm going to excuse you, sir, and I thank you for your candor." (*Ibid.*)

The trial court erred in excusing prospective juror #5637 for cause, because the prospective juror had stated repeatedly that he could vote for the death penalty in this case. The prospective juror stated he did not personally believe in the death penalty, but repeatedly stated he could consider voting to impose death on the facts in this case. As stated in *Wainwright v. Witt, supra,* jurors are not to be excused if they merely express personal opposition to the death penalty. (*Id.* at p. 424.) After the court explained the sentencing options, juror #5637 clearly stated that he could vote for either penalty.

The trial court also erred and tainted the jury selection process with partiality when the court allowed the prosecutor to ask if the prospective juror "could pull the switch." This is an obvious reference to pulling the switch to execute a person sitting in an electric chair, and was a turn of phrase obviously intended to provoke an emotional reaction from the prospective juror. The trial court, in its capacity as the overseer of voir dire, should have reprimanded the prosecutor for referring to a discarded method of execution now seen as barbaric, and for as well unfairly inviting the prospective juror to imagine himself in the situation where he personally was the appellant's executioner. The prosecutor's reference to this dreadful procedure was clearly meant to inspire enough revulsion in a conscientious juror to convince the juror to opt out of the process, thus denying appellant an impartial and conscientious adjudication on the penalty and skewing the jury panel toward a death verdict.

The trial court should also have reprimanded the prosecutor for asking the prospective juror if he thought he was the "right" person to sit on a capital case jury. The prosecutor was asking the prospective juror to make a legal judgment, usurping the trial court's role. The prospective juror's own opinion

was quite irrelevant to the legal question of whether he was qualified to serve on appellant's jury.

Because prospective juror #5637 stated unequivocally that he could consider both a sentence of death and a sentence of life without the possibility of parole, it served no purpose for the trial court to allow the prosecutor to browbeat the prospective juror into answering an irrelevant opinion question as to whether he was the "right" juror to sit on this jury. The prospective juror clarified his thinking and attitude toward the death penalty during the course of the trial court's questioning, and the course of defense counsel's questioning. At the conclusion of defense counsel's voir dire of the prospective juror, his answers were unambiguous. He could impose a sentence of death in this very case, if appellant were convicted of murdering a police officer in uniform without any valid reason.

However, the prosecutor was allowed to push prospective juror #5637 into stating several times that he would rather not be put in the position of having to vote for a sentence of death or life without parole. This answer is not a basis for disqualifying a prospective juror. But the prosecutor did succeed, through this maneuver, in getting the prospective juror to agree that he was probably not the "right" juror to sit on this case. As stated above, this was not a judgment to be made by the prospective juror, and he should not have been even asked whether in his opinion he was the "right" juror to sit on this case. His answer was based on the prosecutor's inappropriate and inflammatory equation of a conscientious reluctance to opt for the death penalty and opposition to a specious requirement that jurors themselves don the executioner's hood.

Moreover, the question posed by the prosecutor, asking whether prospective juror #5637 thought he was the "right" juror to sit on this case, was inherently ambiguous, and therefore so was the prospective juror's

answer, "No." What did "right" mean here? Prospective juror #5637 *could* have been agreeing only that because he did not personally believe in the death penalty, or would be unwilling to physically participate in an execution, he was probably not the right person to sit on a capital jury. But as stated above, such a personal belief is not disqualifying. The real question is whether the prospective juror can put aside his personal belief, follow the instructions of the court, and consider imposing a sentence of death in this case.

Prospective juror #5637 stated repeatedly that he could do so. But when he was improperly asked by the prosecutor to judge his own "rightness" to sit on a capital jury, the trial court not only failed to advise the prospective juror that it was not his responsibility to make a legal judgment on his fitness to serve on a capital jury, the court also improperly took the prospective juror's inherently ambiguous answer as grounds to dismiss the prospective juror for cause. Because the prospective juror did not personally believe in the death penalty, and he did not know that the controlling law does not disqualify him to sit on a capital jury because of this personal belief, prospective juror #5637 naturally answered, "No." In view of prospective juror #5637's earlier answers to voir dire questions, and the impropriety as well as ambiguity of the prosecutor's final question, the trial court erred in dismissing this prospective juror based on his answer to that question.

Since it was not up to the prospective juror himself to decide his fitness to serve on the jury, the trial court erred both in allowing the prosecutor to question the prospective juror in this manner, and in excusing the prospective juror for cause where no cause existed. Nothing in the United States Supreme Court's jurisprudence demands that to be qualified to serve on a capital jury, a prospective juror must profess complete neutrality on the subject of capital punishment. It is simply unrealistic, and perhaps unwise, to expect that prospective jurors will come to court devoid of opinions about such an

important and controversial issue as the death penalty. (See *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"].) Even a juror who is strongly opposed to capital punishment is improperly excluded absent evidence he is unable to subordinate these views and carry out his oath as a juror. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658.)

For all these reasons, the Court must find that the trial court erred in removing prospective juror #5637 for cause, and must reverse appellant's conviction for murder and his sentence of death.

D. The Trial Court Erred in Removing Prospective Juror #6611 For Cause

The trial court initiated the voir dire of prospective juror #6611. The prospective juror had never served on a jury before. He was a plant steam assistant for the Los Angeles Department of Water and Power. (2 RT 496.) In answering Juror Questionnaire question number three, on his general feelings about the death penalty, prospective juror #6611 had answered, "Neutral." The trial court asked what the prospective juror meant by this answer. It should be noted that none of the prospective juror's answers to other questions on the Juror Questionnaire suggested the prospective juror had any difficulty with imposing a sentence of death. (See (CT 207, 578-581, Juror Questionnaire Form filled out by prospective juror #6611, Steven C. Davis.) Prospective juror #6611 answered the court, "I really haven't – I don't know. I've – " At this point, the trial court interrupted the prospective juror's answer and interjected a new question, asking if the prospective juror could and would impose the death penalty, after he heard the evidence presented at the trial. Prospective juror #6611 answered, "I think so. Yeah." (2 RT 497.)

The trial court then asked the prospective juror if he had any religious convictions that would dictate to him that he could not impose the death penalty, and prospective juror #6611 answered, "No" (as he had similarly answered on the Juror Questionnaire). The trial court followed up by commenting, "Okay. And that's a tremendous responsibility to be able to say yes, I can impose the death penalty if I feel the circumstances warrant it. Can you represent to us that that's what you could do?" Prospective juror #6611 answered, "I believe so." (*Ibid.*) The trial court persisted still further, asking, "Okay. You believe so. Any hesitation at all?" Prospective juror #6611 answered, "No. This is just – it's a big deal." (2 RT 497-498.)

At this point the trial court invited defense counsel to question the prospective juror. After establishing that the prospective juror did not have any friends or relatives in law enforcement, defense counsel asked, "If you got to the penalty phase, you would have found my client guilty of killing a police officer, first degree murder, you would have found that true beyond a reasonable doubt. No reason for my client to kill a police officer but he did. Okay? Knowing that, you are in the penalty phase. If the appropriate punishment was death, could you vote death if you felt that was the appropriate punishment?" Prospective juror #6611 answered, "I think so." (2 RT 498.)

After some additional prefatory remarks, defense counsel asked the question again, "So do you think that if you thought it was appropriate, could you vote death?" Prospective juror #6611 answered, "I think I – yes, I think." (2 RT 499.) Defense counsel noted that the prospective juror was "sort of shaking" his head when he answered, and offered that if the prospective juror could not impose a sentence of death, that was fine, it was no problem, the prospective juror could be "let go." (*Ibid.*) At this point, prospective juror #6611 clearly explained his position – that serving as a juror in such a serious matter made him nervous but he would follow the instructions given and

perform his duty. He responded, "I think I could do what would be called upon me. It's just this whole thing, I've never been here before, and this is a big case so I'm a little nervous." (*Ibid.*)

Defense counsel then asked once more, "If you heard all the evidence and you said this man killed a police officer and I think the appropriate punishment is death, can you bring that back? Yes or no. If you can't, fine. But we have to know." Prospective juror #6611's answer was "Yes." Defense counsel then asked if the prospective juror could also bring back a verdict of life without parole if the prospective juror thought this was the appropriate punishment, and prospective juror #6611 once more answered, "Yes." (*Ibid.*)

The prosecutor then questioned the prospective juror. The prosecutor noted that he had been watching prospective juror #6611 while defense counsel was questioning the prospective juror, and he emphasized again to the prospective juror that this was a "very serious case. It's the most serious case we deal with." (2 RT 500.) These remarks seemed calculated to exacerbate the prospective juror's avowed nervousness. The prosecutor then asked if the death penalty were on the ballot the previous week, how would the prospective juror have voted? Prospective juror #6611 answered, "I kind of feel like I'd probably vote yes because it does seem like there are some offenses that the State should have reserved for higher penalty, I guess." (*Ibid.*)

The prosecutor then stated, prefatory to asking his next question, that both sides at the trial had to have a fair opportunity to get the result it wanted, and that the questions the parties were asking the prospective juror did not guarantee that the prospective juror was going to vote for either side. Both sides needed a fair chance. The prosecutor needed to know if jurors could vote death, and "essentially you voting death is like you pushing the button." (2 RT 500-501.) Again the trial court failed to admonish the prosecutor to stop asking prospective jurors to imagine themselves as the executioner. Having

received no such admonishment, the prosecutor took his imagery even a step further, remarking, "And with your hesitancy here, listening to your answers from the Judge and Mr. Leonard, I have a question in my mind, basically can you pull the trigger? Can you have your finger on the button, say I condemn you to death? And if you can't, that's perfectly fine because there's many cases you'd be a fine juror on, but not this one. So – and only you know inside. It's obviously a weighty question. It's the most serious question we ask members of the public in this country to deal with. And there is a number of people that say I support the death penalty, we should have it on the books but I can't make that decision. Are you in that group?" (2 RT 501.)

The record indicates that prospective juror #6611 did not respond. The images the prosecution presented ought to have given anyone pause. The trial court then stated, "You know, as I indicated for as far as we're concerned, there is no right or wrong answer. We only want to know what your true beliefs are," to which prospective juror #6611 responded, "Yeah." The trial court continued, "And I indicated also I want you to stand by whatever your beliefs are, so don't try to satisfy us. You just tell us what your belief is." As prospective juror #6611 began to respond, "Honestly, I –" the trial court interrupted him and interjected "You'd prefer – "; then the prospective juror responded, "I've never been in this situation – " The trial court responded in turn, "I understand." (*Ibid.*)

Prospective juror #6611 then explained, "[I've never been in this situation] before, so I – I feel that I could weigh, you know, everything brought upon me, but, you know, you just never know until you get there. That's kind of how I feel on some things here. I – I don't feel pre-dis – predisposition, you know, either way, but – but you want to know if I – if I would be able to." (2 RT 502.) The prosecutor then stated, "All right. We have one police officer that was killed here. This isn't like the Oklahoma City bombing where you

had 168 people killed. Okay? And in this situation, it's your answer that counts, what's inside of you. And if you couldn't do it, that's perfectly fine." (*Ibid.*)

The record indicates the prospective juror did not respond. He might have been wondering why no one seemed to be accepting his statements that he could vote for life or for death, once the evidence had been presented to him. The trial court then stated, "There has been a substantial silence and that's because you're mulling over in your mind whether or not you could or could not impose the death penalty; is that right? And at this point in time you still haven't reached a conclusion. Is that a fair answer?" (*Ibid.*) Prospective juror #6611 responded, "True. I'm kind of hitting blank just with –" (*Ibid.*) Again the trial court interrupted the prospective juror, not letting him complete his answer. The court stated, "Okay. I think I'm going to make a finding that the juror's response does demonstrate that his views would substantially impair his duties as a juror in accordance with his oath and instruction by the court. And there is no reflection on you. It's – and I appreciate you not knowing, and I don't know what a lot of people would do in your position, but I'm going to excuse you . . . ." (2 RT 502-503.)

The trial court erred in excusing prospective juror #6611 on its own judgment for cause, because the prospective juror had stated repeatedly that he could vote for the death penalty in this case, and he had no religious or personal objections to the death penalty. His problem in answering questions stemmed from the fact that the prospective juror was admittedly "a little nervous" (2 RT 499), which state of mind was likely worsened by the trial court repeatedly interrupting his answers. Being nervous during voir dire does not disqualify a prospective juror from sitting on a capital jury. If this were the rule, few would be allowed to serve.

Moreover, the trial court improperly allowed the prosecutor to ask prospective juror #6611, as the prosecutor had improperly asked prospective juror #5637 (are you ready to "pull the switch"?), would prospective juror #6611 be able to "push the button," "pull the trigger," and have his "finger on the button"? (2 RT 500.) The prosecutor told the prospective juror "essentially you voting death is like you pushing the button." (2 RT 501.) This is not a proper assertion, and the prospective juror should not have had to accept this assertion. Nonetheless, when asked if he could "push the button," prospective juror #6611 honestly responded, "I've never been in this situation . . . before, so I – I feel that I could weigh, you know, everything brought upon me, but, you know, you just never know until you get there. That's kind of how I feel on some things here. I – I don't feel pre-dis – predisposition, you know, either way, but – but you want to know if I – if I would be able to." (2 RT 502.) The prospective juror was stating he was not predisposed to vote for death or for life without the possibility of parole at that point, until he heard the evidence; before that, one just does not know how one will vote on life or death. This is just the attitude a prospective juror is supposed to bring to a capital trial.

When prospective juror #6611 was allowed to answer questions without interruption and to explain his views, he explicitly stated that he could accept either penalty, depending on the evidence presented. His nervousness was understandable, but he was barely allowed to speak due to multiple interruptions. On this record, a blind dismissal of this notably impartial prospective juror was error.

In sum, the trial court erred in excusing prospective juror #6611 for cause because the prospective juror had not given any answer which would disqualify him to sit on a capital jury. The prospective juror's silence following two questions from the prosecutor did not negate his previous

answers to the court's questions and to defense counsel's questions, in which he affirmed that he could vote either for death or for life. Thoughtfulness is not disqualifying. The prospective juror stated that until he heard the evidence at trial, he was "neutral" about imposing a death sentence. Prospective juror #6611 was nervous, but this did not give the trial court cause to excuse the juror. For this reason, appellant was denied his constitutional right to an impartial jury, he did not receive a fair trial and his conviction for murder and his sentence of death must be reversed. In appellant's case, the jury was improperly chosen to foster a death verdict.

E. The Trial Court's Erroneous Exclusion of Prospective Jurors Numbers 4593, 5637 and 6611 For Cause Requires Reversal of Appellant's Conviction For Murder and His Sentence of Death

As stated earlier, the improper exclusion for cause of even a single qualified juror requires a per se reversal of the death sentence. (*Gray v. Mississippi, supra.* 481 U.S. at pp. 666-668; *People v. Heard, supra*, 31 Cal.4th at p. 966.) In this case, three impartial prospective jurors were unconstitutionally disqualified from jury service despite their clear ability to select either penalty and to follow the court's instructions. For this reason, appellant's conviction for murder and his sentence of death must be reversed.

II.

THE TRIAL COURT ERRED IN ADMITTING THE COMPUTER ANIMATION DEPICTING THE SEQUENCE OF SHOTS AND LOCATIONS FROM WHICH THE SHOOTER FIRED

The prosecution presented as an important part of its case a computer animation which depicted the sequence of shots fired at Deputy Hoenig and the locations from which the shots were fired. The animation was based on the locations of the shell casings found on the street, the estimated trajectories of bullets, inferences from the locations of the wounds on Deputy Hoenig's body, blood splatter evidence, and the opinions of Dr. Carley Ward, a forensic pathologist whose expertise was injury reconstruction, regarding the "bio-mechanics" of the bullets that caused Deputy Hoenig's wounds. (1 RT 185-186.) From the outset, appellant's counsel objected to admission of this animation as speculation and as lacking proper foundation. (1 RT 18-19; 4 RT 1029-1030.)

A. The "402" Hearing Evidence and Argument

At the close of jury selection, the trial court held a "402" hearing on the admissibility of the computer animation. The prosecutor called witnesses Parris Ward and Dr. Carley Ward to explain the procedure and premises used to prepare the animation and to support the argument that its preparation and contents met the guidelines for admission set forth in *People v. Hood* (1997) 53 Cal.App.4th 956. *Hood* is apparently the sole published California decision addressing the admissibility of such computer animations in criminal trials.

As described by the prosecutor, the animation depicts shot number one as coming from the north side of the street, near where appellant's bicycle was found. According to this theory, the bullet fired from this location traveled through the rear window of the police car, hit Deputy Hoenig in the hand, and

then went through the top of the dash and into the windshield. (4 RT 1028.) Shots two, three and four are depicted in the animation as coming from the left side of the police car. The animation shows shot number two going through Deputy Hoenig's left leg just above the ankle, shot number three entering Deputy Hoenig's upper torso, just above his bulletproof vest, and shot number four hitting the lower right rear quadrant of the bulletproof vest, and being stopped by the vest. The animation depicts shots five, six and seven as coming from a westward direction, with the shooter firing back toward the east, or toward the front of the police car. The prosecutor argued that this was the order of the shots, but he admitted that the order could not be conclusively proven. (*Ibid.*)

In arguing for admission of the video animation, the prosecutor stated he would make it clear to the jury that the order of shots two through seven could have been different. The order of the shots as depicted in the animation constituted the prosecutor's opinion of the order of the shots, based on expert opinion and the physical evidence. The prosecutor suggested the trial court give the jurors the "*Hood* instructions" regarding the animation. (4 RT 1028-1029.)

Trial counsel agreed that it was a reasonable conclusion that shot number one went through the back of the police car, but he disagreed that the physical evidence or any experts could establish the actual and correct order of shots number two through seven. (4 RT 1029-1030.) Previously, counsel had disputed whether the positions of the shell casings as documented at the crime scene were likely the correct, original positions, because "heroic measures" had been taken at the crime scene by police officers and paramedics in the attempt to save Deputy Hoenig's life, and it was likely that the shell casings had been moved during those activities. (1 RT 186.) Therefore, counsel now argued, it was pure speculation to say what the sequence of shots

numbered two through seven was, or where the shooter was standing at the time the shots were fired. (4 RT 1030.)

Parris Ward testified at the "402" hearing that he created the animation in conjunction with Dr. Carley Ward. (4 RT 1052.) Parris Ward had experience with biodynamics engineering, computer graphics and animation, and photography. In preparation for creating the computer animation of the shooting of Deputy Hoenig, Mr. Ward had reviewed police reports, coroner's reports and photos taken by the coroner, and had gone to the scene of the shooting. There he positioned a police patrol car in the location Deputy Hoenig's police car had been at the time of the shooting, and he made exact measurements at the scene using a surveyor's instrument. (4 RT 1031-1042.)

Mr. Ward also had a special effects company in Hollywood create a digital version of Deputy Hoenig's police car to use in the animation. (4 RT 1051.) Mr. Ward and Dr. Ward put together in the animation a series of depictions of different shooting positions, based on the evidence gathered at the crime scene, the autopsy reports, and the conclusions of the criminalists who investigated the case. According to Mr. Ward, the resulting animation was not intended to be a "simulation" or to add some facts to the case. It was intended to be an illustration of the testimony of the different "experts" involved. (4 RT 1052.)

On cross-examination, Mr. Ward agreed, though he was not a ballistics expert, that when someone fires a weapon that ejects a casing that the casing could fly as far as three feet away from the person firing the weapon. He also agreed that the casings at the crime scene could have been inadvertently moved by personnel arriving at the shooting scene in order to give life-saving treatment to Deputy Hoenig, or by police officers checking the scene initially. (4 RT 1061.)

Dr. Carley Ward, who stated she was a biomechanical engineer, also testified regarding how the animation was prepared, reiterating the testimony of Parris Ward. (4 RT 1066-1077.) On cross-examination, Dr. Ward agreed that she could not say how far away the shooter was when he fired the bullet that entered Deputy Hoenig's throat area. (4 RT 1077.)

Following this testimony, the trial court determined that the prosecution had laid a sufficient foundation to justify admission of the computer animation. The court found the animation was relevant, and the animation would assist the jury in understanding what had transpired. Exercising its discretion under Evidence Code section 352, the court found that the probative value of the animation outweighed any potential prejudice, and overruled appellant's objection to its admission. Nevertheless, the court planned to advise the jury per the instruction set out in *People v. Hood* at the time the jury was shown the animation. (4 RT 1080.)

B. *People v. Hood* Is Inapposite and Does Not Control This Case

In *People v. Hood*, the defendant was convicted of second degree murder after two trials. The victim had worked for the defendant's construction company; he had been accused but acquitted of murdering the defendant's wife. The victim went to see defendant at the defendant's business office. Thereafter he entered the defendant's private office, and within a very short period of time the defendant had fired seven bullets into the victim, killing him. The prosecution contended the killing was deliberate and premeditated, while the defendant maintained that the victim had threatened him beforehand and was in the process of pulling out a gun when the defendant shot him. (53 Cal.App.4th at p. 967.)

Before the first trial, the prosecution sought to introduce a computer animation of the shooting, based upon (1) information supplied by the

defendant's secretary and the detective who did measurements at the scene, (2) reports of the pathologist who conducted the autopsy on the victim, and (3) reports of the prosecution's ballistics and gunshot residue experts. The defendant opposed admission of the animation, claiming that under the *Kelly 2* formulation (*People v. Leahy* (1994) 8 Cal.4th 587), computer animation had not gained the scientific acceptance necessary for admissibility. The trial court ruled that the animation was illustrative, similar to an expert who draws on a board, and it was not being introduced as evidence in and of itself, but only to illustrate the testimony of various prosecution experts. (53 Cal.App.4th at p. 968.)

Before the second trial began, the defendant again objected to admission of the computer animation on the basis of foundation, and the trial court overruled the objection. (*Ibid.*) Before the animation was played to the jury at the second trial, the trial court instructed the jury:

> [Y]ou're reminded that . . . this is an animation based on a compilation of a lot of different experts' opinions. And there are what we call crime scene reconstruction experts who could, without using a computer, get on the stand and testify that based on this piece of evidence and this piece of evidence and this piece of evidence that they've concluded that the crime occurred in a certain manner. And then they can describe to you the manner in which it occurred. And they can sometimes use charts or diagrams or re-create photographs to demonstrate that. And the computer animation that we have here is nothing more than that kind of an expert opinion being demonstrated or illustrated by the computer animation, as opposed to charts and diagrams.

(*Ibid.*)

During the defendant's testimony, the trial court further instructed the jury regarding the computer animations presented by both the prosecution and the defense:

> I . . . again remind you that all of the animated video reenactments or re-creations are only designed to be an aid to testimony or reconstruction, the same as if an expert testified and drew certain diagrams on the board. They are not intended to be a film of what actually occurred or an exact re-creation. And, therefore, there may be things in each of the videos--in fact, you've heard from some of the witnesses [that] in each of the videos[,] . . . there are things that are not exactly accurate or not exactly as they occurred, but reasonably close, and it's important to keep that in mind with regard to all of the animated videos, that they are not actual films of what occurred nor are they intended to be exact, detailed replications of every detail or every event or every movement. They are only an aid to giving an overall view of a particular version of the events, based on particular viewpoints or particular interpretations of the evidence.

(53 Cal.App.4th at pp. 968-969.)

The Court of Appeal agreed with the trial court that the prosecution's computer animation did not need to meet the requirements of the *Kelly* formulation, though it recognized that "[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury. . . ." (53 Cal.App.4th at p. 969, quoting *People v. Kelly* (1976) 17 Cal.3d 24, 31-32.)

The Court of Appeal viewed the computer animation as merely "tantamount to drawings by the experts . . . to illustrate their testimony." (53 Cal.App.4th at p. 969.) The appellate court concluded, "Given the nature of the testimony at trial as to how the prosecution's animation had been prepared, . . . and the instructions given the jury concerning both animations, there was no danger that the jury was swept away by the presentation of a new scientific technique which it could not understand and, therefore, would not challenge." (*Id.* at pp. 969-970.)

However, the appellate court did not address at all several pertinent arguments against admission of the prosecution's computer animation because

the defendant had failed to assert these arguments at trial, and the defense therefore had waived these arguments. Reasons for excluding the animation that the appellate court could not consider in *Hood* for procedural reasons included: (1) the prosecution's animation was based not only on the physical evidence but also on the reactions and states of mind of two witnesses under conditions of extreme stress, for which there simply was no clear evidence, (2) the computer expert who prepared the animation cumulated various assumptions together to create an overall scenario even more remote from the necessary evidentiary foundation than the original evidence, (3) the prosecution witnesses themselves conceded that other explanations of the facts were possible, and (4) the computerized re-enactment was based on "inadmissible speculation regarding the position and posture of [the victim] at the time of the shots." (*Id.* at p. 970.) In the present case, appellant properly raised all these arguments, but the trial court ignored them. The court failed to observe that *Hood* had not addressed them, and failed to consider that the outcome in *Hood* might have been different had the defendant there preserved these objections to the admission of the animation .

The court in *Hood* did not address one additional argument because the defendant failed to raise the argument below, which is pertinent here also: admission of the animation invaded the province of the jury, because the admission constituted an expert statement of how the killing occurred, an ultimate issue which was for the jury to determine. (*Ibid.*)

The court in *Hood* rejected on the merits the defendant's contention that the probative value of the animation outweighed its prejudicial impact. The defendant had argued that the animation was emotionally charged and preyed on the emotions of the jury. The Court of Appeal, however, characterized the animation as "clinical and emotionless." This finding, combined with the instruction the trial court gave the jurors about how they were to utilize the

animation, persuaded the reviewing court that the court below had not abused its discretion in admitting the computer animation. (*Id.* at p. 972.)

The court in *Hood* misjudged the prejudicial impact that *any* computer animation prepared by the prosecution has on a defendant's right to a fair trial. Even assuming *arguendo* that the Court of Appeal was correct that a computer animation such as the one at issue in *Hood* and also in the instant case does not need to meet the requirements of scientifically valid evidence set forth in *People v. Kelly*, *supra*, such computer animations still inevitably and unfairly take on "a posture of mystic infallibility in the eyes of a jury."

This problem was recognized in *Dunkle v. State* (Okla. Crim. App. 2006) 139 P.3d 228. The defendant in *Dunkle* was convicted of murdering her fiancee, Gary White, just outside the home they were sharing. Ms. Dunkle denied she had shot White, maintaining that he had either shot himself or that he was shot accidentally as she attempted to prevent him from shooting himself. (139 P.3d at p. 231.) On appeal, Dunkle challenged the State's use of a computer-generated series of crime scene "re-enactments" during the testimony of its crime scene reconstruction expert, and the Court of Appeal upheld this challenge, reversing Dunkle's murder conviction on this ground and also on a separate ground that the trial court had erred in allowing the prosecution to present improper character evidence against Dunkle. (*Id.* at pp. 245; 251.)

The Court of Appeal in *Dunkle* applied a three-part test originally set forth in *Harris v. State* (2000 OK CR 20, 13 P.3d 489) to assess the admissibility of the computer re-enactments. The court stated that in order for a computer crime scene re-enactment to be admissible before a jury, as an aid to illustrate an expert witness' testimony, a trial court first must require that the re-enactment be authenticated, that is, the trial court had to determine that the re-enactment was a correct representation of the object portrayed, or a fair and

accurate representation of the evidence to which it related. Second, the trial court had to make a ruling that the re-enactment was relevant, and third, that its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise. (139 P.3d at p. 247.) If the trial court found the re-enactment admissible, then the court had to instruct the jury that the computer-generated exhibit represented only a re-creation of the proponent's version of the event, that the animation should in no way be viewed as an actual re-creation of the crime, and like all other evidence, it could be accepted or rejected in whole or in part. (*Ibid.*)

The court in *Dunkle* contrasted the computer animation which was accepted in *Harris* with the problematic computer animations presented in Ms. Dunkle's case. In *Harris*, the victim was shot three times in the head and once in the side of the abdomen while seated in the passenger seat of a car. The computer animation was based upon the trajectory of the bullet passing through the victim's abdomen and into the car seat. The court in *Harris* found the computer animation had been authenticated and was relevant. Regarding probative versus prejudicial value, the *Harris* court stated, "[w]ith the measurements of the bullet trajectories, entry and exit wounds, it was possible through scientific and/or technical analysis to come to a conclusion about the position of the victim's body at the time of the shooting." (139 P.3d at p. 247, quoting *Harris v. State*, *supra*, 13 P.3d at p. 496.)

The computer animations at issue in *Dunkle*, in contrast, consisted of a series of four re-enactments showing a female and a male victim posed in various positions relative to the steps on the outside of a home, with a gun held by one or the other or both of them. The court found that the prosecution's use of the four computer animations was inappropriate and the evidence was potentially highly misleading to Ms. Dunkle's jury. The animations were

authenticated, but the record in the case did not establish that they were "fair and accurate representations of the evidence to which they related." The court found that the evidence in the case "simply did not adequately support the assumptions implicit in each of the four animations." (139 P.3d at p. 250.)

The court recognized the potential value of computer-based animations within trials, but it emphasized that it was more concerned with the potential dangers inherent in their use, quoting *Clark v. Cantrell* (2000) 339 S.C. 369, 529 S.E.2d 528, on this point: "[A] computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images. The computer maxim 'garbage in, garbage out' applies to computer animations." (529 S.E.2d at p. 536; quoted at 139 P.3d 250.) The court in *Dunkle* then explained that the use of computer-based animations has the potential to be highly prejudicial and misleading, since the computer-generated images "lend an air of technical and scientific certainty to the 're-enacted' evidence, which may or may not be justified." (139 P.3d at p. 250.)

The *Dunkle* court concluded that the computer animations presented in that case were not fairly representative of the evidence in the case, and therefore they were not relevant. Furthermore, their probative value was substantially outweighed by the potential to mislead and confuse the jury, and because the animations were essentially a further restatement of the prosecution's theory of the case, based upon previously admitted evidence and without new content or analysis, they were also needlessly and unfairly cumulative. (*Id.* at p. 251.)

The computer animation in appellant's case suffers from the same flaws as in *Dunkle*, and this evidence should have been excluded here as well. First, as the prosecution's own expert witnesses admitted, the order of shots number two through seven as depicted in the animation was based purely on opinion

and inference from data gathered and measured largely by others. The prosecutor told the trial court that the animation showed only the *likely* order of the shots, admitting that the order of the shots could not be conclusively proven. (4 RT 1028.) Further, defense counsel disputed without rebuttal that the positions of the shell casings as portrayed in the computer animation could be different from the original locations the shell casings landed, because a variety of police officers and medical personnel had engaged in "heroic measures" at the crime scene in the attempt to save Deputy Hoenig's life, *before* the locations of the shell casings were identified and measured. It was likely that at least one – and possibly more – of the shell casings had been moved during those activities. (1 RT 186.) The activities of the police and medical personnel at the crime scene therefore irretrievably tainted any effort to determine what the true positions of the shell casings had been. For this reason, defense counsel correctly argued that it was pure speculation to say what the sequence was of shots two through seven, or where the shooter was standing when those shots were fired. (4 RT 1030.)

Therefore, as in *Dunkle*, the computer animation in this case failed the test of being a "fair and accurate representation of the evidence to which it related," and the computer animation therefore should have been ruled inadmissible as not relevant.

Second, as in *Dunkle*, the evidence presented through the computer animation in this case was entirely cumulative. All the evidence illustrated in the computer animation had been presented to the jury separately through the many prosecution witnesses who detailed where the final locations of the shell casings were, where the bullets had entered and exited from Deputy Hoenig's body, what the inferred trajectories of the bullets were, and so on. Yet the presentation of the computer animation, together with the presentation of the lengthy testimony of its two creators, unfairly gave the computer-generated

images "an air of technical and scientific certainty to the 're-enacted' evidence" (*Dunkle v. State*, *supra*, 139 P.3d at p. 250) which in the instant case was definitely not justified. Morever, in appellant's case, the only two witnesses who testified about the content of the animation did not use the animation to illustrate their own testimony, but instead testified to "validate" the content of the animation. The "scientific" air their testimony lent to what was essentially hearsay cannot be overestimated; for the most part, these two witnesses drew their conclusions from others' extrapolations from the original data found at the crime scene. Moreover, their conclusions as to the ultimate issues in the case were improperly allowed to go before the jury.

"Videotape makes a more lasting and intense impression on jurors than other forms of proof." *Witke, Higgins and Babcock,* "Video Tape is Worth a Thousand Words": Use of Demonstrative Evidence in the Defense of a Product Liability Case, 50 Ins.Counsel J. 94, 97 (1983). Courts regularly recognize that "'seeing is believing,' and [as] demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect." 2 *McCormick on Evidence*, section 214 at p. 3. Where demonstrative evidence was not properly based in undisputed facts, reviewing courts have not hesitated to find error in its admission at trial. In *United States v. Gaskell* (11th Circuit 1993) 985 F.2d 1056, the prosecution introduced a demonstration of shaken baby syndrome performed by a witness using a doll. The circuit court concluded that the demonstration "tended to implant a vision of [the defendant's] actions in the jurors' minds that was not supported by adequate factual basis." (*Id.* at p. 1060.) For this reason, the court concluded the "slight" probative value of the demonstration was overwhelmed by its unfairly prejudicial effects. (*Ibid.*) In *Hinkle v. City of Clarksburg, W. Va.* (4th Cir.1996) 81 F.3d 416, the circuit court noted that a

computer-animated videotape is the equivalent of a real-life re-creation and thus it needed to be close to the actual known facts to be admissible. (*Id.* at pp. 424-425.)

In *State v. Stewart* (2002) 643 N.W.2d 281, the court held that a computer animation should have been held inadmissible as demonstrative evidence to illustrate the opinion of the prosecution's expert witness regarding the manner in which the crime occurred. The court found that the animation did not merely recreate the facts but sought to present speculation as fact – depicting without sufficient basis deliberate, intentional actions supporting the prosecution's theory of the case. Similarly, the animation presented in appellant's case painted the sequence of the shots fired in reference to an alleged intent or deliberate plan to kill the victim.

In *People v. McHugh* (1984) N.Y.S.2d 721, the court analogized computer re-creations to "charts or diagrams illustrating expert testimony." To meet the demonstrative evidence standard, a threshold showing had to be made that "there is substantial similarity between conditions existing at the time of the occurrence giving rise to the litigation and conditions created in the experiment." (*Id.* at p. 742.) That standard simply was not met here. (See also, *Ford Motor Co. v. Nowak* (1981) 638 S.W.2d 582, 590 [a film intended for even a limited purpose, such as illustration of a principle or use as a visual aid, must show sufficient similarity to the actual accident to be admissible]; *Kaminski v. Board of Wayne County Road Commissioners* (1963) 121 N.W.2d 830, 835-836 [accident re-enactment film not admissible where poor visibility from dust in the atmosphere was a vital issue in the case, and no dust was portrayed in the re-enactment]).

Because the Court of Appeal opinion in *People v. Hood* did not address the relevant objections raised by appellant below in this case, because the computer animation here did not fairly and accurately represent the evidence

in the case, and because the computer animation was purely cumulative here, the Court must find the trial court erred in admitting the computer animation into evidence, and reverse appellant's conviction and sentence.

C. Appellant was Prejudiced by the Admission of the Computer Animation

The admission of a computer animation into evidence that depicted without sufficient proof the sequence of shots fired and the locations from which the shots were fired unfairly prejudiced appellant because the computer animation lent "an air of technical and scientific certainty to the 're-enacted' evidence" (*Dunkle v. State*, *supra*, 139 P.3d at p. 250) which was not justified. The prosecutor relied heavily on the computer animation in his closing argument, going through each frame in the animation during argument to support his assertions about trajectories, where each shot was fired from, and what the intent of the shooter was with each shot. (7 RT 1768-1770; 1782-1783.) The prosecutor described the animation as presenting *the* sequence of events in the murder of Deputy Hoenig, and argued the animation dispelled any argument that appellant was so intoxicated from methamphetamine use that he could not deliberate and premeditate. (7 RT 1781-1782.)

The prosecutor argued the computer animation should sway the minds of the jurors on the ultimate issues of deliberation and premeditation, and surely it did, but improperly so since it did not have a proper foundation for its depictions of events. With good reason, even ballistics witnesses and pathologists are not allowed to state unequivocally that a shooting was premeditated and deliberate, but the video animation so stated here, through the manner in which the events were depicted. Thus, the animation was misleading, and its probative value was outweighed by its prejudicial effect. For all the reasons stated herein, the prosecution should not have been allowed to rely on a computer animation of the shooting of Deputy Hoenig, and the

trial court's error in admitting that evidence so prejudiced the jury's ability to fairly deliberate on the issue of deliberation and premeditation that this Court must reverse appellant's conviction of murder and sentence of death.

* * * * *

III.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

At the conclusion of the penalty phase, the trial judge instructed the jury pursuant to CALJIC No. 8.85. (CT 931-932; RT 1973-1976.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnham* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein.

A. The Trial Court's Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of Capital Punishment

The instructions given failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See CT 931-932; RT 1973-1976.) This Court has concluded that each of the factors introduced by a prefatory "whether or not"– factors (d), (e), (f), (g), (h), and (j) – are relevant solely as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1141, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769770; *People v. Davenport* (1995) 41 Cal.3d 247, 288-289.) But the jurors here were left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. The jurors here

were not even instructed pursuant to CALJIC 8.85.6 that the absence of a statutory mitigating factor "does not constitute an aggravating factor." For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1982) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. at p.280.)

By instructing the jury in this manner, the trial judge ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, mitigating factors. The fact that the jury may have considered these mitigating factors to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of the trial judge's failure to define mitigating factors as mitigating will differ from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC

No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 violated appellant's Eighth and Fourteenth Amendment rights.

B. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Appellant's Jury

CALJIC No. 8.85 provides, pursuant to Penal Code section 190.3, that jurors may consider certain factors to be mitigating only if they also find the factors to be "extreme" or "substantial." More specifically, the jurors in this case were instructed that they could consider "[w]hether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance," and "[w]hether or not the defendant acted under *extreme* duress or under the substantial domination of another person." (CT 931-932; RT 1974-1975 [emphasis added].)

These modifiers impermissibly raised the threshold for the consideration of mitigating evidence and risked misleading the jurors into believing that evidence of emotional disturbance or duress that was not extreme, or evidence of domination that was not substantial, could not be considered in mitigation. Adjectives such as "extreme" and "substantial" in the list of mitigating factors rule out the possibility that lesser degrees of the disturbance, duress, or domination can be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments. *(Stringer* v. *Black, supra,* 503 U.S. 222; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. 586.)

In the instant case, there was evidence that appellant was an emotionally disturbed individual. Juan Parra, appellant's oldest brother, testified that when appellant was growing up, he was a good-hearted boy, he liked everybody and played with everyone, and he went to school. He was not violent. (7 RT 1921-1923.) Luis Navarro, who was married to appellant's sister Blanca, testified that he worked for RPS Delivery Service as an independent contractor. Appellant had worked for Navarro for four and one-half years, starting in 1991, helping him when he needed boxes to be carried and the truck to be loaded and unloaded. Appellant had been a real hard worker, and other coworkers wanted appellant to ride with them also to help. (7 RT 1923-1925.) When appellant used drugs, however, he acted differently than described above. According to Navarro, he would be a "total different person," and become violent, tense and pushy. (7 RT 1926-1927.)

Maria Villa, the daughter of appellant's uncle, Eliseo Villa, from whom appellant had taken the gun used in the shooting, testified she had seen appellant when he was under the influence of drugs. He would become paranoid and "scary." Toward the end of the period before he was arrested for murder, appellant used drugs more. He started using them when his father died, about a year before appellant's arrest. Appellant lost his job because of his drug use. During the period before October 1997, he was using a lot of drugs. (7 RT 1932-1933.)

Fernando Solano, a close friend of appellant for about twelve years, testified that he had seen appellant under the influence of drugs. When appellant used drugs, he became "erratic, nervous, violent." Fernando could see something in his eyes "that just something would change in him." (7 RT

1934-1938.) At nights, appellant could not even be alone, because he was afraid to be alone at nights. (7 RT 1938-1939.)

Solano knew appellant was using methamphetamines by the way he acted. Appellant would be at Solano's home, just doing nothing, and appellant would leave and come back, and then act "totally different, very paranoid." Once, a couple of weeks before appellant's arrest, appellant was sleeping in Solano's front room on the couch, and Solano and his family came home from the movies. They were laughing about something, and appellant jumped off the couch and jumped in their faces, saying "What's going on? What are you guys laughing about?" Solano told him to calm down. (7 RT 1940-1942.) Appellant was under the influence of drugs "a lot" during the year before the murder. Solano told appellant to stop using drugs almost every time he talked to him. Appellant wanted to stop, but "he couldn't help it." When appellant was under the influence, Solano would tell him to stop and appellant would just say, "I don't care anymore. I don't care if I just die." (7 RT 1942-1943.)

Eliseo Villa, appellant's uncle, testified that appellant had lived with Eliseo and his wife and daughter Maria for a month or two prior to the killing. Eliseo had known appellant for fifteen years. Eliseo believed appellant committed this crime because he was using drugs. In his sound mind, appellant would never have committed the crime. Before appellant's arrest, Villa suspected appellant's life was not going well because he was missing days at work and his boss called for him at Villa's house. (8 RT 1959-1961.)

On one occasion, Villa talked to appellant for a long time about all the things that were not going well for appellant. Appellant lowered his head and then started to cry. Eliseo reminded appellant that when appellant came to Los Angeles, his father entrusted appellant to Eliseo, and he told appellant he needed to behave better and take care of his job. (8 RT 1961.) Villa believed

that when appellant committed this crime, he did not know what he was doing, because he was under the influence of drugs. (8 RT 1961-1962.)

In light of this evidence, the instruction in factor (d) that jurors were not to consider whether appellant committed the crime while he was under the influence of a mental or emotional disturbance unless the disturbance was "extreme" violated appellant's right to have the jurors consider that evidence as mitigating.

Such wording as "extreme" and "substantial" also renders these factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. *(Maynard v. Cartwright* (1988) 486 U.S. 356, 361-64; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) The jury's consideration of these vague factors, in turn, introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Appellant recognizes that there are a plethora of cases holding that the word "extreme" need not be deleted from this type of instruction (see, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [no substantial explanation]; *People v. Benson* (1990) 52 Cal.3d 754, 803-804), as well as cases holding that the language of factors (d) and (h) is not impermissibly restrictive. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) However, these holdings are based on the assumption that jurors will utilize the "catchall" instruction provided by factor (k) to consider evidence that may not be "extreme" or "substantial."

But the "catchall" provision of factor (k) does not serve to cure this defect. First, factor (k) makes no reference whatsoever to mental or emotional disturbance or duress and, in light of the more specific language of factors (d) and (g), factor (k) would not be understood by any reasonable juror as superseding those factors. In addition, by its terms, factor (k) refers only to "any *other* circumstances" not previously listed in CALJIC No. 8.85, and no

reasonable juror would therefore understand it to include factors already included in the instruction.

For these reasons, the instructions contained in CALJIC No. 8.85 are constitutionally flawed. Because CALJIC No. 8.85 fails to comply with constitutional requirements, appellant's death sentence should be reversed.

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IV.

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

At the penalty phase jury charge, the trial judge instructed the jury pursuant to CALJIC 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injuries 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 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 933-934; RT 1976-1978.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. For all these reasons, reversal of appellant's death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

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A. In Failing to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.)[11] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction 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 plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating

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

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 violates the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-347.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [emphasis in original].)

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 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 opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *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.)[12]

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[12] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal

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

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

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

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be

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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*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle to appellant in the instant 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 is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as – if not more – entitled as noncapital defendants to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, reversal is required.

B. In Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979; *People v. Brown, supra,* 40 Cal.3d at pp. 538-541 [holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was *ipso facto* the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation – and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the

effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

Clearly, in appellant's case the overall impact of the penalty phase instructions, and in particular CALJIC No. 8.88, the concluding instruction, was to falsely give the jurors the impression (1) that the trial judge wanted the jurors to impose a sentence of death, and (2) that jurors did not "have the right to just as easily give Life without Parole." (*Ibid.*)

Since these defects in the instructions deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

C. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3

Under the standard CALJIC instructions, the question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (CT 934; RT 1978.)

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is

so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391; see *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.) Regarding 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. [Footnote.] 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 a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a "murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions," is unconstitutional and, thereby, unenforceable.

(*Arnold v. State, supra,* 224 S.E.2d at p. 392 [brackets in original].)[13]

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrants death" that "implies any inherent restraint on the arbitrary

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

and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 429.) These words do not provide meaningful guidance to a sentencing jury attempting to determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

D. By Failing to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden and Reversal Is Required

As noted above, CALJIC No. 8.88 informed the jury that "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 934; RT 1978.) Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) CALJIC No. 8.88 does not adequately convey this standard; it thus violates the Eighth and Fourteenth Amendments.

To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for

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imposition of death.[14] Clearly, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty.[15] The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

E. The Instruction Is Unconstitutional Because It Fails to Set Out the Appropriate Burden of Proof

(1) The California Death Penalty Statute and Instructions Are Constitutionally Flawed Because They Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor or of Proving Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors

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[14] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something; (b) to authorize (the doing of something)." (*Webster's Unabridged Dictionary* (2d ed. 1966) 2062.) In contrast, "appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; . . . ." (*Id.* at p. 91.) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (*ibid*), while the verb "warrant" is synonymous with broader terms such as "justify, . . . authorize, . . . support." (*Id.* at p. 2062.)

[15] The trial court instructed that "[i]n 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." (CT 933; RT 1978; CALJIC No. 8.88 [emphasis added].)

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3; *People v. Cudjo* (1993) 6 Cal.4th 585, 634). However, under the California scheme, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.

Appellant submits that the failure to assign a burden of proof renders the California death penalty scheme unconstitutional and appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected similar claims (*see e.g. People v. Stanley* (1995) 10 Cal.4th 764, 842 and *People v. Ghent* (1987) 43 Cal.3d 739, 773-774, cert. denied (1988) 485 U.S. 929), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three recent opinions, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the United States Supreme Court has observed, "*in 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." (*People v. Monge* (1998) 524 U.S. 721, 732 [citations and interior quotation marks omitted; emphasis added].)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable-doubt standard in the penalty phase of a capital case. If any doubt remained about this, the Supreme Court laid such doubts to rest by the series of cases that began with *Jones v. United States*.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended the holding of *Jones* to the states through the Fourteenth Amendment, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones*, *supra*, 526 U.S. at pp. 252-253.)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree

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

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied the principles of *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) It considered Arizona's capital sentencing scheme, where the jury determines guilt, but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*:

> Capital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

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

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings "necessary to . . . put [a defendant] to death," regardless of whether those findings are labeled "sentencing factors" or "elements" and whether made at the guilt or the penalty phase of trial. (*Ring v. Arizona*, *supra,* 536 U.S. at p. 609.)[16] The Court observed:

> 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. We hold that the Sixth Amendment applies to both.

(*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." *(People v. Ochoa* (2001) 26 Cal.4th 398,. 454.). The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Id.* at p. 454.) However, post *Ring*, this holding is no longer tenable.

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[16] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Id.* at p.610 (con. opn. of Scalia J.).)

Read together, the *Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" *(Ibid.)* The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings both that aggravation exists and that it outweighs mitigation must be made.

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

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "If a State makes an increase in a

defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination or balancing test, the reasoning in *Apprendi* and *Ring* requires that this most critical "factual assessment" be made beyond a reasonable doubt.[17]

In addition, California law requires the same result.[18] The reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as

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[17] It cannot be disputed that the jury's decision of whether aggravating circumstances are present and whether the aggravating circumstances outweigh mitigating circumstances are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ("the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard").)

[18] The practice in other states also supports this conclusion. In at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See J. Acker and C. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 Crim. L. Bull. 19, 35-37, and fn. 71-76 (1995), and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

sentence enhancement allegations, such as that the defendant was armed during the commission of an offense, must be proved beyond a reasonable doubt. (See CALJIC No. 17.15.) The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in the defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently . . . . unless it has 'some rational basis, announced with reasonable precision' for doing so."].)

Accordingly, appellant submits that *Apprendi* and *Ring*, and consistent application of California precedent both require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

(2) The Fifth, Sixth, Eighth and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

The penalty phase instructions given here not only failed to impose a reasonable doubt standard on the prosecution (see preceding argument), the instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it has also held that a burden of persuasion at the penalty phase is inappropriate given the "normative" nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant submits that this holding is constitutionally unacceptable under the Fifth, Sixth, Eighth, and Fourteenth Amendments and urges this Court to reconsider that ruling.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination will also vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, *some* burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments – "wanton" and "freakish" (*Proffitt v Florida* (1976) 428 U.S. 242, 260) and the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p. 374) – that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state, while another assigns it to the accused or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant.

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of

murder and at least one special circumstance. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code §190.3) and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53.Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[19]

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

Third, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (See Cal. Rules of Court, rule 420, subd. (b) (existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence); Evid. Code § 520 ["The party claiming that a person is guilty of

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[19] Of course, the Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to non-capital 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.)

(3) The Trial Court's Failure to Instruct on the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances Resulted in an Unfair, Unreliable and Constitutionally Inadequate Sentencing Determination

By failing to provide a sua sponte instruction on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation), the trial court impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) "There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to

consider it." (*Lashley v. Armontrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

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

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*Ibid*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards.

Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Eighth and Fourteenth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

(4) Even if It Is Constitutionally Acceptable to Have No Burden of Proof, the Trial Court Erred in Failing to So Instruct the Jury

Appellant further submits in the alternative that even if it were permissible not to have any burden of proof at all, the trial court still erred prejudicially by failing to articulate to the jury that there was no such burden. 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. at pp. 280-282.) 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. Such arbitrary and capricious decision-making in a capital case is contrary to the Eighth Amendment.

The same error occurs if there is no burden of proof but the jury is not so informed. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase would continue in this erroneous belief with no other guidance. 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, rendering the failure

to give any instruction at all a violation of the Eighth and Fourteenth Amendments.

(5) The Absence of a Burden of Proof Is Structural Error Requiring That the Penalty Phase Verdict Be Reversed

The burden of proof applicable to a particular case reflects society's estimation of the "consequences of an erroneous factual determination" (*In re Winship*, *supra*, 397 U.S. at pp. 370-373 (conc. opn. of Harlan, J.)), and the consequences of an erroneous factual determination in a capital penalty phase can be the most severe of all. There can be no explanation why the most important and sensitive fact-finding process in all of the law – a penalty phase jury's choice between life and death – could or should be the only fact-finding process in all of the law completely exempted from a burden of proof. The absence of any burden of proof in the capital sentencing process is the antithesis of due process and of the Eighth Amendment principle that there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 427 U.S. at p. 305; see also *Caldwell v. Mississippi*, (1985) 472 U.S. 320 at p. 341; *California v. Ramos* (1983) 463 U.S. 992, 998-999.)

The notion that a burden of proof is not required at all for proof of the facts at the penalty phase of a capital trial also violates the fundamental premise of appellate intervention in capital sentencing – the need for reliability (see *Ford v. Wainwright* (1986) 477 U.S. 399, 414) and "genuinely narrowed" death eligibility (*Zant v. Stephens*, *supra*, 462 U.S. at p. 877), rather than unbridled discretion. (See *Furman v. Georgia*, *supra*, 408 U.S. at p. 247.)

Even in the administrative arena, "[d]ue process always requires, of course, that substantial evidence support sanctions imposed for alleged misconduct. . . ." (*Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 154, fn.

16; see also, *Simms v. Pope* (1990) 218 Cal.App.3d 472, 477 [trial court may overturn property assessment board's decision only where no substantial evidence supports it, otherwise action is deemed arbitrary and denial of due process]; *In re Estate of Wilson* (1980) 111 Cal.App.3d 242, 247 [determination that decision is supported by substantial evidence is a "procedure reasonably demanded by developing concepts of due process"], citing *Jackson v. Virginia* (1979) 443 U.S. 307 and *Bixby v. Pierno* (1971) 4 Cal.3d 130.)

Since any and all factual determinations by any and all entities acting on behalf of the public must be made under some burden of proof to be consistent with due process, even if that is nothing more than "rational basis," as with legislative decisions (see, e.g., *Webster v. Reproductive Health Services* (1989) 492 U.S. 490), it is self-evident that the reliability required of decision-making in capital sentencing also requires some burden of proof. To hold otherwise would ignore this well-established principle of Eighth Amendment jurisprudence.

The absence of the appropriate burden of proof prevented the jury from rendering a reliable determination of penalty. The error was structural and interfered with the jury's function, thus "affecting the framework within which the trial proceeds," and rendered the trial fundamentally unfair. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 310; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.)

Even if the error did not amount to a structural defect, the constitutional harmless error standard should apply. It is reasonably possible that the error adversely affected the penalty determination of at least one juror. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) It certainly cannot be found that the error had "no

effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment must be reversed.

F. The Instruction Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

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

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant submits that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, and slanted 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 requirement 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.)[20]

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

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* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure

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[20] 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.)

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* (1998) 524 U.S. at 721, at p. 732; accord, *Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida* (1977) 430 U.S. 349 at p. 359 (plur. opn. of White, J.); *Woodson v. North Carolina* (1977) 428 U.S. 349 at p. 305), the Fifth, Sixth, and Eighth Amendments similarly are 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* (1978) 22 Cal.3d 258, 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.[21] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence,

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[21] It should also be noted that the federal death penalty statute provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. §848(k).) In addition, 14 of the 22 states like California that vest in the jury the responsibility for death penalty sentencing require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20© (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

the jury must render a separate, unanimous verdict on the truth of such allegations. (Pen. Code §§ 1158, 1158(a), 1163.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum 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.

G. The Instruction Violated 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 version of CALJIC No. 8.88 given at appellant's trial was also constitutionally flawed because it failed to require explicit findings by the jury identifying which aggravating factors it relied upon in reaching its death verdict. The jury should have been required to state the findings on which it relied in its sentencing determination. (See *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) The failure to require the jury to give a statement of reasons for imposing death violates the Equal Protection and Due Process Clauses of

the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 24 of the California Constitution.

In all noncapital felony proceedings, the sentencer is required by California law to state on the record the reasons for the sentence choice in order to provide meaningful appellate review. (See *People v. Martin* (1986) 42 Cal.3d 437, 449; *People v. Lock* (1981) 30 Cal.3d 454, 459; Pen. Code § 1170 ©.) It is only when the accused's life is at stake that this Court excuses the sentencer from providing written findings. Such disparate treatment of similarly situated individuals denies appellant his right to equal protection of the laws. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 565; U.S. Const., Amend. XIV; Cal. Const., art. I, § 7.) Because capital defendants are entitled under the Fifth, Eighth, and Fourteenth Amendments to more rigorous protections than those afforded non-capital defendants (see *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 the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating and mitigating circumstances found and rejected.

In addition, the sentencing process in capital cases is highly subjective, and an erroneous sentence determination will result in the defendant's death (see *Turner v. Murray* (1986) 476 U.S. 28, 33-34). Given all that is at stake, the enormous benefit it would bring, and the minimal burden it would create, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in death-sentencing that is demanded by both the Due Process Clause and the Eighth Amendment. (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.)

Finally, a provision for meaningful appellate review of the sentencing process is an indispensable ingredient of a death penalty scheme under the Eighth Amendment. The United States Supreme Court has recognized as much in a number of cases where, in the course of explaining why the state death statutes at issue were constitutional, it pointed to the fact that the statutory schemes required on-the-record findings by the sentencer, thus enabling meaningful appellant review. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198 (plur. opn.) [explaining appellate review is an "important additional safeguard against arbitrariness and caprice"]; *id.* at pp. 211-212, 222-223 (conc. opn. of White, J.) [stating provision for detailed appellate review is an important aspect of constitutional death penalty statute]; *Proffitt v. Florida*, *supra*, 428 U.S. at pp. 250-253, 259-260 ("[s]ince . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"); see, e.g., *California v. Brown* (1987) 479 U.S. 538, 543 [describing judicial review as "another safeguard that improves the reliability of the sentencing process"].[22] Indeed, most state statutory schemes require such findings.[23]

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[22]Appellant notes that in *Clemons v. Mississippi* (1990) 494 U.S. 738, 750, the United States Supreme Court was not impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts could not perform their proper role. Nevertheless, in a weighing state, such as California or Florida, an Eighth Amendment violation occurs when the sentencer considers and weighs an invalid aggravating circumstance in reaching its penalty verdict. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532.) Written findings would allow for meaningful appellate review of such an error; a review that cannot take place under California's current procedures.

[23] See Code of Ala., sec. 13A-5-47(d) (1994); Ariz. Rev. Stat., sec. 13-703(D) (1995); Conn. Gen. Stat., sec. 53a-46a(e) (1994); 11 Del. Code, sec. 4209(d) (3) (1994); Fla. Stat., sec. 921.141(3) (1994); Ga. Code Ann.

This Court has also recognized the importance of explicit findings. (See, e.g., *People v. Martin, supra*, 42 Cal.3d at p. 449.) Indeed, the Court has described written findings as "essential" for meaningful appellate review:

> In *In re Podesto* (1976) 15 Cal.3d 921, we emphasized that a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.

(*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.)

In California, the primary sentencer in a capital case is the jury. California juries have absolute discretion and are provided virtually no guidance on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 978-979.) Moreover, jurors, unlike the judge, cannot be presumed to know the law or to apply it correctly.

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§17-10-30(c) (Harrison 1990); Idaho Code, sec. 19-2515(e) (1994); Ind. Code Ann., sec. 35-38-1-3(3) (Burns 1995) (per *Schiro v. State* (Ind. 1983) 451 N.E.2d 1047, 1052-53); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Code Ann., art. 27, secs. 413(i) and (j) (1995); Miss. Code Ann., sec. 99-19-101(3) (1994); Rev. Stat. Mo., sec. 565.030 (4) (1994); Mont. Code Ann., sec. 46-18-306(1994); Neb. Rev. Stat., sec. 29-2522 (1994); 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); N.J. Stat., sec. 2C:11-3© (3) (1994); N.C. Gen. Stat., sec. 15A-2000© (1994); 21 Okla. Stat., sec. 701.11 (1994); 42 Pa. Stat., sec. 9711(F) (1) (1992); S.C. Code Ann. § 16-3-20© (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann., sec. 39-13- 204(g) (2)(A)(1) (1995); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat., sec. 6-2-102(d) (ii) (1995). See also 21 U.S.C., sec. 848 (k) (West Supp. 1993).

(See *Walton v. Arizona*, *supra*, 497 U.S. at p. 653; *Pulley v. Harris* (1984) 465 U.S. 37, 46.) Without a statement of findings and reasons for the jury's sentencing choice, this Court cannot fulfill its constitutionally required reviewing function. Any given juror in appellant's case could have made his or her decision to impose death by using one of the improper considerations described elsewhere in this brief. Further, the individual factors listed were not identified as either mitigating or aggravating. As a result, it is quite possible that a juror improperly considered a mitigating factor in aggravation.

The sentencing process in which the jurors must engage is fraught with ambiguities and unreviewable discretion, concealed beneath a stark verdict imposing a penalty of death. Such a verdict does not allow for meaningful appellate review of the sentencing process, a constitutionally indispensable ingredient of a death penalty scheme under the Eighth and Fourteenth Amendments.

In *People v. Frierson* (1979) 25 Cal.3d. 142, 177, a plurality of this Court concluded that written findings were not required under the 1977 law because the scheme provided "adequate alternative safeguards for assuring careful appellate review," including (1) the requirement that a special circumstance be found beyond a reasonable doubt before a death sentence could even be considered, and (2) the provision that the trial court in ruling on the automatic modification motion "must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's . . . verdict, and state on the record the reasons for its findings." (*Id.* at p. 179.) In *People v. Jackson* (1980) 28 Cal.3d 264, 317, this Court carried the analysis a step further, concluding:

> Surely, if Florida's scheme is valid (wherein an advisory jury makes recommendations, without findings, to the trial judge), California's system, which imposes the *additional* safeguard of a jury independently determining the penalty, must likewise be valid.

(*Ibid*; emphasis in original.)

This logic is flawed, because it conflates the reviewing role of the California trial court at the automatic sentence modification hearing with the sentencing function of the jury responsible for fixing the penalty of death. The findings referred to approvingly in *Gregg* and *Proffitt* are statements of the reasons for the sentence by the sentencer.[24] A trial court's statement of reasons for upholding the jury's sentence is no substitute for a statement of reasons by the entity that actually made the critical decision. Although a judge's findings might provide insight as to his or her considerations in upholding the jury's findings, that explanation sheds no light on the appropriateness, consistency, propriety, or strength of the sentencing body's actual reasons. The fact that the court, while independently reviewing the evidence, is able to articulate a rational basis for the sentencing decision affords no assurance that the jury did

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[24] In Florida, prior to *Ring*, the jurors' function was merely to advise the judge, who was responsible for the final pronouncement of sentencing and specifying in writing the underlying reasons for such a sentence. (See *Proffitt*, *supra*, 428 U.S. at pp. 251-252 ["[s]ince . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible"].)

There are other critical distinctions between the California and the former Florida statutes. For example, Florida's sentencing considerations were separated into discrete categories as either aggravating or mitigating. California factors are not so designated. In addition, Florida's aggravating factors for death selection correspond to California's special circumstances that serve to narrow the class of individuals eligible for death.

so. (Cf. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 [explaining court reviewing for harmless error must look "to the basis on which 'the jury *actually rested* its verdict'" (emphasis in original)].) Thus, rather than "substantially comport[ing] with the requirements of both *Gregg* and *Proffitt* with respect to disclosure of the reasons supporting a sentence of death" (*People v. Frierson*, *supra*, 25 Cal.3d at p. 180), that feature of California's sentencing scheme further insulates the jury's sentencing decision from meaningful appellate review. (See *People v. Lock*, *supra*, 30 Cal.3d at p. 459 [meaningful appellate review obviously impossible where sentencer states no reasons for its sentence choice].)

H. The Failure to Instruct the Jury on the Presumption of Life Violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

In noncapital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. (See *Estelle v. Williams*, *supra*, 425 U.S. at p. 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that such a presumption of life is not necessary when a person's life is at stake, 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 the state's law properly limits death eligibility. (*Id.* at p. 190.) However, California's capital-sentencing statute fails to narrow adequately the class of murders that are death eligible. (See Shatz & Rivkind, "The California Death Penalty Scheme: Requiem for Furman?" (1997) 72 N.Y.U. L.Rev. 1283.) Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to require written findings regarding aggravating factors, and fails to require intercase proportionality review. Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and reversal of the penalty judgment is required.

For all the above reasons, the trial court violated appellant's federal constitutional rights by instructing the jury in accordance with CALJIC No. 8.88, and appellant's death sentence must therefore be reversed.

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V.

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

Neither CALJIC No. 8.88 nor any other instruction given in this case informed the jurors that a sentence of life without possibility of parole meant that appellant would *never* be considered for parole. Appellant submits that the trial court had a sua sponte duty to instruct on the true meaning of this sentence.

The trial court is obligated to instruct on its own motion on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131 [proposed instruction on the meaning of life without parole found to be inaccurate and not constitutionally required]), the Court should reconsider its decisions based on recent United States Supreme Court rulings.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* opinion has been repeatedly reaffirmed by the United States Supreme Court. In 2001, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52 [citation omitted].)

Most recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court again reversed a South Carolina death sentence for this same error, even though the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the

law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (534 U.S. at p. 256.)[25]

The state in *Simmons* had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the

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[25] The Supreme Court opinions make it quite clear that there was an inference of future dangerousness in this case sufficient to warrant an instruction on parole ineligibility. In *Kelly* the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." (*Kelly, supra*, 534 U.S. at p. 254 [footnote omitted].) In that case, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the state's closing argument. (*Id.* at pp. 250-251; see also *Shafer, supra*, 532 U.S. at pp. 54-55; *Simmons, supra*, 512 U.S. at pp. 165, 171 (plur. opn.) [future dangerousness in issue because "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regard the [same]"]); *id.* at p. 174 (conc. opn. of Ginsburg, J.); *id.* at p. 177 (conc. opn. of O'Connor, J.).

As Justice Rehnquist argued in his dissent from the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (534 U.S. at p. 261 (dis. opn. of Rehnquist, J.).) The rule is invoked, "not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness." (*Ibid.*)

In this case, the evidence raised an implication of future dangerousness, and the prosecutor argued during penalty phase closing argument that appellant was remorseless, and that the jurors were not seeing the real, dangerous person appellant was in court, because appellant was like a Bengal tiger, and the jurors were seeing only the "sleeping cat at the zoo," so they needed to impose a sentence of death. (see RT 1994-1995;1999-2001.)

petitioner to be released into society. (512 U.S. at p. 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. *(Id.* at pp. 166-168.)

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People* v. *Arias, supra*, 13 Cal.4th at pp. 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.)

The results of a telephone poll commissioned by the *Sacramento Bee* showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (*Sacramento Bee* (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons, supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California

jurors is not significantly different from that found wanting by the United States Supreme Court.

In the instant case, jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole meant that the defendant would not be released. In *Kelly*, the Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Court also recognized that the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly, supra*, 534 U.S. at p. 257.)

Similarly, in *Shafer*, the defense counsel argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer, supra*, 532 U.S. at p. 52.) The Court nevertheless found these statements inadequate to convey a clear understanding of parole ineligibility. *(Id.* at pp. 52-54.)

In *Simmons*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons, supra*, 512 U.S. at p. 170.) Here, the instruction that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole.

The Supreme Court's rejection of South Carolina's "plain and ordinary meaning" argument in the *Simmons* case should be instructive when applied to California's statutory language of "life without possibility of parole." The principle to be derived from the Court's reliance in *Simmons* on *Gardner v.*

Florida, supra, 430 U.S. 349, is that the Constitution will not countenance a false perception to form the basis of a death sentence, whether that perception is brought about as a result of incorrect instructions or by inaccurate societal beliefs regarding parole eligibility.

Further, the inadequate instruction violated the principles of *Caldwell v. Mississippi, supra,* 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without specific instructional guidance on the meaning of life without parole that addressed and overrode the belief so commonly held among jurors that "without the possibility of parole" is legal jargon for "life until someone decides otherwise," the jurors undoubtedly deliberated under the mistaken perception that the choice they were asked to make was between death and a limited period of incarceration. (See *Simmons, supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was unfairly simplified.

The prejudicial effect of the failure to clarify the sentencing options is clear. There is a substantial likelihood that at least one of the jurors[26] concluded that the non-death option offered was neither real nor sufficiently severe and chose a sentence of death not because the juror deemed such

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[26] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915,. 937 (conc. opn. of Gould, J.) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, at pp. 691-692].)

punishment warranted, but because he or she feared that appellant would someday be released if they imposed any other sentence.[27] Given the existence of evidence in this case from which the jurors would infer future dangerousness, the jurors should have been clearly instructed that a sentence of life without the possibility of parole meant that appellant would never be eligible for parole – not just that they should "assume" that a sentence of "life without parole," if imposed, would be carried out.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605.) Had the jury been instructed forthrightly that appellant could not be paroled, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *Chapman v. California, supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

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[27] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Issues 149 (1994), at pp. 170-171; accord, Ramon, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

VI.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), cert. den. (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *(United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.).

Appellant has argued that a serious constitutional error occurred during the guilt phase of trial and that this error alone was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. The death judgment rendered in this case also must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is

> overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown, supra,* 46 Cal.3d at p. 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. *(Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California, supra,* 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown that errors occurred in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that appellant was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because

respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. *(Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

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VII.

CALIFORNIA'S CAPITAL-SENTENCING STATUTE IS UNCONSTITUTIONAL

A. California's Use of the Death Penalty as a Regular Form of Punishment Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."[28] (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 225-229 (conc. and dis. opn. of Harrison, J.).)

The unavailability of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is uniform within the nations of Western Europe. (See *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma,* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Indeed, all nations of Western Europe, plus Canada, Australia, and the Czech and Slovak Republics, have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)

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[28] South Africa abandoned the death penalty in 1995, five years after the article was written.

The abandonment of the death penalty in Western Europe is especially important since 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.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners, was constitutionally forbidden here. (See *Miller v. United States, supra,* 78 U.S. at pp. 315-316, fn. 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* (1958) 356 U.S. 86, 100.) And if the standards of decency, as perceived by the civilized nations of Europe to which our Framers looked as models, have themselves 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* (2002) 536 U.S. 304, 316, fn. 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, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Thus, 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 it, and the Eighth Amendment does not permit states in this nation to lag so far behind. (See *Hilton v. Guyot, supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)[29]

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[29] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.)

Thus, the very broad death scheme in California, and the regular use of death as a punishment, violates the Eighth and Fourteenth Amendments. Consequently, appellant's death sentence should be set aside.

B. Failing to Provide Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Rights

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness 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 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 Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Based upon that, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra,* 28 Cal.4th at p. 193; *People v. Fierro* (1991) 1 Cal.4th 173, 253.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* 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," thus "guarantee[ing] that the jury's discretion

will be guided and its consideration deliberate. 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.), quoting *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1194 [interior quotation marks omitted].)

The time has come for *Pulley v. Harris* to be reevaluated, because the special circumstances of the California statutory scheme fail to perform the type of narrowing required to sustain the constitutionality of a death penalty scheme in the absence of intercase proportionality review. Comparative case review is the most rational, if not the only, effective means by which to demonstrate that the scheme as a whole is not producing arbitrary results. That is why the vast majority (31 out of 34) of the states that sanction capital punishment require comparative, or intercase, proportionality review. [30]

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[30] 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, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A27A-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

The capital sentencing scheme in effect in this state is 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.) One reason for this is that the scope of the special circumstances that render a first-degree murderer eligible for the death penalty is now unduly broad. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, *supra*, 72 N.Y.U. L. Rev. at pp. 1324-1326.) Even assuming that California's capital-sentencing statute's narrowing scheme is not so overly broad that it is actually unconstitutional on its face, the narrowing function embodied by the statute barely complies with constitutional standards. Furthermore, the open-ended nature of the aggravating and mitigating factors, especially the circumstances-of-the-offense factor delineated in Penal Code section 190.3, grants the jury tremendous discretion in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 [dis. opn. of Blackmun, J.].)

The minimal narrowing of the special circumstances, plus the open-ended nature of the aggravating factors, work synergistically to infuse California's capital-sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few first-degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks

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433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

other safeguards, such as a beyond-the-reasonable-doubt standard and jury unanimity requirement for aggravating factors, the use of an instruction informing the jury which factors are aggravating and which are mitigating, or the required use of an instruction informing the jury that it is prohibited from finding nonstatutory aggravating factors. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

Penal Code section 190.3 does not forbid intercase proportionality review; the prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries is strictly the product of this Court. *Furman v. Georgia, supra*, raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 [conc. opn. of White, J.].)

California's capital-sentencing scheme does not operate in a manner that enables it to ensure consistency in penalty-phase verdicts; nor does it operate in a manner that assures that it will prevent arbitrariness in capital sentencing. Because of that, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a

constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution, and therefore requires the reversal of appellant's sentence of death.

* * * * *

VIII.

BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE HERE MUST BE VACATED

The California death penalty procedure 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 death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky, supra,* 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

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 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v.*

Robertson (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[31]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals 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. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

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[31] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 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. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Appellant requests that the Court reconsider and, in this context, find appellant's death sentence violates international law. (See also *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].) For this reason, the death sentence here should be vacated.

* * * * *

CONCLUSION

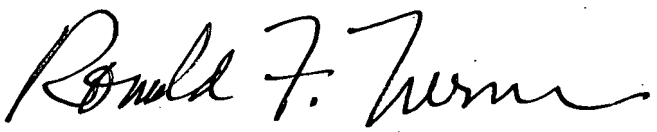
For all the foregoing reasons, appellant's conviction for murder and his judgment of death must be reversed.

Counsel's Certificate as to Length of Brief Pursuant to Rule 36(b)

I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the table, contains approximately 47,109 words.

DATED: March 31, 2009

Respectfully submitted,



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Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Enrique Parra Duenas*** **Crim. No. S0077033**
(Los Angeles County Superior Court No. BA109664)

I, Ronald Turner, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 5050 Laguna Blvd., Suite 112-PMB 322, Elk Grove, California 95758.

On March 31, 2009, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the address shown, and by sealing and depositing said envelope in the United States Mail at Elk Grove, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 31, 2009, at Elk Grove, California.

Ronald Turner

Declarant