No. S080477

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELVYN RONDELL BANKS,

Defendant and Appellant.

LOS ANGELES COUNTY
SUPERIOR COURT

Case No. BA109260

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Charles E. Horan, Judge Presiding

APPELLANT'S OPENING BRIEF

Stephen M. Lathrop (S.B. #126813)
Certified Specialist, Appellate Law
State Bar of CA, Board of Legal Specialization
904 Silver Spur Road #430
Rolling Hills Estates, California 90274
Tel. 310.237.1000, ext. 3; Fax 310.237.1010

Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

No. S080477

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KELVYN RONDELL BANKS, Defendant and Appellant.	LOS ANGELES COUNTY SUPERIOR COURT Case No. BA109260

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Charles E. Horan, Judge Presiding

APPELLANT'S OPENING BRIEF

Stephen M. Lathrop (S.B. #126813)
Certified Specialist, Appellate Law
State Bar of CA, Board of Legal Specialization
904 Silver Spur Road #430
Rolling Hills Estates, California 90274
Tel. 310.237.1000, ext. 3; Fax 310.237.1010

Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

TOPICAL INDEX

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES AND CONSTITUTIONS

MISCELLANEOUS

///

No. S070686

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KELVYN RONDELL BANKS, Defendant and Appellant.	LOS ANGELES COUNTY SUPERIOR COURT Case No. BA109260

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Charles E. Horan, Judge Presiding

APPELLANT'S OPENING BRIEF

INTRODUCTION

A jury convicted appellant Kelvyn Rondell Banks of the first degree murders of Charles Coleman and Charles Foster (Pen. Code, § 187, subd. (a); counts 1 and 8, respectively), attempted murder of Latasha Whiteside (Pen. Code, §§ 664, subd. (a), 187, subd. (a); count 2), forcible rape of Latasha Whiteside (Pen. Code, § 261, subd. (a)(2); count 3), forcible oral copulation of Latasha Whiteside (Pen. Code, § 288a, subd. (c); count 4), first degree robbery of Charles Coleman (Pen. Code, § 211; count

5), first degree burglary (Pen. Code, § 459; count 6), and attempted second degree robbery of Charles Foster (Pen. Code, §§ 664, 211; count 9). The jury also found true the special circumstances allegations of multiple-murder, robbery-murder, and burglary-murder (Pen. Code, § 190.2, subd. (a)(3)), 190.2, subd. (a)(17)(A)), 190.2, subd. (a)(17)(G)), the allegations that appellant personally used a firearm in the commission of each offense (Pen. Code, § 12022.5, subd. (a)), and that the attempted murder was committed willfully, deliberately and with premeditation (Pen. Code, § 664, subd. (a)). (CT 8:2157-2175; RT 34:2988-3003, 38:3771-3774.)[1]

The first penalty phase trial ended in a mistrial. (RT 38:3771-3774.) After a retrial as to penalty, a jury returned a verdict of death. (RT 51:6001-6002.) The trial court denied the automatic motion to modify the penalty (Pen. Code, § 190.4, subd. (e)), sentenced appellant on the noncapital counts and enhancements, and imposed a sentence of death. (RT 52:6013-6052.)

STATEMENT OF APPEALABILITY

This appeal from a judgment of death is automatic. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).)

---

[1] References to rules are to the California Rules of Court, "RT" designates the reporter's transcript, and "CT" designates the clerk's transcript.

STATEMENT OF THE CASE

By indictment filed August 30, 1996, amended by interlineation on August 12, 1998 (CT 8:2061-2062), appellant was charged with the first degree murders of Charles Coleman, Michael Haney, and Charles Foster (Pen. Code, §§ 187, subd. (a), 189; counts 1, 7 and 8, respectively), attempted murder of Latasha Whiteside (Pen. Code, §§ 664, subd. (a), 187, subd. (a); count 2), forcible rape of Latasha Whiteside (Pen. Code, § 261, subd. (a)(2); count 3), forcible oral copulation of Latasha Whiteside (Pen. Code, § 288a, subd. (c); count 4), first degree robbery of Charles Coleman (Pen. Code, § 211; count 5), first degree burglary (Pen. Code, § 459; count 6), and attempted second degree robbery of Charles Foster (Pen. Code, §§ 664, 211; count 9). It was alleged that appellant (1) committed the attempted murder of Latasha Whiteside (count 2) willfully, deliberately and with premeditation (Pen. Code, § 664, subd. (a)) and (2) personally used a firearm (Pen. Code, § 12022.5, subd. (a)) in the commission of each offense. Finally, four special circumstances were alleged: (1) multiple-murder (Pen. Code, § 190.2, subd. (a)(3)); (2) murder of Charles Coleman during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(A)); (3) murder of Charles Coleman during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(G)); and, (4) murder of Charles Foster during the commission of an attempted robbery (Pen. Code, § 190.2, subd. (a)(17)(A)). (CT 1:145-152.)

On September 11, 1996, appellant entered pleas of not guilty to the charges and denied the enhancement allegations. (CT 1:156.)

Trial commenced with jury selection on August 5, 1998. (RT 23:659-660.) On August 11, 1998, the trial and alternate jurors were impaneled and sworn. (RT 25:1425-1426, 26:1503.)

The jury commenced deliberations on August 25, 1998. (CT 8:2080-2081.) On August 27, 1998, appellant was convicted as charged, except he was found not guilty of the murder of Michael Haney (count 7). (CT 8:2157-2175; RT 34:2988-3003.)

On August 31, 1998, the penalty phase of the trial commenced. (RT 35:3010.) On September 11, 1998, the trial court declared a mistrial on the ground that the jury was deadlocked. (RT 38:3771-3774.)

On March 2, 1999, the penalty phase retrial commenced with jury selection. (RT 41:3901-3902.) On March 10, 1999, the jurors were impaneled and sworn. (RT 44:4590, 4716, 4725.) The jury commenced deliberations on March 19, 1999. (CT 8:2350-2351, RT 50:5992.) On March 25, 1999, the jury returned a verdict of death. (CT 9:2409-2410; RT 51:6001-6002.)

On June 28, 1999, appellant filed motions for new trial (CT 17:4530-4547) and modification of the death verdict (CT 17:4525-4529).

On July 8, 1999, the trial court denied the motions for new trial and modification of the death verdict, and then sentenced appellant on counts 1 and 8 to death.[2] (CT 17:4576-4580; RT 52:6013-6052.)

STATEMENT OF FACTS

I. FIRST TRIAL

A. GUILT PHASE – THE PROSECUTION'S CASE

1. THE CHARLES COLEMAN HOMICIDE AND EVENTS AT COLEMAN'S RESIDENCE INVOLVING LATASHA WHITESIDE, COUNTS 1 - 6

The evidence presented by the prosecution at the guilt trial consisted of the following: On July 1, 1996, at approximately 2:30 a.m., two or three men approached

---

[2] On the noncapital counts and enhancements, the trial court sentenced appellant as follows: (1) an indeterminate term of life in state prison on count 2, attempted murder of Latasha Whiteside committed willfully, deliberately and with premeditation (Pen. Code, §§ 664, 187), stayed pursuant to section 654; (2) eighteen years on count 3, forcible rape of Latasha Whiteside (Pen. Code, § 261, subd. (a)(2)), calculated as the upper term of eight years plus ten years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)); (3) eighteen years on count 4, forcible oral copulation of Latasha Whiteside (Pen. Code, § 288a, subd. (c)), calculated as the upper term of eight years plus ten years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)); (4) nineteen years on count 5, first degree robbery of Charles Coleman (Pen. Code, § 211), calculated as the upper term of nine years plus ten years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)); (5) sixteen years on count 6, first degree burglary (Pen. Code, § 459), calculated as the upper term of six years plus ten years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)), stayed pursuant to section 654; and, (6) thirteen years on count 9, attempted second degree robbery of Charles Foster (Pen. Code, §§ 664, 211), calculated as the upper term of three years plus ten years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)). A restitution fine was imposed and appellant was given custody credit. (RT 52:6013-6052; CT 17:4576-4580.)

Latasha Whiteside and Charles Coleman, a "Black Stone" or "BPS" gang member known as "Wink," outside Coleman's house. (RT 27:1784, 1836.) Inside the house, one of the men fired a single bullet from a handgun into the back of Coleman's head at close contact range. (RT 26:1603-1605, 27:1784, 1865-1866, 1869.) The gunman then sexually assaulted Whiteside. (RT 27:1723-1728.) Before leaving the house, the gunman fired a second bullet into Coleman's head, and then fired a single shot at Whiteside as she lay on the floor, striking her left ear. (RT 27:1738-1739, 1810, 1859-1863.) Coleman died from the gunshot wounds to the head. (RT 26:1603-1605, 27:1784, 1855.)

Latasha Whiteside testified that Coleman, a paraplegic confined to a wheelchair but able to drive, came to her house at approximately 1:20 a.m., and then drove her to his house. (RT 27:1702-1705.) He parked his car in front of his house. (RT 27:1706.) Whiteside got out of the car, left the vehicle, removed the wheelchair from the vehicle, put it next to the driver's door, and then began taking bags inside the house. (RT 27:1706-1707.)

As she was returning to the car, Whiteside saw two African-American males, one coming from the alley holding a handgun and the other coming around the corner of the street. (RT 27:1708-1709.) The gunman was talking to Coleman about some Hispanics around the neighborhood. He put the gun away and helped Coleman into the house by pulling the wheelchair up the stairs of the front porch and into the house.

(RT 27:1710.) The person that had come around the corner entered the house and closed the front door. Whiteside was seated on a couch inside the house. (RT 27:1710-1711.)

As Coleman was seated in the wheelchair facing the front door, the gunman, standing behind Coleman, pulled out a gun, pointed it at the back of Coleman's head, and pulled the trigger two times; the gun clicked twice, but did not fire, causing Coleman to jump. (RT 27:1712.) The gunman pulled the trigger a third time, firing a single bullet into the back of Coleman's head, causing him to fall forward onto the ground. (RT 27:1713, 1859-1863.)

Whiteside testified that appellant was the person that shot Coleman. (RT 27:1714.) She described the shooter having hair that was cut short to the point that it was bald or shaved, and wearing black pants and a black jacket. (RT 27:1714.) Whiteside identified the second person as having a ponytail. (RT 27:1715.)

After the shooting, the gunman grabbed Whiteside by the jacket and took her into Coleman's bedroom. (RT 27:1715.) He asked where the money and dope were located. (RT 27:1716.) Whiteside responded that she did not know about the dope, but he kept the money inside the mattress. (RT 27:1716.) Whiteside then went to the corner of the bedroom and got down on her knees, as the gunman had requested; the gunman threw the mattress on top of her. (RT 27:1717.) She could hear the two men rummaging through the bedroom. (RT 27:1718.) The gunman removed the mattress

from her and took her by the arm to the bedroom door; there she could see the second man going through her purse, which was on the couch in the living room. (RT 27:1719, 1721-1722.) The gunman told the man to leave; he complied by leaving through the front door. (RT 27:1722.)

The gunman walked Whiteside by the arm through the kitchen and into the laundry room, which was near the back door. (RT 27:1723.) He unbuckled his pants, had Whiteside get on her knees and, after placing the handgun on top of the washing machine, had Whiteside orally copulate him. (RT 27:1724-1725.) He then ripped her shorts and put his penis inside her vagina for about a minute or two. (RT 27:1725-1726.) He then had her lay down on her back and engaged in intercourse again for two or three minutes. (RT 27:1727-1728.)

They got up and went to the kitchen. (RT 27:1729.) The man with the ponytail was standing there with a third man, whom Whiteside could not identify. (RT 27:1730.) The third person told the gunman to keep Whiteside in the kitchen. (RT 27:1730.) She stayed there for several minutes, during which time she could hear the men rummaging through the house. (RT 27:1732.)

Whiteside was brought into the living room, forced to lie face down on the floor, and then the man with a ponytail tied her arms and legs with a telephone cord. (RT 27:1732-1734.) The men continued searching the house for a few more minutes, and then Whiteside heard someone say that they had found what they were looking for,

and that they also had gotten the keys to Coleman's car. (RT 27:1737.) Two of the three men left the house, but the gunman remained. (RT 27:1737-1738.) The gunman shot Coleman again, striking him in the head, and then, from where he was standing near Coleman, shot in Whiteside's direction. The bullet struck her ear as she lay face down on the floor in the living room. (RT 27:1738-1739, 1810, 1859-1863.)

Whiteside heard Coleman's car drive away. (RT 27:1740.) She waited several minutes and then ran outside the house and around the corner. (RT 27:1739-1741.) Whiteside thought she saw the gunman coming toward her. (RT 27:1741.) She hid behind some bushes, and then was assisted by a passer-by to an intersection where she flagged down a policeman. (RT 26:1609-1612, 27:1742-1742.) After speaking with several policemen at the scene, she was transported to California Hospital where she was given a physical examination, including a vaginal examination. (RT 27:1757-1759.)

Los Angeles Police Officer Martin Martinez testified that he was on patrol on July 1, 1996, at approximately 3:00 a.m., when Whiteside flagged him down. (RT 26:1607-1610.) She told him that her friend had been shot in the head and killed, and that she had been raped by the gunman. (RT 26:1612-1613, 1623-1634.) She described the shooter as an African-American man approximately 27 years old, approximately 5 feet 9 inches tall, 180 pounds, bald, and wearing a black jacket and white T-shirt. (RT 26:1613-1614, 1617.) The shooter had a stainless steel handgun,

which he held in his hand. (RT 26:1618.) She also told Martinez that there were other individuals. She described the second person as an African-American man with a ponytail, about 5 feet 6 inches tall, 140 pounds, approximately 26 years old, wearing a white, long sleeved shirt, and gray or khaki pants. (RT 26:1614-1618.)

Coleman's vehicle, a Ford Thunderbird, was found later that morning about two blocks from Coleman's house. (RT 27:1688-1689.) The handgun was never recovered. (RT 27:1698.)

On August 7, 1996, Whiteside identified a photograph of appellant from a color six-pack, stating he was the shooter and person that engaged in sexual intercourse with her. (RT 27:1750-1752, 1878-1879; People's Exh. 8A.) During the grand jury proceedings on August 27, 1996, Whiteside identified appellant from a six-pack photo spread. (People's Exhibit 8A; RT 29:2020-2021.) On February 18, 1997, she identified appellant from a live lineup of six individuals. (RT 27:1752-1753.)

Whiteside further testified at trial that she described the gunman to another detective, Detective Labarbera, while seated in the patrol car near Coleman's residence on the morning of the incident. She described the gunman as Black with a light brown complexion, between 24 and 25 years old, about 5'9" tall, a little hair on top of his head, medium build, weighed between 180 and 190 pounds, and was wearing a black jacket that came to about his thighs and black pants. (RT 27:1785-1787.)

An autopsy revealed that Coleman died from two gunshot wounds to the head. One was a close contact entrance wound at the back of the head, and the other was a non-contact entrance wound to the side of the head. (RT 26:1603-1605, 27:1784, 1855, 1865-1866, 1869.)

Madeline Marini, executive director of the sexual assault response team at Mission Community Hospital, examined Whiteside on July 1, 1996 at California Hospital. (RT 29:2123-2124.) Marini examined Whiteside, drew a blood sample, and took the swab samples that were contained in the rape kit. (People's Exhibits 22 and 24.) (RT 29:2126-2131.) Marini observed injuries to Whiteside indicative of a forced sexual encounter, including redness and abrasions in the lower part of the vagina and broken blood vessels in the vagina. (RT 29:2135-2136.) She also noticed that Whiteside's left ear was lacerated. (RT 29:2132.) She could not recall what Whiteside said to her about whether the person ejaculated, but the form she prepared at the time of the examination states that Whiteside said the person ejaculated outside of the body orifice. (RT 29:2139-2140.) Whiteside told her that she last had consensual sex on June 28, 1996. (RT 29:2141.) Marini also testified that Whiteside told her there were three Black men present. She described the suspect as bald, 5'9" tall, and weighing about 170 pounds. (RT 29:2141.) At some point, the suspect told her that if she lifted her head, "We're going to blast you." (RT 29:2143-2144.)

At the request of the prosecution, Cellmark Laboratory conducted DNA analysis and comparison of vaginal swabs from Whiteside and bloodstain cards from appellant and Whiteside, using the DQ-alpha method. (RT 29:2154-2155.) The DNA on the sperm fraction of the swabs matched that of appellant at all loci tested, meaning he could not be excluded as a donor. (RT 30:2186-2191.) Whiteside could not be excluded as the contributor of the DNA in the non-sperm fraction, which is consistent with the swab having been taken from her. (RT 30:2189.)

Cellmark's expert witness, Robin Cotton, testified that in African-Americans the grouping of characteristics that is common to Banks and the sperm fraction of the vaginal swab would occur in about 1 in 17 million people. (RT 30:2193.)

2. THE CHARLES FOSTER HOMICIDE AND EVENTS AT THE AUTOMATIC TELLER MACHINE, COUNTS 8 AND 9

On July 26, 1996, at approximately 1:20 a.m., Charles Foster was attempting a transaction at an automated teller machine ("ATM") outside Home Savings Bank, located in the area of Harvard Park on South Vermont Avenue. Someone wearing a red cloth covering his head approached Foster with a nine-millimeter handgun. Foster turned toward the gunman, held up a piece of paper, and then was shot. (RT 30:2346-2347.) The bullet went through Foster's hand, traveled into his throat, and then exited through his shoulder. (RT 30:2327, 31:2420-2421.) Foster fell to the ground. The gunman fired a second shot, striking Foster in the back of the head. (RT 30:2327,

31:2425.) Foster died at the scene within a minute of the first shot. (RT 31:2425-2426.)

The gunman, and a second person that was seen with the gunman but who stayed in the alley by the adjacent apartment building and did not approach Foster, fled the area in a Cadillac. (RT 30:2371, 2385.) The shooting incident was recorded in a series of time-lapse photographs taken by two cameras, one inside the ATM that Foster was at and the other inside an adjacent ATM. (RT 31:2426, 2449-2450, 2457, 32:2548; People's Exhibit 42.)

Foster had arrived at the bank a few minutes earlier with two women, Sandra Johnson and Yvonne McGill. (RT 30:2263, 2267-2268.) Johnson parked her vehicle in the bank parking lot, and she and McGill (who was in the front passenger seat) waited while Foster got out and went to one of the two ATMs outside the bank. (RT 30:2268, 2278.) McGill was watching Foster. She saw that two or three other people had come to the other ATM, completed a transaction, and left. (RT 30:2268-2269.) Foster was taking longer than normal. He was fumbling around and appeared to be looking for his automatic teller machine card. (RT 30:2284.) Johnson backed the truck out of the parking stall and parked it parallel with the headlights facing South Vermont Avenue. (RT 30:2268, 2279.)

Two minutes later, Johnson said someone was walking up behind her vehicle. (RT 30:2269.) McGill turned to look out the passenger side window and saw an

African-American male standing with a handgun pointed directly at her. (RT 30:2269-2270, 2279, 2294-2295, 2304.) McGill looked into the gunman's eyes, saw the gun, and started screaming. (RT 30:2270.) Johnson drove away, and the handgun was not fired. (RT 30:2271.) When they had driven a short distance away, they heard two gunshots. (RT 30:2271.)

The two women stopped a police vehicle that happened to be coming in the opposite direction. (RT 30:2271.) The police vehicle followed them back to the bank parking lot, where they saw Foster lying on the ground in front of the ATM. (RT 30:2271-2272.)

On August 27, 1996, McGill was shown a photographic six-pack and selected the person in position number 4 (appellant) as the one with "eyes [that] look like the guy with the gun." (RT 30:2272-2275; People's Exhibit 29.) McGill testified at trial that appellant was the person shown in position number 4 in the photographic six-pack, and that appellant appeared to be the person whose eyes matched those of the man that killed Foster. (RT 30:2276.)

On July 29, 1996, Officer Weber took statements from both Johnson and McGill. Johnson described the person who approached her car as a Black male, 5'8" tall, and having a dark complexion. He was wearing a red hoodie with a red scarf. (RT 30:2333-2334.) McGill told him that the gunman had a red sweater wrapped

around his head and was wearing a big black jacket. All she could see were his eyes. He was Black, 5'9" tall, and had a dark complexion. (RT 30:2335-2336.)

Patricia Manzanares, who lived in an apartment building adjacent to the bank parking lot, testified that as she was getting ready for bed she looked out her bedroom window and saw two men. One was standing in front of her window and the other one, wearing a mask covering his face, was walking toward the bank. (RT 30:2344.) The masked man walked up to a man who was standing at the ATM, shot him, and then walked back to within five to six feet of Manzanares' bedroom window. (RT 30:2346-2347.) As he was walking toward her bedroom window, the gunman removed what he was wearing around his head and Manzanares was able to see his face. (RT 30:2347, 2358-2359, 31:2450.) The gunman exchanged some words with the other man who had remained standing by her window. (RT 30:2368-2369, 31:2443.) The two men got into a vehicle, which was parked in the alleyway on the opposite side of the street from her apartment building, and departed the area. (RT 30:2370-2372.) Manzanares described the vehicle as a large green Cadillac with a white top. (RT 30:2371, 2385.) She called the police and reported the shooting. (RT 30:2379-2380.)

On August 7, 1996, Manzanares was shown a single photographic six-pack and selected the person in position number 4 (appellant) as the gunman. (RT 31:2447-2448, 2455; People's Exhibit 35.) On August 21, 1996, she identified appellant's

photograph again from the same six-pack. (RT 30:2348-2352, 31:2447-2450, 2454-2455, 32:2551-2552; People's Exhibit 36.) On February 18, 1997, she attended a live lineup and identified appellant as the gunman. (RT 30:2353-2356; People's Exhibits 9 & 37.) Manzanares testified at trial that appellant was the person that she saw shoot Foster. (RT 30:2373.)

Two bullet casings were recovered about five to ten feet from Foster's body. (RT 30:2317, 2322; People's Exhibit 33.) A bullet traveled through one of the ATMs. (RT 30:2317, 2326.) An expended bullet was found just West of Vermont Avenue. (RT 30:2317.)

3. APPELLANT'S ARREST AND RECOVERY OF A FIREARM

On the night of July 31, 1996, police saw appellant Kelvyn Banks walking with two other people in the vicinity of Harvard Park. Banks began running when he saw the police and was detained after a brief pursuit. Before being stopped, one of the officers saw him discard an object in a wood pile. A search of the wood pile turned up a nine-millimeter handgun. (RT 28:1975-1979, 1982.)

The report of his arrest, dated July 31, 1996, indicated that appellant was 5'10" and weighed 225 pounds. (RT 28:1984-1985.)

/ / /

4. THE SEARCH OF D'JOY ROBINSON'S RESIDENCE WHERE APPELLANT LIVED

On August 21, 1996, the police searched D'Joy Robinson's residence, located at 1446 West 58th Place, in the Harvard Park area, which Robinson shared with appellant and her 14-year-old son Carlos. (RT 31:2461, 2467, 32:2545-2550, 2580-2582.)

The police recovered an extra-large black jacket on the floor inside a bedroom closet (RT 32:2545, 2555-2556; People's Exhibit 20), four red T-shirts and a pair of black jeans (RT 32:2547-2548, 2550, 2556-2557; People's Exhibit 45), two ammunition boxes containing live nine-millimeter bullets (RT 31:2462-2463, 5158; People's Exhibit 43), and an empty CCI ammunition box (RT 31:2462-2463; People's Exhibit 44).

5. STIPULATIONS REGARDING THE NINE-MILLIMETER HANDGUN AND AMMUNITION

The parties stipulated that on July 31, 1996, Officer Marcelo Raffi recovered a fully functional nine-millimeter handgun (People's Exhibit 19), which had a magazine containing two nine-millimeter CCI cartridges, two nine-millimeter Norenco cartridges, one nine-millimeter Federal cartridge, and one nine-millimeter Speer cartridge. The handgun fired the nine-millimeter bullet and the nine-millimeter CCI casing that were recovered at the scene of the Michael Haney homicide. (People's Exhibit 16). The handgun also fired the Speer casings and both of the bullets recovered from the Foster crime scene (People's Exhibit 32). The Speer cartridge in

the handgun (People's Exhibit 19) and the Speer casings from the Foster crime scene have the same head stamp and are identical in caliber, brand, type, and material composition. (RT 31:2478-2483, 2485.)

The parties also stipulated that the Speer ammunition recovered from the handgun (People's Exhibit 19) and the Foster crime scene (People's Exhibit 32) are commonly packaged in the type of box contained in People's Exhibit 43, which is a box for Speer nine-millimeter ammunition. (RT 31:2483-2484.)

The parties also stipulated that the CCI cartridge recovered from the handgun (People's Exhibit 19) and the CCI casing at the Haney crime scene (People's Exhibit 16) are commonly packaged in the type of box contained in People's Exhibit 44, which is an empty box for CCI ammunition. (RT 31:2484.)

6. STIPULATION REGARDING APPELLANT'S GANG AFFILIATION

The parties further stipulated that appellant's left arm contains the letters "HPB", which stand for Harvard Park Bloods or Harvard Park Brims. The Harvard Park Brims are a Blood gang operating in an area roughly bounded by Slauson, Vermont, Gage and Western. The word "blood" is a term commonly used between Blood gang members and is a friendly term. (RT 32:2579-2581.)

/ / /

B. GUILT PHASE – THE DEFENSE CASE

1. THE COLEMAN HOMICIDE – DESCRIPTIONS OF THE GUNMAN AND THE IDENTIFICATION OF A MAN IN CUSTODY AT THE TIME OF THE INCIDENT

Los Angeles Police Officer Donna Shoates testified she was with Whiteside from approximately 5:15 a.m. to 8:00 a.m. on the morning of the incident, having transported Whiteside to California Hospital for a physical examination. (RT 32:2634-2636.) Shoates heard Whiteside describe the gunman that shot Coleman and attacked her as a Black male, 5'9" tall, and weighing 175 pounds; he wore a white T-shirt, black pants, and a large black jacket. (RT 32:2637-2638.) There were two other individuals, but Whiteside was unable to give a description of either one. (RT 32:2638.) Shoates further testified that Whiteside stated that the man that attacked her did not ejaculate. (RT 32:2638, 2644.)

Los Angeles Police Officer Sal Labarbera testified that on July 12, 1996, he showed Whiteside a binder with over 100 photographs of Six Deuce Brims or Harvard Park Bloods gang members. Each page contained photographs of sixteen different people. (RT 33:2723-2724.) Whiteside looked at over 100 photographs. (RT 33:2725.) When she came to the page that is numbered one through sixteen, she identified the photograph in position number 11, stating that the person "looked like" the person that attacked and shot her. (RT 33:2725; Defense Exhibit G.) Labarbera made a color copy of the page. On the copy, Whiteside circled the photograph in

position number 11, initialed and dated it, and wrote "looks like him" thereon. (RT 33:2725; Defense Exhibit H.) Labarbera testified that the person Whiteside identified in the photograph in position number 11 on Defense Exhibit G was in custody at the time of the incident. (RT 33:2732.)

Officer Labarbera testified that his report indicates appellant was 5'10" tall and weighed 210 pounds. (RT 33:2729-2730.) He also acknowledged that Officer Raffi testified that when appellant was arrested on July 31, 1996, appellant was 5'10" tall and weighed 225 pounds. (RT 33:2728-2729.)

Officer Labarbera further testified on cross-examination that despite writing in his report that the gunman was "clean shaven, possible stubble" (RT 27:1897), Whiteside actually described the gunman as having a mustache and a small goatee. (RT 27:1896-1897.) Labarbera testified on cross-examination, in part:

Q: Did she describe to you the suspect who supposedly raped her and had the gun originally as having a mustache and a small goatee?

A: Yes.

Q: That is the suspect that supposedly raped her and shot Mr. Coleman?

A: Yes.

Q: Is that -

A: Yes. She indicated facial hair.

Q: Is that the suspect you are calling No. 1?

A: Yes. [RT 27:1896-1897.]

Whiteside acknowledged on cross-examination that a few days after the incident Officer Labarbera showed her a binder of photographs. She identified one of the photographs as looking similar to the gunman. (RT 27:1799-1800.) She further testified, however, that she immediately identified appellant's photograph when subsequently shown the six-pack that is People's Exhibit 8A. (RT 27:1829-1831.)

Whiteside knew that Coleman sold drugs. (RT 27:1766.) Whiteside testified that Coleman had a large sum of money in his sock, which was inside a hole in the mattress in his bedroom. (RT 27:1767.) Whiteside knew Coleman as "Wink," a member of the "Black Stone" or "BPS" Blood gang. (RT 27:1784.) She had the distinct impression that Coleman knew the men that approached him because he was talking to them. (RT 27:1784.) She further testified to being certain that Coleman would not have asked them into the house if he had not known them. (RT 27:1784.)

2. DNA DATABASE AND VARIOUS FREQUENCY CALCULATIONS

Dr. Robin Cotton testified on cross-examination that in computing the probability of a specific set of genes occurring in a population, she used the Cellmark database, which is limited to African Americans in the United States, and which contained a sample of 100 African Americans living across the United States. (RT 30:2199-2200.) Cotton did not know how many of these 100 African Americans were mixed race, nor could she independently verify that they were in fact African Americans. (RT 30:2200-2201.) Cotton also testified that there are differences

between ethnic groups (RT 30:2201), yet the database itself does not account for inter-racial or mixed race ethnic groups. (RT 30:2202.)

Cotton testified that most of the databases that she has seen separate Southeastern and Southwestern Hispanic populations on the assumption that Hispanic individuals that have immigrated to the East Coast of United States may have a different ethnic background than those immigrating to the West Coast. (RT 30:2208-2209.) The database cannot take into account African Americans who have inter-married and have genetic backgrounds that are also Caucasian. (RT 30:2209.) The database does not take into account, therefore, the background of an African American who may have mated with a Native American. (RT 30:2209.) Moreover, the database only includes Caucasians, African Americans and Hispanics. There is no frequency for Asians or Native Americans because they do not have any samples for these. (RT 30:2209.)

Cotton testified that although the database does not account for sub-structure genetics, or mixed race, the matter is taken into account when the calculation is performed as suggested by the National Research Council. (RT 30:2210.) Cotton does not have the raw data, and thus cannot testify precisely about how the calculation would change, except to state that it results in a more conservative estimate. (RT 30:2211-2212.)

Cotton also testified that use of the database figures produce a representative frequency, but the true frequency based on a database containing a sample from every person in the United States, might be 10 fold greater or 10 fold less, based on information from the 1996 National Research Council report. (RT 30:2216-2217.) Accordingly, the figure of 1 in 17 million could actually be 1 in 1.7 million on the conservative end of the spectrum. (RT 30:2217.)

Cotton testified that Hall, the analyst who did the DNA testing, prepared two reports, one on June 2, 1997 and one on June 30, 1997. (RT 30:2228, 2230.) In the first report, Hall arrived at a statistical probability of 1 in 8,000, which was based on information for DQA1, LDLR, GYPA, HBGG and D7S8. (RT 30:2228.) In the second report, Hall added CSF, TPOX, THO1 and XY, which resulted in a statistical probability of 1 in 17 million. (RT 30:2216, 2230.)

3. THE FOSTER HOMICIDE – DESCRIPTIONS OF THE GUNMAN

On cross-examination, Yvonne McGill was impeached with Officer Weber's report, which states that McGill told him that the gunman had a dark complexion. (RT 30:2259-2260.) She could not remember what she told Weber, but acknowledged she might have told him that the gunman was dark complected. (RT 30:30:2298.) McGill recalled that the gunman appeared "dark skinned to her." (RT 30:2260.) Further, although McGill identified appellant's photograph from a photographic six-pack as having eyes that looked like the gunman (RT 30:2272-2275), she admitted at trial that

"most of his face was covered" with either sweater material or T-shirt material; it was covering his face in a "knitted type fashion." (RT 30:2276.) She was further impeached with her testimony at the grand jury proceeding, where she stated that she only got a "glimpse" of the gunman. (RT 30:2299-2300.) McGill testified, seeing appellant in the courtroom, that she would describe appellant's complexion as follows: "Light. Light skinned." (RT 30:2299.)

Manzanares admitted on cross-examination that she described the gunman to a police officer on July 26, 1996, as a Black man, 25 to 26 years of age, 5'6" to 5'7" tall, approximately 190 pounds, a short Afro haircut, no facial hair, and a chubby face. (RT 30:2390, 32:2565.) She further stated that he had little whiskers, indicating the upper lip and chin. (RT 30:2390-2391.) She also stated he was wearing several black-and-white checkered shirts, a heavy black and white jacket, jeans, and a red mask that extended below the collar. (RT 30:2391-2392.) The black jacket worn by the gunman is common among Black men in her neighborhood. (RT 30:2392-2394.) The second man was about 5'2" tall. (RT 30:2392.) Manzanares also testified that the jacket in People's Exhibit 20 is black, but the jacket in People's Exhibit 11 is green. (RT 30:2373-2374.)

C. PENALTY PHASE – MISTRIAL

The prosecution presented the testimony of Eddie Candelaria, Armando Quintana, Lashan Thomas, Sandra Hess, Thomas Butler, Richard Bee, Joseph Elloie,

Henry Nandino, Bridget Robinson, Sandra Vinning, Chandra Vinning, and, Roberto Perovich. (RT 35:3031-3178, 37:3393.) The defense presented the testimony of Linda Allen, Barbara Sparks Mitchell, Brian Keith Mitchell, Carole Sparks, Louis Weisberg, Ira Mansoori, Michael E. Gold, and Nancy Kaser-Boyd. (RT 36:3192-37:3515.)

After a period of deliberation (RT 38:3735-3771), the court concluded that the jury was unable to reach a unanimous verdict and declared a mistrial. (RT 38:3771-3774.)

II. PENALTY PHASE RETRIAL

A. THE PROSECUTION'S CASE

1. VIOLENT CRIMINAL ACTIVITY

a. ASSAULT ON SANDRA HESS

At the penalty retrial before a newly sworn jury, Sandra Hess, a teacher at juvenile hall, testified about an incident that occurred Friday, March 31, 1988, when appellant was a student of hers. (RT 45:4785.) Appellant was upset about not being awarded a "good gram," which is something awarded on Fridays for good behavior, work and citizenship. (RT 45:4786.) Appellant was not receiving a "good gram" because the previous day Hess wrote a behavior referral report, which suspended appellant from her classroom for being disruptive in the classroom (i.e., being out of his seat and talking). (RT 45:4786.)

Appellant kept going to her desk without permission, trying to convince her that he should receive a "good gram." (RT 45:4787.) She was in the process of having appellant removed from the classroom for not following her instructions to sit down and be quiet when he put his right arm around her throat and used his left arm to push against it in a choke-hold position. (RT 45:4787.)

Appellant moved her out of her seat and across the room until she was in the middle of the room. She was not able to breathe or talk. (RT 45:4788, 4794-4795.) She thought she was going to be killed. She motioned for another student to pick up the emergency phone and said, "phone." (RT 45:4788.) Appellant kept yelling at another student, "Come on. You said you'd help me. We'll get her." (RT 45:4788, 4814.) Appellant told the student that went toward the phone, "Don't pick up the phone. Don't do that." (RT 45:4788, 4796.) The emergency phone immediately alerts a probation officer to come to the classroom. (RT 45:4788.) As soon as the student picked up the phone, appellant sat down in the chair beside her desk and smiled. (RT 45:4788.)

Hess sustained a bruised larynx, which caused her throat to be sore, and marks on her neck. (RT 45:4799.) She went back to work the next day. (RT 45:4799.)

b. ASSAULT ON RICHARD BEE

Sergeant Richard Bee testified to an incident that occurred on August 5, 1989, when appellant was fifteen years old and a ward at the California Youth Authority.

(RT 45:4825-4827.) At approximately 9:45 p.m., while in the living unit with 75 other wards, appellant refused to adhere to redline procedures, which require the wards to be in bed and stay quiet. (RT 45:4827.) Appellant was talking. (RT 45:4827.) Bee told appellant that he was going to place appellant in a detention room until morning. (RT 45:4827.) Appellant became argumentative, hostile, and aggressive, stating, "Fuck that. I'm not going." (RT 45:4827-4828.) Bee then sprayed appellant with mace, and as he did so appellant swung and struck Bee in the chin and chest. (RT 45:4831.) Bee dropped the mace, and he and a co-worker wrestled appellant to the ground. (RT 45:4831.) Bee sustained a sore jaw and a bruised chest, but these were not serious injuries. (RT 45:4831.)

c. ROBBERY OF LUZ HERNANDEZ

Lashan Thomas testified that on January 23, 1988, at 8:00 p.m., she and appellant were walking down the street behind a woman. Appellant, holding a pipe in his hand, hit the pipe on the ground and said, "Watch me rob her." (RT 45:4904.) Appellant approached the woman and said, "Give me your money and your purse." (RT 45:4905.) The woman responded, "No." (RT 45:4905.) Appellant then struck the woman across the back of the head. (RT 45:4904.) She fell to the floor and was bleeding from the back of the head. (RT 45:4905.) The woman's husband ran across the street and said, "Police, help me. Somebody." (RT 45:4904.) She and appellant ran. (RT 45:4905.)

The prior testimony of Luz Hernandez, taken at a juvenile court proceeding in 1988, was read to the jury. (RT 48:5426.) Hernandez testified that she was walking with her husband, but had crossed the street without him to look at something. (RT 48:5429-5430.) She saw two minors following her, whom she identified in court as appellant and Thomas. Without warning, appellant struck her in the back of the head with a long stick. She fell to the ground and started screaming. (RT 48:5428-5437.) Hernandez suffered a hematoma; the area where she was struck was swollen for five days, and she had a very intense headache and an intense stomach ache. (RT 48:5438-5439.) She was pregnant when she was struck, and lost the baby about five days later.[3] (RT 48:5439-5440.)

The prior testimony of Carlos Pineda, taken at a juvenile court proceeding in 1988, was read to the jury. (RT 48:5482.) Pineda testified that he was walking with his wife, Luz Hernandez, and then she crossed the street. (RT 48:5483-5484.) He then heard her screaming. (RT 48:5484.) He looked up, saw her holding her head, and saw appellant and Thomas running away from her. (RT 48:5484-5489.)

---

[3] Armando Quintana, who also testified at the juvenile court proceeding, testified for the defense that while working at a group home he saw two people standing nearby but with nothing in their hands. He then heard a woman scream. He went to her. She said, "They hit me." He never saw another man that purportedly was her husband. The police arrived and he got into the police vehicle. Shortly thereafter the police apprehended a person that he identified as the "young kid" that was standing by the group home. Quintana further testified that Hernandez did not appear to be pregnant. (RT 48:5498-5509.)

d. ASSAULT ON SEVEDEO SANCHEZ

Deputy Roberto Perovich testified that on December 10, 1996 at about 11:00 p.m. he was working the disciplinary cells at East Facility when he heard screaming from one of the cells. (RT 46:4964.) When he arrived at appellant's cell, which contained only inmates Sevedeo Sanchez and appellant, Sanchez appeared agitated. (RT 46:4965-4966.) Sanchez had a swollen red face and was screaming for help. (RT 46:4968.)

e. INCIDENT INVOLVING ARTHUR PENATE

Deputy Arthur Penate testified that on January 31, 1999 appellant was housed in the Twin Towers, a custodial facility for the Los Angeles County Sheriff's Department. (RT 46:4971.) At 7:10 a.m., while doing a security check, he saw appellant's breakfast in front of the cell door. (RT 46:4971-4972.) Penate decided to give appellant his food. He opened the small sliding door and gave appellant his food in his hands. Appellant grabbed a carton with feces and urine and threw it at Penate, striking him in the torso. (RT 46:4972.)

f. ASSAULT ON BRIDGET ROBINSON

Bridget Robinson testified that appellant was her boyfriend for about three months, during a portion of which time they lived together. (RT 46:5113.) Although they got along well initially, on February 21, 1994, after accusing her of cheating on him, appellant hit her with his fists and struck her with hair clippers, causing her to

bleed from the forehead and top of her head. (RT 46:5115-5116.) Appellant also made her perform oral sex on him, which she would not normally do. (RT 46:5117.) She also had regular sex with appellant because she was scared. (RT 46:5119.) Appellant was very violent and angry. (RT 46:5117.) At one point, she was trying to run out of the house, but appellant caught her. (RT 46:5118.) She tried to kick him in "his private part," but he responded by punched her, knocking her unconscious on the floor. (RT 46:5118.) Appellant placed his hands around her neck and apologized for what he had done. (RT 46:5120.) She agreed not to tell the police about the incident. (RT 46:5120.) He then began choking her; she would catch her breath, and then he would choke her again.[4] (RT 46:5121.)

Later than night, appellant picked her up, took her to the bathroom, and cleaned the blood from her forehead. (RT 46:5123.) He then tied her up with the telephone cord that he had earlier pulled out from the wall socket. (RT 46:5124.) Appellant said he was going to the store to buy a telephone cord; he left with Robinson's three-year-old daughter who was present during the altercation.[5] (RT 46:5116, 5119, 5123-5124.)

---

[4] Officer Ernest London testified for the defense that he responded to the scene and interviewed Robinson outside the apartment; his partner interviewed appellant in the living room. (RT 46:5511-5514.) The report he wrote of the interview does not state that Robinson told him that appellant had choked her, and thus she must not have told him this. (RT 46:5518.)

[5] Officer Ernest London further testified that Robinson never told him that appellant had taken Robinson's child to the store. (RT 46:5519, 5524-5525.) If she had told him that appellant took the child without her permission, then this is a crime that he would have written in the report; it is not written in the

Appellant returned shortly thereafter; Robinson already had untied herself. (RT 46:5124.) Appellant hit her with a pair of hair clippers, and he told her that he also was going to hit her with an iron that he was holding. (RT 46:5125-5126.)

The police arrived at her house, having been called by a neighbor. (RT 46:5134-5135.) Robinson told the police everything that happened. (RT 46:5126, 5134-5135.) Thereafter, she received a telephone call from appellant. He apologized to her for the loss of the baby as she was pregnant at the time of the assault, a fact which she had discussed with appellant prior to the assault, and the assault caused her to lose the baby. (RT 46:5126-5127.) He also told her that if she went to court to report the incident, he would kill her mother. (RT 46:5127-5128.)

2. THE OFFENSES FOR WHICH APPELLANT WAS CONVICTED IN THE GUILT-PHASE

a. THE COLEMAN HOMICIDE AND WHITESIDE ASSAULT

The prosecution presented substantially the same evidence that was presented at the guilt phase of appellant's first trial, which included the testimony of Detective Sal Labarbera (RT 45:4846-4845) and Latasha Whiteside (RT 45:4847-4900, 4919-4945), and Dr. Pedro Ortiz (RT 47:5288-5302), except for stipulations set forth below.

The parties stipulated to the following facts regarding the physical examination of Whiteside and the results of the DNA analysis: (1) People's Exhibit 22 is a rape kit

---

report of the interview, and thus she did not tell him this. (RT 46:5524-5525.)

taken July 1, 1996, which contains swabs of various areas and orifices from Whiteside, including vaginal swabs; (2) People's Exhibit 23 is a vial containing appellant's blood; (3) People's Exhibit 24 is a vial containing Whiteside's blood; (4) People's Exhibit 25 is an Airborne Express envelope containing items from Cellmark relating to DNA analysis; (5) Mike Mastrocovo, a criminalist for the city of Los Angeles, examined the rape kit (People's Exhibit 22), found that sperm was contained on the vaginal swabs and on the interior crotch area of the panties, and then sent People's Exhibits 22, 23, and 24 to Cellmark for DNA analysis; (6) Cellmark laboratories performed a DNA analysis of the rape kit (People's Exhibit 22), and found that each of the 10 areas of the sperm fraction tested matched identically to appellant and each of the 10 areas of the non-sperm fraction tested matched identically to Whiteside; and, (7) 1 in 17 million African Americans would have the combination of DNA present on the sperm fraction matched to appellant. (RT 45:4947-4953.)

b. GANG EXPERT TESTIMONY

Detective Christopher Barling testified that the Harvard Park Brims (also known as the Six Deuce Brims) is a Blood gang comprised of African-Americans that claims the area encompassing Slauson Avenue, Gage Avenue, Western Avenue, and Vermont Avenue. (RT 46:5001-5003, 5011.) The Coleman and Foster crime scenes are located within this area. (RT 46:5003.) Members of the Harvard Park Brims commonly greet

one another with the name "Blood." (RT 46:5006.) The Harvard Park Brims gang is associated with the color red or burgundy. (RT 46:5004.)

The rival Crips gang is predominately comprised of African-Americans. The Crips gang is associated with the color blue. (RT 46:5004.)

Appellant's nickname is Poochie. (RT 46:5007.) The letters "HPB" are tattooed on appellant's left arm, extending from the forearm to the wrist, which stands for Harvard Park Bloods and which shows that appellant is affiliated with the Harvard Park Brims. (RT 46:5007.) The writing shown in People's Exhibits 51C and 51D, which contain the words ""S-I-X-X D-U-S-E," "BRIMS" and "POOCHIE," is associated with the Six Deuce Brims and it lets people know that Poochie from Six Deuce Brims was in the cell.[6] (RT 46:5008-5010.)

c. THE FOSTER HOMICIDE

The prosecution presented substantially the same evidence that was presented at the guilt phase of appellant's first trial, which included the testimony of Detective Frank Weber (RT 46:5018-5037, 5141-5144), Yvonne McGill (RT 46:5038-5057), and Patricia Manzanares (RT 46:5058-5091), except for the stipulations set forth below.

The parties stipulated that on July 27, 1996, Dr. Steve Scholtz performed an autopsy on Foster. He died of gunshot wounds to the head. He had cocaine metabolite

---

[6] The photographs are of the inside walls of a holding cell at the Twin Towers where appellant was housed in January 1999. (RT 46:4971, 4982-4983.)

in his blood, meaning he ingested cocaine the day he was shot. (RT 47:5302-5305.) The parties further stipulated that the gunshot wounds are depicted in People's Exhibit's 40 and 41, which are accompanied by Dr. Scholtz' handwriting findings of the autopsy. (RT 47:5302-5305.)

d. APPELLANT'S ARREST

The prosecution presented substantially the same evidence that was presented at the guilt phase of appellant's first trial, which included the testimony of Officer Marcelo Raffi (RT 46:5092-5108.)

e. STIPULATIONS REGARDING SEARCH OF APPELLANT'S RESIDENCE AND BALLISTICS

The parties stipulated to several facts. On August 21, 1996, the police served a search warrant at a residence located at 1446 West 58th Street relating to the Foster and Coleman homicides. Appellant was living at the residence with D'Joy Robinson (a lady unrelated to Bridget Robinson) and D'Joy Robinson's 14-year-old son, Carlos. (RT 47:5164-5165.) A search of the residence uncovered four red t-shirts, Speer ammunition (People's Exhibit 43), an empty CCI Blazer nine millimeter Luger ammunition box (People's Exhibit 44), and a jacket (People's Exhibit 20). The nine millimeter handgun recovered by Officer Raffi at the time of appellant's arrest was the handgun that killed Foster. When the handgun was recovered, it had six live bullets in it, which included two CCI bullets and one Speer bullet. The Speer bullet found in the handgun, the Speer casings recovered from the Foster crime scene, and the Speer

ammunition found in a search of the residence all contain the same head stamp and are the same brand. (RT 47:5164-5168.)

3. VICTIM IMPACT EVIDENCE

Coleman's older sister, Chandra Vinning, testified about how Coleman's death has impacted their mother, Sandra Vinning, who was seated in the courtroom and identified for the jury. (RT 47:5170-5171.) Coleman was a very helpful child. He was always there for their mother. It was a shock to their mother that anyone could do this to Coleman. He was a "people person" that trusted everybody. Coleman's death took a heavy toll on their mother. (RT 47:5171-5174.)

Vinning further testified that she recognized People's Exhibit 48 as a photograph taken shortly before Coleman's death, showing Coleman and his four-year-old daughter Cherie, whom he loved very much. (RT 47:5174.) Coleman's daughter does not have a father to see her grow. (RT 47:5176.)

Vinning also testified that Coleman was dealing narcotics and was involved in a gang. (RT 47:5177.) When Vinning came back from New York, however, Coleman was not engaged in those activities. (RT 47:5178.) Vinning testified that she misses Coleman very much. (RT 47:5177.)

/ / /

B. THE DEFENSE CASE

1. CLINICAL ASSESSMENT OF MENTAL HEALTH ISSUES ADVERSELY AFFECTING APPELLANT

Dr. Louis W. Weisberg, a board certified psychiatrist, evaluated appellant in 1988 when appellant was at the California Youth Authority stemming from the incident involving Sandra Hess. He performed a general mental status exam as part of the intake procedure to determine if there were any major psychiatric illnesses or anything that might need referral for further evaluation. (RT 48:5391-5394, 5396, 5400.) Appellant was fifteen years old. (RT 48:5400.)

Refreshing his recollection from the four-page psychiatric evaluation report that he wrote, Dr. Weisberg testified that the information he received implied that appellant had a neurologic problem. (RT 48:5400.) Appellant reported feeling frightened about his behavior relating to the attack on the teacher. (RT 48:5397-5398.) Appellant's mother had a significant history of alcohol and drug abuse, including drug use during her pregnancy with appellant. (RT 48:5398, 5407.) His principal diagnosis was that appellant suffered from a conduct disorder, undifferentiated type, which meant he engaged in a broad range of severe anti-social activity. (RT 48:5398.)

Dr. Weisberg further testified that appellant had an intermittent explosive disorder, which meant appellant could become explosive at any time and in a violent manner; appellant had explosive personality traits and anti-social personality traits. (RT 48:5399.) Appellant had a reported history of blackouts associated with violence.

(RT 48:5399, 5405.) Dr. Weisberg recommended (1) a neurological evaluation to rule out organicity (i.e., brain disorder) and seizure disorder and (2) an intensive treatment program. (RT 48:5399.) The recommendations, which were never acted upon, were based, in part, on the fact that he had information from the central file and from appellant that led him to believe that appellant could have an organic brain dysfunction. (RT 48:5415.)

Dr. Michael Gold testified that he is a medical doctor practicing as a neurologist in Santa Monica. He holds a teaching appointment as a clinical associate professor at UCLA Medical Center where he teaches neurology to neurology residents, medical students, and family practice residents. (RT 48:5528-5529.)

Dr. Gold performed a neurological examination of appellant, which included an interview with appellant, a physical examination, and diagnostic and specialized tests, including an EEG (i.e., brain wave test), a MRI brain scan, and a SPECT scan. (RT 48:5531-5537.)

Dr. Gold testified that appellant's general medical health was normal. He was a healthy young man. (RT 48:5537.) In the neurologic exam, however, he found that on the left side of appellant's body, he perceived or felt sensation more poorly than he did on the right. He also found that the left side of his body demonstrated different reflexes than the right side. These physical findings revealed that there was some area of appellant's brain that was abnormal or damaged. (RT 48:5538.) The diagnostic test

showed an abnormal SPECT scan, which is a test of how the brain is functioning. (RT 48:5538.) Dr. Gold's diagnosis is that appellant has malfunction or abnormal function in both of his temporal lobes, which could affect emotions, behavior, and impulse control. (RT 48:5539, 5545-5546, 5551, 5559, 5584-5585.) Moreover, appellant presented a history that suggested, but did not prove, that he could be experiencing a type of epilepsy or seizure that arises in the temporal lobe. (RT 48:5540.)

Dr. Carl Osborne testified that he is a licensed psychologist with a specialty in the forensic area, having earned a Ph.D. in clinical psychology from USC in 1986. (RT 48:5591.) Dr. Osborne performed an examination of appellant, which included interviews of appellant and family members. He reviewed extensive records from the Department of Social Services regarding appellant's early childhood. He also performed several tests on appellant, including the Wechsler Adult Intelligence Scale, the Validity Indicator Profile, and the Wechsler Memory Scale. (RT 48:5594-5597.)

Dr. Osborne testified that appellant suffers from several severe and chronic mental illnesses, including intermittent explosive disorder and probably substance dependence. (RT 48:5601, 5614, 49:5693-5694, 5697.) Intermittent explosive disorder means that people suffering from this disorder have a period of build-up tension or emotion that results in explosive aggressive behavior. (RT 48:5601.)

Although appellant has an IQ of 94, which is within the normal range, his working memory is impaired. (RT 48:5604-5606.) Working memory is the ability to

put things into one's head and manipulate them on a short term basis, such as reading a telephone number from the telephone book and remembering it long enough to walk across the room and dial the number. (RT 48:5605-5606.)

Dr. Osborne also testified that he reviewed reports by neuropsychologist Dr. David Rudnick and Dr. Michael Gold, and was aware that Drs. Rudnick and Gold both believed that appellant was organically brain damaged and had right temporal lobe damage. Dr. Osborne's own tests showed that appellant was brain damaged. (RT 48:5615.)

Dr. Osborne further testified that appellant's impaired working memory is consistent with temporal lobe damage. It also "affects broadly impulse control." (RT 48:5617.) It affects aggressive impulses and sexual impulses. (RT 48:5617.)

Appellant's behavior was influenced by the following factors: (1) his mother was a drug addict and neglected him; (2) his life was very chaotic in that he was shifted from place to place; (3) when appellant was young and happy living at his aunt's house his mother kept taking him away; (4) appellant's father was absent from his upbringing and very violent toward appellant's mother; (5) appellant suffered extreme intrauterine trauma caused by the accident that occurred when appellant's mother was pregnant; and, (6) the deficiency in working memory, which is consistent with appellant's brain damage and impaired ability to reason. (RT 49:5686-5692.)

Dr. Osborne also testified that appellant has an intermittent explosive disorder, which means that a person experiences over a period of time increasing tension, frustration and anger. (RT 49:5693-5694.) Periodically, a person with this disorder will just explode, as occurred with appellant. (RT 49:5694-5695.) Intermittent explosive disorder is by definition an impulse control disorder. The impulse to act out is not something that appellant can stop. (RT 49:5696.)

Appellant's combination of mental illnesses and brain damage is very uncommon in people, and in fact Dr. Osborne has never before seen this particular combination. (RT 49:5701.) Appellant indicated to Dr. Osborne that he would like help to behave differently, and has asked on several occasions if there is anything that Dr. Osborne could do for him. (RT 49:5704.)

Dr. Iraj Mansoori testified that he is a psychologist with the CYA, having obtained a Ph.D. in clinical psychology. (RT 49:5774-5775.) In 1991 when appellant was a ward at the CYA, he counseled appellant for approximately 12 to 15 one-hour sessions over the course of six months. (RT 49:5775.) He got along with appellant, and appellant never tried to attack him. Appellant was bitter and angry, but appellant never got angry with him. He read about a dozen psychological and psychiatric reports on appellant by different professionals in different placements and places, including the intake report at the reception center by the CYA professionals. (RT 49:5776-5777.)

On May 14, 1991, he wrote a parole evaluation report on appellant. (RT 49:5777.) The decision was made not to parole appellant, and he would have informed appellant of the decision. Appellant was very content with what he had in the CYA system, even to the extent that it appeared he liked it. When he told appellant that he could not go because he was not ready, appellant responded okay. Dr. Mansoori's understanding was that appellant found the CYA institution much better than what he had been offered at home. (RT 49:5778.)[7]

2. ABANDONMENT BY MOTHER AND SUBSEQUENT REMOVAL FROM MOTHER'S CARE AND PLACEMENT WITH CHILD PROTECTIVE SERVICES

Mary Goldie, a former police detective with the Pasadena Police Department, testified that on January 21, 1977, while on assignment to the juvenile section at the police station, a woman by the name of Mrs. Berkins came in with appellant. Appellant was three years old. (RT 49:5783.) Mrs. Berkins was not a relative. Neither appellant's mother nor father, nor any family member, could be located. (RT 49:5784-5785.) Ms. Goldie took appellant into protective custody and transported him to a shelter care home arranged through McClaron Hall, which is a facility for abused

---

[7] Pursuant to an in limine ruling by the court, Dr. Mansoori was not permitted to testify, as he had at the first penalty trial, that he had recommended neuropsychological testing of appellant for possible organic brain damage. (RT 49:5747-5764.)

and neglected children. She does not know what happened to him after that. (RT 49:5785-5786.)

Juanita Terry testified that she was employed by the Los Angeles County Department of Public Social Services as a protective services worker. Her job involved dealing with cases of children who were physically endangered. (RT 49:5788.) Ms. Terry's involvement with appellant began March 31, 1978. (RT 49:5798.) The previous month, on February 7, 1978, appellant was placed with Barbara Mitchell, his aunt and concerned relative. (RT 49:5788-5789, 5790, 5797.) Prior to placement with Mitchell, however, appellant had been removed from the care of his mother, Carole Sparks, and initially placed in a shelter care home, which is used when children have to be taken quickly out of an unsafe environment. (RT 49:5798.)

Appellant was removed from his mother's care because she was unfit. Ms. Terry testified that the records indicated that appellant's mother was presumed to be mentally unstable, had been using excessive corporal punishment, and was not giving appellant consistent care and supervision. (RT 49:5790.)

Ms. Terry further testified that her focus was on appellant's care, and that his mother not disrupt the care plans. On some occasions, appellant's mother attempted to remove him from the nursery school or interfere with the care he was receiving from Mitchell. (RT 49:5794.) In October 1978, appellant was placed back into the care of his mother. This occurred against Ms. Terry's recommendation that appellant not be

placed with his mother because she considered his mother's care to be an unsafe environment. (RT 49:5795-5796.)[8]

3. CHARACTER WITNESSES LINDA ALLEN, BARBARA MITCHELL, AND CAROLE SPARKS

Linda Allen testified that appellant's mother, Carole Sparks, is her older sister, and thus appellant is her nephew. She loves appellant very much and, despite being aware of his convictions in this case, she wants him to live. (RT 47:5205-5208.)

Allen testified that Carole Sparks was a heavy drug user and stripper. (RT 47:5209-5211.) There were many times when she was taken to the hospital in an ambulance because she had overdosed. (RT 47:5210.)

They discovered she was three months pregnant with appellant after she was hit by an automobile while exiting a club. (RT 47:5209.) She sustained serious injuries and was in a full body cast for a long time. (RT 47:5210.) Allen was taking care of Sparks at home, and Sparks told her that she did not want to keep the baby (i.e., appellant). (RT 47:5211-5212.) While at home and pregnant with appellant, Sparks took prescribed medication, but she also continued to take illegal drugs. (RT 47:5212.)

Allen testified that she was not really able to enjoy appellant because Sparks "was a monster." (RT 47:5214.) Allen stopped having contact with Sparks. (RT

---

[8] The court refused to let Ms. Terry testify that she had, at one point, written a letter to appellant's elementary school warning the school to call the police if appellant's mother tried to take him. (RT 49:5792-5793.)

47:5215.) Two or three years ago appellant called and said he had just been released from CYA, and so she picked him up from the train station and dropped him off in front of Sparks' house; she did not speak with Sparks. (RT 47:5215-5216.)

At one point, Sparks moved in with appellant's father, Melvyn Banks. He was very abusive toward Sparks, and burned her with cigarettes and beat her with golf clubs. (RT 47:5217-5218.) She recalled one time when she went in an ambulance with Sparks after finding Sparks on the floor of her apartment with burns to her chest. Allen could not recall whether this incident occurred before or after appellant was born because there were so many incidents. (RT 47:5218.) Melvyn Banks died two or three years before the trial. (RT 47:5219.)

When appellant was about two years old, Sparks called and asked Allen if she would keep appellant. Allen would have taken appellant for as long as Sparks was out of the picture. (RT 47:5233-5234.) Appellant lived with Allen's oldest sister Barbara when he was three or four years old. When he was six or seven years old, appellant was back living with his mother. During that time, she saw him at a market taking bags to the car for a quarter; he was the youngest kid there. (RT 47:5221-5222.) He was trying to make money to give to his mother. (RT 47:5230.) Allen fed appellant because he complained that he was hungry. (RT 47:5229-5230.) She gave money to a grocery store for food for appellant, but she never gave appellant money because he gave it to his mother. (RT 47:5229-5230.)

Sparks prohibited Allen from having contact with appellant, and at one point even attempted to attack Allen and threatened to kill her and burn down her house because she thought Allen had picked up appellant from a foster home where he was living. (RT 47:5223.) Sparks did not want the family to have anything to do with appellant. (RT 47:5224.)

Appellant loved his mother very much, and always hoped that he could go and live with her. (RT 47:5225.) When appellant was an adult, Allen told him that he had to take care of himself first, and then he could help his mother. Allen did not think that appellant got the message, however, as appellant always had some hope that he and his mother would have a decent relationship. Although appellant was affectionate to Sparks, Allen, and to the entire family, Allen never saw Sparks being affectionate toward appellant. (RT 47:5225-5226.) In fact, even before appellant started walking, Sparks told appellant, "You're my man. You will take care of me." (RT 47:5231-5232.) Appellant was never disrespectful nor violent toward Allen, and Allen never saw appellant being violent toward anyone. (RT 47:5257.)

Allen testified that Sparks attempted suicide many times. One time as an adult she drank Drano at her mother's house. She could not recall whether that incident occurred prior to appellant's birth, but a low point in Sparks' life started not too long after appellant's birth. (RT 47:5232- 5233.)

Barbara Mitchell testified that appellant's mother, Carole Sparks, is her sister, and thus appellant is her nephew. She had lived out-of-state since the 1960s, but returned to California when Sparks was in an accident and hospitalized. During the hospitalization, they learned that Sparks was pregnant with appellant. (RT 47:5322-5323.) While pregnant with appellant, Sparks was on pain medication prescribed by the doctors. (RT 47:5324.)

At some point after appellant was born, Sparks and appellant went to live with appellant's father, Melvyn Banks. They had a physically violent relationship, which frequently landed Sparks in the hospital. Melvyn Banks beat Sparks, choked her, pushed her down the stairs, slammed car doors on her, and pulled her hair. (RT 47:5326.) Barbara Mitchell was taking care of appellant sporadically during this time. (RT 47:5327.)

When appellant was two years old, Sparks dropped him off at the daycare attended by Mitchell's children with a note stating, "Take him. I don't want him." (RT 47:5328.) Mitchell took appellant, and obtained legal custody of him. (RT 47:5328, 5346.) He lived with her for about three or three and a half years. (RT 47:5328.) She cared for appellant as her own. Appellant was an extremely affectionate child. Mitchell used to hug and kiss appellant, and her sons and appellant hugged her back. (RT 47:5328-5331.) When Sparks came and picked him up, she just took him with the clothes on his back; she left his toys and all of the rest of his possessions. (RT

47:5330.) Appellant screamed and begged Mitchell to take him back. She could hear appellant screaming, "Bobbie. Bobbie. Take me. Take me, please," as Sparks dragged him down the street. (RT 47:5330.)

Sparks took appellant back because she was getting child assistance money from the county, and the county had discovered that Sparks did not have physical possession of appellant; Sparks did not give any money to Mitchell to care for appellant. (RT 47:5329.) When Sparks took appellant, Mitchell called the Rampart Police Department because Mitchell, not Sparks, had legal custody of appellant. (RT 47:5346.) After a court hearing on the matter, however, Sparks obtained legal custody. (RT 47:5346.) Mitchell never saw appellant thereafter on a regular basis. (RT 47:5346-5347.) When appellant was with Sparks as a young child, he was filthy and often hungry. (RT 47:5352.)

Sparks was a drug addict. She took PCP, marijuana, cocaine, and an unknown drug called "ice." (RT 47:5354.) She swallowed Drano one time. Sparks was very weird. Mitchell believed that Sparks was crazy. (RT 47:5354.)

Appellant was living at a halfway house when he was nine or ten years old. Mitchell visited him there. He was then moved to another place off of Figueroa. Appellant was moved from one foster home to another. (RT 47:5335-5336.) He cried when she visited him. (RT 47:5337.) Appellant had nightmares too. (RT 47:5351.)

When appellant was fifteen years old, he was back living with his mother and things seemed okay. (RT 47:5351-5352.)

Mitchell testified that appellant loved his mother, but he also was afraid of her. (RT 47:5331.) Appellant wanted to hug his mother, and he tried, but she pushed him away. (RT 47:5332.) Sparks called appellant a "man child." (RT 47:5332.) When appellant was nine years old, Sparks told him, "You're a man child. You have to fend for yourself." (RT 47:5332.) At the time of trial, Mitchell had no contact with Sparks.

Appellant's father never went to get him when Mitchell had him. Appellant never had a loving relationship with his father. His father would "jump on Carole [Sparks] and scream." (RT 47:5332.)

Mitchell also testified that she had last spent time with appellant four years ago when appellant was released from CYA for the second time. (RT 47:5338.) She had never seen appellant act in a violent manner. (RT 47:5338, 5343.) She was aware of appellant's convictions. She loved him and did not want him to die. (RT 47:5333.)

Carole Sparks, appellant's mother, testified that the accident in which she was seriously injured occurred well before she was pregnant with appellant, and that she never took any illicit drugs before or during her pregnancy. (RT 47:5360-5362.) Before the accident, however, she did smoke some marijuana. (RT 47:5361.) She was never a stripper, but was in beauty college. (RT 47:5368.)

Sparks testified that she never left appellant, and did not drop him off at the daycare center with a note stating she did not want him. (RT 47:5362-5363.) Appellant was in a group home for some time. (RT 47:5373.) He ran away, and his probation officer released him to live with her. (RT 47:5374-5375.) She testified that she did not get along with either Allen or Mitchell, and referred to them as her mother's daughters, not her sisters. (RT 47:5362.)

Sparks recalled an incident when appellant was ten years old and he came home with a stolen bicycle; she made him return it. (RT 47:5373.) She had "falling outs" with appellant's father, Melvyn Banks, but he never beat her. (RT 47:5380, 5382.) They lived together for a period of time before appellant was born, but never after he was born. (RT 47:5383.) She had never seen appellant attack anyone, nor had she ever seen him carrying a weapon. (RT 47:5376.)

C. THE PROSECUTION'S REBUTTAL CASE – TESTIMONY OF DR. RONALD MARKMAN

Dr. Ronald Markman, a forensic psychiatrist, testified in the prosecution's rebuttal case. (RT 49:5809.) He performed an evaluation of appellant, which consisted of a face-to-face interview on September 2, 1998 and a review of appellant's handwritten notes regarding his past. (RT 49:5811-5812, 5828.)

He testified that he could not label appellant as manipulative, but his responses appeared to be carefully thought and self-serving. (RT 49:5811.) Appellant denied participating in the incident in which Charles Foster was killed. Appellant also spoke

about being concerned at the age of two that his mother was being physically abused by his father; he was afraid that his mother would die and leave him. (RT 49:5813.) Dr. Markman testified that recalling something that happened at age two would be highly unlikely, and particularly regarding concern about death, which a child does not develop until at least eight years of age. (RT 49:5813.)

Dr. Markman also testified that there are a variety of impulse disorders that the American Psychiatric Association has defined as definitive diagnosis. (RT 49:5814.) For example, kleptomania (i.e., the need to steal even though one may have money to pay for it) and gambling. There are other kinds of impulse disorders that reflect an individual's behavior generally without thinking or planning, where the individual reacts in an erratic, unpredictable manner. (RT 49:5814.) The following scenario would not be indicative of an impulse disorder: the act of secreting urine and feces in a plastic bag, concealing it for at least an hour or more, and then standing up and launching the object toward a bench officer or deputy district attorney. (RT 49:5814-5815.) The scenario is inconsistent with an impulse disorder because it demonstrates a certain amount of planning and thinking; an impulse disorder has to be an event or activity without any thinking or planning behind it; something that one does on the spur of the moment with what is available at that time. (RT 49:5815-5816.)

Dr. Markman also testified that the following scenario is not consistent with an impulse disorder: a person goes up to an ATM with their face concealed, attempts to

rob a person standing there, shoots the person, and then after the person falls to the ground shoots the person again in the back of the head, and then flees in a getaway vehicle located in an alley. (RT 49:5816.) The scenario describes a premeditated act as opposed to an impulsive act. (RT 49:5817.)

He is familiar with EEGs, MRIs, and SPECT imaging. (RT 49:5817-5818.) One cannot make a diagnosis, nor predict behavior, based on any of these tests. (RT 49:5821.) The fact that appellant had a normal EEG tells him that the electrical function in the brain is "pretty much normal" and it would be highly unusual to find electrical abnormalities present or some kind of disastrous physical or medical problem. (RT 49:5820.) SPECT imaging demonstrates "functional," which shows whether all areas of the brain are getting proper blood profusion. It does not translate into behavior, psychology, diagnosis, or dysfunction. (RT 49:5821-5822.) A person with a temporal lobe seizure or temporal lobe disorder might act very unpredictably, but would not show a behavioral pattern that is planned, intentional, and deliberate. (RT 49:5822-5823.)

Dr. Markman also testified that the following scenario would not be caused by a temporal lobe disorder and seizure: the act of planning and premeditating the robbery of a person in a wheelchair, wheeling the person up some stairs, wheeling them into a house, waiting for the door to be closed, shooting the person in the back of the head, beginning to look throughout the house for property to steal, taking a 17-year-old girl

in the house to a back bedroom and raping her and causing forcible oral copulation on her, taking her to the living room, tying her up, locating items of value and then fleeing the crime scene after attempting to kill the young woman, and then shooting the person that was in the wheelchair a second time. (RT 49:5824-5825.)

On cross-examination, Dr. Markman, acknowledging that he is not a neurologist, explained that it was not his intention to testify, if he did, that the brain and its structure have no effect on behavior; the brain is the basis for behavior. (RT 49:5825-5827.) Although he interviewed appellant on September 2, 1998, he did not prepare his written report until March 17, 1999. (RT 49:5828-5829.) He reviewed Dr. Gold's report regarding SPECT imaging, and accepted the interpretation that there was some profusion impairment in appellant's temporal lobes, bilaterally noted on the SPECT by Dr. Gold. (RT 49:5831-5832.) That does not translate into brain damage. (RT 49:5832.) He does not accept Dr. Gold's interpretation that appellant is a brain damaged individual. (RT 49:5832.) He did not look at the SPECT image. (RT 49:5832.) He did not do any psychological testing or physical testing. (RT 49:5837.) He is aware that appellant had a "tumultuous and dysfunctional upbringing with little security support or direction." (RT 49:5835.) There is no way of correlating brain damage with specific behavior. (RT 49:5841.)

/ / /

ARGUMENT

JURY SELECTION ISSUE, GUILT PHASE

I.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE *BATSON/WHEELER* OBJECTION TO THE PROSECUTOR'S PEREMPTORY CHALLENGES AGAINST THREE BLACK PROSPECTIVE JURORS BECAUSE REMOVAL OF THE JURORS ON ACCOUNT OF THEIR RACE VIOLATED THE FEDERAL AND CALIFORNIA CONSTITUTIONS, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS

A. INTRODUCTION AND FACTUAL BACKGROUND

Appellant is Black. (RT 25-1:1228.) During jury selection in the first trial, and after hardship excusals and challenges for cause, the prosecutor exercised five out of his first eleven peremptory challenges against Blacks. (RT 25-1:1226, 1230.)

The five Black prospective jurors were as follows: (1) Prospective Juror 6 [#5321, seated (RT 24:859), excused (RT 24:980)]; (2) Prospective Juror 9 [#3145, seated (RT 24:859), excused (RT 24:1023)]; (3) First Prospective Juror 12 [#2726, seated (RT 24:1037), excused (RT 24:1057)]; (4) Prospective Juror 8 [#7363/#7960, seated (RT 24:859), excused (RT 25-1:1181)]; and, (5) Second Prospective Juror 12 [#8322, seated (RT 25-1:1214), excused (RT 25-1:1224)].

Here, appellant claims error limited to the trial court's ruling of no prima facie case as to Prospective Juror 6 (#5321), First Prospective Juror 12 (#2726), and Second Prospective Juror 12 (#8322).

After the prosecutor exercised a peremptory challenge against Second Prospective Juror 12 (#8322), the fifth peremptory against a Black juror, trial defense counsel stated she was making a *Wheeler*[9] motion. (RT 25-1:1226-1244; CT 2:456.) Counsel explained that the prospective jurors appeared to be very neutral, and that five out of the first eleven peremptory challenges were against Blacks, and appellant is Black. (RT 25-1:1226.) Defense counsel stated she could see no justification for the prosecutor's challenge to Prospective Juror 6 (#5321). (RT 25-1:1227.) Counsel further stated that all of the prospective jurors at issue said they could impose the death penalty. (RT 25-1:1232.) Defense counsel argued that the pool of Blacks is relatively small, noting that Blacks comprised approximately one-third, or less, of the venire. (RT 25-1:1238.)

The court invited the prosecutor to comment whether the defense had established a prima facie case. (RT 25-1:1230.) The prosecutor confirmed that he had exercised peremptory challenges against eleven prospective jurors and that nine of them had been against members of minority groups: five Black, three Hispanic, and one Asian. (RT 25-1:1230.) The prosecutor stated that following the eleven challenges the panel of seated prospective jurors consisted of four Blacks, two male Whites, a male Armenian, two female Whites, a female Asian, and another male (either Armenian or White). (RT 25-1:1230-1232.)

---

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

The trial court stated that in determining a prima facie case the issue was whether there is "evidence on the record to suggest that the prosecution is making a systematic attempt to utilize peremptory challenges for an impermissible purpose, i.e., to ... [exclude] members of a sex or race or religion or what have you from the jury box." (RT 25-1:1233-1234.)

The court noted that relevant factors include the racial composition of the panel and the fact that the defense exercised ten peremptory challenges, only one of which was against a Black prospective juror. (RT 25-1:1234-1235.) In deciding whether a prima facie case had been made, the court explicitly – and erroneously – considered "[t]he manner in which [the] defense ... [had exercised] challenges[,] ... [because] it artificially skews things." (RT 25-1:1234.) The court placed fault on trial defense counsel for the prosecutor's challenges on Blacks, reasoning that defense counsel's disproportionate racial challenges (i.e., ten peremptory challenges, only one of which was on a Black) "artificially skew[ed] things" by increasing the proportion of Blacks among the seated prospective jurors, making it more likely that the prosecutor's peremptory challenges would be directed at Black jurors.

The court ruled that no prima facie case had been made because each of the prospective jurors gave answers in their questionnaire that presented grounds for the prosecution to exercise a peremptory challenge. (RT 25-1:1235-1236.)

Following the ruling, the court again invited the prosecutor to state reasons for the challenges, except no reason had to be given for excusing Second Prospective Juror 12 (#8322). (RT 25-1:1236-1237.) The prosecutor stated:

> I think it is creating a problem for me to justify when there is no prima facie showing.
>
> I would say that the questionnaires speak for themselves in terms of the answers written there.
>
> The number of answers they provided while they were seated in the box either caused me discomfort or concern on their ability to impose the death penalty.
>
> That is why I excused all of these people was [sic] for inability to impose the death penalty. [RT 25-1:1237.]

The trial court reiterated its ruling of no prima facie case. (RT 25-1:1243.) The court further stated that defense counsel's argument that the prospective jurors' answers were neutral was incorrect. The court found that each expressed problems with the concept of the death penalty, problems with the imposition of the death penalty, and doubts about their ability to impose the death penalty, and some even expressed confusion. (RT 25-1:1244.)

The final composition of the sworn jury was six Black jurors and six White jurors. (RT 26:1619-1620.)

As explained below, the trial court committed reversible error when it found appellant did not make a prima facie case of exclusion of Prospective Juror 6 (#5321), First Prospective Juror 12 (#2726), and Second Prospective Juror 12 (#8322).

B. STANDARD OF REVIEW AND THE PROCESS TO GUIDE THE CONSTITUTIONAL REVIEW OF PEREMPTORY CHALLENGES

The use of peremptory challenges to remove prospective jurors because of their race violates both the federal and the California Constitutions. (U.S. Const., 6th & 14th Amends. [right to impartial jury and equal protection, respectively]; Cal. Const., art. I, § 16; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *Powers v. Ohio* (1991) 499 U.S. 400, 409 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler, supra*, 22 Cal.3d pp. 276-277.)

The high court has set out a three-step process to be followed when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges. First, the complaining party must make out a prima facie case of invidious discrimination. Second, the party exercising the challenge must state nondiscriminatory reasons for the challenge. Third, the trial court must decide whether the complaining party has proved purposeful discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

"In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: '[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate

number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted.)." (*People v. Bonilla* (2007) 41 Cal.4th 313, 342; *Batson v. Kentucky, supra*, 476 U.S. at p. 97 [examples of circumstances that bear upon the issue of racial animosity include a pattern of discrimination against racial minorities, the impact of the prosecution's challenge on the composition of the jury, and the prosecutor's questions and statements during jury selection].)

If the trial court denies the motion without finding a prima facie case of group bias, as here, the reviewing court considers "the entire record of voir dire. [Citations.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155; see *People v. Box* (2000) 23 Cal.4th 1153, 1188.) Because *Wheeler* motions call upon trial judges'

personal observations, appellate courts typically review their rulings with deference on appeal (i.e., for abuse of discretion). (*People v. Alvarez* (1996) 14 Cal.4th 155, 196.)

This Court has held that the same rule applies where the trial court states that it does not believe a prima facie case has been made, but nonetheless invites the prosecution to justify its challenges for purposes of completing the record on appeal – the question whether a prima facie case has been made is not moot, nor is a finding of a prima facie showing implied. (*People v. Welch* (1999) 20 Cal.4th 701, 745-746; but see *Hernandez v. New York* (1999) 500 U.S. 352, 359; *People v. Howard* (2008) 42 Cal.4th 1000, 1032 (dissenting op. of Kennard, J.) "When the trial court under these circumstances rules that no prima facie case has been made, 'the reviewing court considers the entire record of voir dire. [Citation.]' If the record 'suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question,' we reject the challenge." (*People v. Welch, supra.* [internal quotation marks omitted]; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 422.)

Finally, although trial defense counsel only invoked *Wheeler* (RT 25-1:1226), the *Wheeler* objection preserves the *Batson* claim. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

C. THE TRIAL COURT'S RULING IS SUBJECT TO DE NOVO REVIEW BECAUSE THE COURT APPLIED AN INCORRECT STANDARD WHEN RULING ON THE MOTION

The trial court made no reference to the precise standard it applied in determining that a prima facie case had been established, except it stated that the issue was whether "the prosecution is making a systematic attempt to utilize peremptory challenges for an impermissible purpose ...." (RT 25-1:1233-1234.)

When the trial court delivered its *Wheeler/Batson* ruling in 1998, California law held that a defendant challenging a strike under *Wheeler/Batson* had to "'show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.'" (*Johnson v. California, supra*, 545 U.S. at p. 163.) In *Johnson*, which was decided in 2005, the high court held "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Ibid.*) The high court declared the appropriate standard to be that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid.*)

After *Johnson*, this Court applied a modified standard of review to those *Wheeler/Batson* cases in which the trial court may have applied the "more likely than not" standard disapproved by the high court in *Johnson*. Normally, as noted above, a trial court's ruling on a *Wheeler/Batson* motion is reviewed for substantial evidence,

with deference to the trial court's factual assessments. (*People v. Huggins* (2006) 38 Cal.4th 175, 227-228, & fn. 13; *People v. Crittenden* (1994) 9 Cal.4th 83, 116-117.)

Here, the trial court is presumed to have applied the incorrect pre-*Johnson* standard. (See *People v. Coddington* (2000) 23 Cal.4th 529, 644 ["As an aspect of the presumption that judicial duty is properly performed, we presume ... that the court knows and applies the correct statutory and case law"], overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046,1069, fn. 13; accord *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914 [rule that trial court is presumed to follow "established law ... encompasses a presumption that the trial court applied the proper burden of proof in matters tried to the court"]; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 ["The general rule is that a trial court is presumed to have been aware of and followed the applicable law"].)

Where the trial court may have applied the incorrect pre-*Johnson* standard, as here, the appellate court should not defer to the trial court but instead "'review the record independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.'" (*People v. Bonilla, supra*, 41 Cal.4th at p. 342); *People v. Bell* (2007) 40 Cal.4th 582, 597.)

D. THE TRIAL COURT ERRED WHEN IT RULED THAT APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF GROUP BIAS FOR THE PROSECUTOR'S CHALLENGE OF PROSPECTIVE JUROR 6, FIRST PROSPECTIVE JUROR 12, AND SECOND PROSPECTIVE JUROR 12; THE JURORS STATED THEY COULD FAIRLY DECIDE THE CASE, INCLUDING IMPOSING THE DEATH PENALTY, THEREBY DEFEATING THE PROSECUTOR'S CLAIM THAT HE CHALLENGED EACH FOR THEIR INABILITY TO IMPOSE THE DEATH PENALTY

A review of the record reveals that a reasonable inference of racial discrimination is raised as to Prospective Juror 6 (#5321), First Prospective Juror 12 (#2726), and Second Prospective Juror 12 (#8322).

There is no dispute that Blacks are a cognizable group for purposes of *Wheeler* and *Batson* (*People v. Clair* (1992) 2 Cal.4th 629, 652), and that appellant, the crime victims, and the challenged jurors are all Black. (RT 25-1:1226, 1228, 1230, 27:1784, 32:2634-2635, 46:5021.)

Appellant recognizes that the mere fact that the challenged jurors are Black is insufficient alone to raise an inference of discriminatory purpose. (*People v. Box, supra*, 23 Cal.4th at pp. 1188-1189.) Contrary to the trial court's ruling, however, appellant established a prima facie case because these facts, when considered with other relevant circumstances, raise an inference that the prosecutor excluded the three prospective jurors at issue here on account of their race.

Prospective Juror 6 (#5321) completed a juror questionnaire in which she stated, among other things, that her contact with the legal system involved visiting a niece in juvenile hall and having a brother convicted of felony theft, for which the brother

served one year. (CT 4:1090-1091.) She did not know whether she would automatically vote for death and/or life in prison, and she did not know whether she had any conscientious objections to the death penalty. (CT 4:1097-1098.) During voir dire, however, she stated that she would be fair and impartial and, unequivocally, could impose the death penalty. (RT 24:876-877, 880-881, 886, 893, 899, 903, 926-930 [could impose the death penalty].)

First Prospective Juror 12 (#2726) completed a juror questionnaire in which she stated, among other things, that her contact with the legal system involved visiting her oldest child's father in prison and prior jury service. (CT 5:1361-1364.) She did not know whether she could vote to put someone to death because the death penalty is not a way to stop crime, but stated she had not given the subject much thought. (CT 5:1369-1370.) She did not know whether she had any conscientious objections to the death penalty. (CT 5:1371.) During voir dire, however, she stated that she would be fair and impartial, and she unequivocally stated she could impose the death penalty. (RT 24:1037-1045; RT 24:1042 [could impose the death penalty].)

Second Prospective Juror 12 (#8322) completed a juror questionnaire in which she stated, among other things, that her contact with the legal system involved a brother who is in prison for bank robbery, a husband convicted of drug possession in 1980, and, when she was very young, a sister who was sexually assaulted. (CT 6:1694-1695, 1697, 1699.) She felt that the criminal justice system was unfair to victims of

sexual assault because the system did not always treat rape, child molestation, and spousal battery as serious crimes. (CT 6:1698.) She did not know whether she would automatically vote for death and/or life in prison. (CT 6:1701.) During voir dire, she expressed concern that appellant looked young (RT 25-1:1220), and that she might feel ill when viewing a photograph of a dead body (RT 25-1:1216-1218). She further stated, however, that she would be fair and impartial and, unequivocally, could impose the death penalty. (RT 25-1:1214-1224.)

The trial court found that each prospective juror at issue expressed problems with the concept of the death penalty, problems with the imposition of the death penalty, and doubts about their ability to impose the death penalty. (RT 25-1:1244.) As explained below, the finding is not supported by substantial evidence. Further, an independent review of the record supports an inference that the prosecutor excused these prospective jurors on a discriminatory basis.

During voir dire, Prospective Juror 6 (#5321) responded to the court, in part, as follows:

The Court:	Now, in terms of these death penalty answers, do you have any confusion at all about the questions on the questionnaire?
Prospective Juror 6:	No, sir.
The Court:	Were you aware that California in fact has a death penalty law?
Prospective Juror 6:	No, sir.

The Court:	You didn't know that? A lot of people don't. There had been one in effect for a number of years in the state. [¶]
Prospective Juror 6:	Well, I understood it, but my answer to that is I don't know anything much about the death penalty.
The Court:	You understand now, do you not, that if we have a penalty phase the jurors will have to decide the appropriate penalty? Do you understand that?
Prospective Juror 6:	Yes.
The Court:	Do you understand there is [sic] two choices: life in prison without parole or the death penalty. Do you understand that?
Prospective Juror 6:	Yes.
The Court:	The question, and we need to know this: if we get to that phase, if we get to a penalty proceeding in this case, can you make that choice?
Prospective Juror 6:	Yes.
The Court:	Between life without parole or the death penalty based on that weighing process?
Prospective Juror 6:	Yes.
The Court:	Will you believe that one verdict will be easier on you than the other for example?
Prospective Juror 6:	No, sir.
The Court:	Can you think of any reason you wouldn't be an appropriate juror in this matter?
Prospective Juror 6:	No, sir. [RT 24:927-929.]

During voir dire, First Prospective Juror 12 (#2726) responded to the court, in part, as follows:

The Court:	Do you know anything about the facts of the matter?
Prospective Juror 12:	No.
The Court:	Do you know any reason you wouldn't be a good juror for this particular case or this sort of case?
Prospective Juror 12:	No.
The Court:	How do you feel about serving on the matter?
Prospective Juror 12:	Okay, I guess.
The Court:	You sure?
Prospective Juror 12:	Yeah. [RT 25-1:1038.] [¶]
The Court:	... Let's see here. You indicated on question 30, that you don't know if you can honestly vote for the death penalty in a criminal trial. Do you remember saying that?
Prospective Juror 12:	Yeah, I remember.
The Court:	Is that a fact?
Prospective Juror 12:	I don't know. Well, listening to what you had to say then by listening to the facts I think I would be able to.
The Court:	What has changed your mind?
Prospective Juror 12:	Um, well, knowing that I have to listen to the facts and not go on my feelings.
The Court:	Well, what the law requires is the jury arrive at a penalty decision by weighing aggravating factors and mitigating factors. Not just overwhelmed with the emotional aspects

of the case, whichever way that might lead you. But a weighing, a rational weighing process. Sometimes folks have such strong feelings about the matter that they're unable to do that or they talk themselves into believing they can and they really can't. You know, one can justify any decision in one's mind, I guess. What we need to know is this: both sides here get to have twelve people that can really make a decision, working with a clean slate not having that hammer over their head that we've talked about. Do you understand what I mean?

Prospective Juror 12: Yes.

The Court: Do you believe you can do that, or do you think your feelings about the subject is [sic] so strong that you're committed to go the other way on a case?

Prospective Juror 12: Um, I think I can do it. I really didn't have any strong feelings about it. [RT 24:1042-1043.]

During voir dire, Second Prospective Juror 12 (#8322) expressed concern about being a juror because she might become ill looking at the photographs. (RT 25-1:1215-1217.) Following discussion with the court, however, she agreed that she would look at the evidence presented at trial and would inform the court if she felt ill. (RT 25-1:1218.) She further responded to the court, in part, as follows:

The Court: .... If you do serve, you need to promise me this, that you will look at the evidence in this case because the law requires that the jury look at the evidence introduced.

Prospective Juror No. 12: I understand that.

The Court: You promise you will do that?

Prospective Juror No. 12: Yes.

The Court: Fair enough. 32 and 33. You were asked whether you would automatically always vote for the death penalty regardless of the evidence and you were asked whether you would automatically vote for life without parole. You said "don't know", "don't know". Do you understand the process that the jury will be asked to go through in a penalty phase?

Prospective Juror No. 12: Yes.

The Court: Are you sure?

Prospective Juror No. 12: Yes.

The Court: The weighing process?

Prospective Juror No. 12: Right.

The Court: Aggravation and mitigation?

Prospective Juror No. 12: And because I would have to see or understand the reason behind it and I couldn't say yes or no.

The Court: Could you say yes or no to that question because this question asked, if you would automatically in every case regardless of the evidence -

Prospective Juror No. 12: I would say no.

The Court: And the other one asked you if you would automatically in every case forget the evidence and vote for life without.

Prospective Juror No. 12: I would say no.

The Court: That is what those questions asked. Do you understand that you have the obligation to weigh the evidence and arrive at a penalty decision in that way if we get there?

Prospective Juror No. 12: Yes.

The Court: Can you see yourself rendering a verdict of life without parole if the evidence and law led you there?

Prospective Juror No. 12: Yes.

The Court: Can you see yourself rendering a verdict of death if the evidence and the law led you there?

Prospective Juror No. 12: Yes.

The Court: Can you think of any reason you would tend to favor one side or the other here?

Prospective Juror No. 12: No.

The Court: You hesitated. What was that hesitation about?

Prospective Juror No. 12: I'm just not sure.

The Court: Tell me. What was on your mind right then?

Prospective Juror No. 12: I don't know. He seems very young. I might hesitate.

The Court: He, whom?

Prospective Juror No. 12: The defendant seems very young.

The Court: Is that what struck you, his youthful appearance?

Prospective Juror No. 12: Yes. So I might hesitate.

The Court: To what?

Prospective Juror No. 12: To make a decision.

The Court: You may consider a person's age and all sorts of things when -- if you get to a penalty phase in the case. That would be one matter. You wouldn't be able to decide the whole case based on somebody's age. You can't decide whether somebody is guilty or not guilty or what

punishment they deserve solely based on that factor. Do you understand that?

Prospective Juror No. 12: Yes.

The Court: Anything else that is troubling you?

Prospective Juror No. 12: No. [RT 25-1:1218-1221.]

The prosecutor justified using five of his first eleven peremptory challenges on Black jurors based on their purported inability to impose the death penalty. (RT 25-1:1237 ["That is why I excused all of these people was [sic] for inability to impose the death penalty."].) Yet, the prosecutor's stated reason is belied by the record, which shows that each of the prospective jurors could impose the death penalty. Prospective Juror 6 (#5321) explicitly stated that she could think of no reason why she would not be "an appropriate juror in this matter" and, further, that as between death and life in prison, neither verdict would be easier to impose. (RT 24:928-929.) First Prospective Juror 12 (#2726) stated she understood the weighing process and could impose either death or life in prison. (RT 24:1042-1043.) Second Prospective Juror 12 (#8322), although expressing concern about viewing photographs and appellant's youthful appearance, explicitly stated that she would view the evidence at trial and understood that the defendant's age was one factor, among many, that would need to be considered in imposing sentence. (RT 25-1:1218-1221.)

Moreover, when offered the opportunity to state reasons for challenging the five Black prospective jurors, the prosecutor first gave a suspect answer: "*I think it is*

creating a problem for me to justify when there is no prima facie showing." (RT 25-1:1237 [emphasis added].) If the prosecutor had valid, race-neutral reasons for challenging each of the jurors, then logically it would create no problem for him to justify those challenges in a succinct statement to the court. In other words, the purported failure of the defense to make an after-the-fact prima facie showing does not have any bearing on the prosecutor's prior unstated reasons for challenging the jurors. Instead of answering with reasons specific to each challenged juror, the prosecutor merely stated he was concerned with answers given during voir dire and thus challenged each juror based on an "inability to impose the death penalty." (RT 25-1:1237.) None of three jurors at issue here, however, ever expressed during voir dire an inability to impose the death penalty.

Further, the three Black prospective jurors are in all respects as heterogeneous as the community as a whole, save for their membership in the group. (See *People v. Bonilla, supra*, 41 Cal.4th at p. 342 [relevant factors include that the jurors in question share only this one characteristic – their membership in the group].) Prospective Juror 6 (#5321) was a 32-year-old divorced female, she was employed for nine years as a clerk typist, and she had no religious preferences that would interfere with her ability to sit in judgment of another person. (CT 4:1089-1091.) First Prospective Juror 12 (#2726) was a 36-year-old married female, she was a homemaker, and she had no religious preferences that would interfere with her ability to sit in judgment of another

person. (CT 5:1360-1362.) Second Prospective Juror 12 (#8322) was a 41-year-old widowed female, she was employed as a teaching assistant, and she had no religious preferences that would interfere with her ability to sit in judgment of another person. (CT 6:1693-1696.)

Of additional significance in the instant case is that appellant and the victims of the charged offenses are all Black (RT 25-1:1226, 1228, 1230, 27:1784, 32:2634-2635, 46:5021). (*People v. Bonilla, supra*, 41 Cal.4th at p. 342 [relevant factors include that the victims are members of the same group as the challenged jurors].)

Nor should this Court "engag[e] in needless and imperfect speculation" about the prosecutor's possible unstated reasons for striking the jurors; what matters is the "'real reasons'" for the strikes, not speculation that the "'prosecutor might have had good reasons ....'" (*Johnson v. California, supra*, 545 U.S. at p. 172, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 ["inference of bias" established by evidence that prosecutor used five out of six peremptory challenges against African-Americans].)

E. AUTOMATIC REVERSAL OF APPELLANT'S CONVICTIONS IS REQUIRED

Because of the fundamental nature of the constitutional rights of which appellant was deprived, the trial court's erroneous denial of the *Wheeler/Batson* motion is reversible per se. (See *People v. Wheeler, supra*, 22 Cal.3d at p. 283 ["[N]o inquiry

as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."].)

Appellant recognizes that this Court has held that where the trial court erroneously denies a *Wheeler/Batson* motion at the first step of the *Batson* analysis, the proper remedy is to remand the matter for a hearing at which the trial court can conduct the second and third steps of the *Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

Remand would not be an appropriate remedy in this case, however, because the amount of time that will have passed between appellant's trial in August 1998 and the time this case is decided is considerably longer than the time periods for which limited remand was deemed appropriate in *People v. Johnson, supra*, 38 Cal.4th at pp. 1103-1104, making a reliable hearing on the facts impossible as a practical matter.

In *People v. Johnson, supra*, this Court remanded the matter despite the lapse of between seven and eight years since jury selection had taken place. (*Id.* at p. 1101.) Of the federal cases cited by the Court in which remand was ordered, none involved a time lapse as long as that involved here. (*Id.* at pp. 1100-1101; *Batson v. Kentucky, supra*, 476 U.S. at p. 100 [trial held two years prior to reversal of the judgment]; *Williams v. Runnels, supra*, 432 F.3d 1102 [trial held in March 1998; remand ordered in January 2006]; *Paulino v. Castro, supra,* 371 F.3d 1083 [remand ordered five years after the state appellate court decision and a longer time after trial]; *Fernandez v. Roe*

(9th Cir. 2002) 286 F.3d 1073 [remand ordered about seven years after trial]; *United States v. Tindle* (4th Cir. 1986) 808 F.2d 319 [remand after more than three years].)

In cases prior to *People v. Johnson, supra*, in which this Court considered and rejected remand, time lapses shorter than involved here were considered too long to allow a realistic chance of a meaningful hearing on remand. (*People v. Snow* (1987) 44 Cal.3d 216, 226-227 [voir dire began approximately six years before reversal of judgment]; *People v. Hall* (1983) 35 Cal.3d 161, 170-171 [trial held more than three years before reversal of judgment]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [trial held nearly three years before reversal of judgment].)

Penal Code section 1260 provides that an appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." Remand is appropriate "if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand. ..." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) Here, no such reasonable possibility exists, due primarily to the lapse of time.

> Ordinarily, factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges. [*People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.]

While trial counsel and the court may recall the circumstances of the case generally, there is no reasonable likelihood that they can reliably recall the specific circumstances of voir dire.

Further, in view of the court's pattern throughout the case of ruling against the defense (*infra*, §§ VII - XXV), exemplified in this instance by the court's specious reason for ruling against the defense's *Batson* challenge – i.e., that the defense was to blame for the prosecutor using extra challenges on Blacks because of its own peremptory challenges against non-Blacks, making it more likely that the prosecutor's peremptory challenges would be directed at Black jurors (RT 25-1:1234)[10] – it would be unfair to the defense to remand the case to the trial court.

///

---

[10] The court's logic is dubious because it is improbable that given the composition of the seated jury was so altered by the defense challenges that one could assume that the challenge of jurors for reasons other than race would include five Blacks. The prosecutor was exercising his peremptories alternately with defense counsel, so that the first several would have been made when the racial composition of the jury could not have been appreciably altered by any selective pattern of defense challenges. Moreover, there is no evidence that Black prospective jurors were seated as replacements for the defense peremptory challenges against non-Blacks, and thus the record does support a finding that the defense peremptory challenges actually altered the racial composition of the jury.

GUILT PHASE ISSUES

II.

APPELLANT'S CONVICTION IN COUNT 2 FOR ATTEMPTED WILLFUL, DELIBERATE, AND PREMEDITATED MURDER OF LATASHA WHITESIDE MUST BE REVERSED, AND THE CONVICTION REDUCED TO ATTEMPTED MURDER, BECAUSE THE INDICTMENT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE – PREMEDITATION AND DELIBERATION – THEREBY VIOLATING APPELLANT'S STATE STATUTORY RIGHTS, DEPRIVING HIM OF DUE PROCESS UNDER THE CALIFORNIA CONSTITUTION, AND DEPRIVING HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

Appellant was convicted in count 2 of the attempted willful, deliberate, and premeditated murder of Latasha Whiteside (Pen. Code, §§ 187, subd. (a), 664). (CT 8:2158; RT 34:2991.) Appellant was sentenced to life imprisonment on count 2. (RT 52:6043.)

The indictment, however, alleged only an attempted murder, as follows:

> For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in the aforestated Count hereof, the said KELVIN RONDELL BANKS, is accused by the Grand Jury of the County of Los Angeles, State of California, by this Indictment, of the crime of ATTEMPTED MURDER, in violation of PENAL CODE SECTION 664/187(A), a felony, committed prior to the finding of this Indictment, and as follows:
>
> On or about July 1, 1996, in the County of Los Angeles, the crime of ATTEMPTED MURDER, in violation of PENAL CODE SECTION 664/187(A), a felony, was committed by KELVIN RONDELL BANKS, who did willfully, unlawfully and with malice aforethought attempt to murder LATASHA WHITESIDE, a human being.

> NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c).
>
> It is further alleged that in the commission and attempted commission of the above offense, the said defendant, KELVIN RONDELL BANKS, personally used a firearm, to wit: a handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5(a) (1) also causing the above offense to become a serious felony pursuant to Penal Code section 1192.7(c) (8). [CT 1:146.]

An essential element of the offense of attempted premeditated murder is a deliberate and premeditated specific intent to kill. (*People v. Seel* (2004) 34 Cal.4th 535, 541 [the premeditation allegation of section 664, subdivision (a) constitutes an element of the offense of attempted premeditated murder]; see *People v. Anderson* (1968) 70 Cal.2d 15, 26 [deliberation and premeditation require a level of reflection greater than that required to merely form the intent to kill].) Attempted murder, in contrast, merely requires a specific intent to kill. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328 [attempted murder requires the specific intent to kill an intended victim].) The indictment thus pled only an unpremeditated attempted murder.

Under our California statutory scheme, the additional term of life in state prison for attempted willful, deliberate, and premeditated murder can only be imposed where, among other things, the accusatory pleading charges that the attempted murder was willful, deliberate, and premeditated. (Pen. Code, § 664, subd. (a).) Section 664, subdivision (a) provides, in pertinent part:

> .... However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that

> attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. .... The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact. [Emphasis added.]

Moreover, the high court has held that an indictment is sufficient if: (1) it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and (2) it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. (*Hamling v. United States* (1974) 418 U.S. 87, 117 [94 S.Ct. 2887, 41 L.Ed.2d 590]; see *Russell v. United States* (1962) 369 U.S. 749, 763-764 [82 S.Ct. 1038, 8 L.Ed.2d 240] [for the information to be sufficient it must at the very least charge all the elements and formally apprise the defendant of what he must be prepared to meet].) "These requirements reflect the rights guaranteed by the Sixth and Fifth Amendments, respectively." (*United States v. Hill* (9th Cir. 2002) 279 F.3d 731, 741 [footnotes omitted] [reversing defendant's conviction for being an accessory after the fact because the indictment's omission of an essential element of the offense resulted in the indictment being insufficient as a matter of law].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the high court reaffirmed the principle that all the essential elements of an offense must be pleaded. (*Id.* at p. 476 [all elements must be pleaded]; see *Jones v. United States* (1999) 526 U.S. 227, 243, n.6 [119 S.Ct. 1215, 143 L.Ed.2d 311] [noting

that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"].)

In *United States v. Carter* (8th Cir. 2001) 270 F.3d 731, the Eighth Circuit explained the rule as follows:

> .... An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. [*Id.* at p. 736; see *United States v. Wessels* (8th Cir. 1993) 12 F.3d 746, 750; *United States v. Young* (8th Cir. 1980) 618 F.2d 1281, 1286.]

In *United States v. Schramm* (3rd Cir. 1996) 75 F.3d 156, the Third Circuit explained the rule as follows:

> The principle that an indictment must contain the essential elements of the offense charged is premised upon three distinct constitutional commands which we cannot ignore. First, the indictment must be sufficiently precise to inform the defendant of the charges against which he or she must defend, as required by the Sixth Amendment. Second, the indictment must enable an individual to determine whether he or she may plead a prior acquittal or conviction to bar future prosecutions for the same offense, in accordance with the Fifth Amendment. To accomplish these goals, an indictment must specifically set forth the essential elements of the offense charged. Third, the purpose of an indictment is to shield a defendant in a federal felony case from unfounded prosecutorial charges and to require him to defend in court only those allegations returned by an independent grand jury, as provided by the Fifth Amendment. ... [*Id.* at pp. 162-163 (internal quotation marks and citations omitted); *United States v. Whited* (3rd Cir. 2002) 311 F.3d 259, 262.]

Moreover, instruction on a theory of liability for which defendant was not given notice violates due process. (See *Cole v. Arkansas* (1948) 333 U.S. 196, 201-202 [68 S.Ct. 514, 92 L.Ed.2d 644]; *Stirone v. United States* (1960) 361 U.S. 212 [80 S.Ct. 270, 4 L.Ed.2d 252]; *United States v. Shipsey* (9th Cir. 1999) 190 F.3d 1081 [improper to instruct on theft by any wrongful taking when charging document was limited to theft by false pretenses]; *Lucas v. O'Dea* (6th Cir. 1999) 179 F.3d 412 [fatal variance between indictment and jury instruction violated Fourteenth Amendment notice requirement]; *United States v. Sloan* (10th Cir. 1987) 811 F.2d 1359, 1363 [jury instruction that quotes the language of a kidnapping statute and includes means of committing the offense that were not charged in the indictment violates due process].)

The California rule is in accord. An accusatory pleading provides notice of the specific offense charged and also of offenses included within the charged offense, but it does not provide notice of non-included offenses or uncharged enhancements. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369; *In re Arthur N.* (1976) 16 Cal.3d 226, 233.) Accordingly,

> [a] person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. [*People v. Toro* (1989) 47 Cal.3d 966, 973, citing *In re Hess* (1955) 45 Cal.2d 171, 174-175.]

Where the statute's words "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense

intended to be punished" (*United States v. Carll* (1882) 105 U.S. 611, 612 [26 L.Ed. 1135]), "an indictment that tracks the statute verbatim satisfies the above requirements." (*United States v. Hill, supra*, 279 F.3d at p. 741.) Here, the words of the indictment did not track the language of the statute because the indictment omits the essential element of "willful, deliberate, and premeditated" set forth in the statute.

Nor is the defect in the indictment cured by the fact that it states the Penal Code section that appellant is alleged to have violated (i.e., Pen. Code, §§ 187, subd. (a), 664). (See *United States v. Brown* (10th Cir. 1993) 995 F.2d 1493, 1505 [correct statutory citation is not a sufficient substitute for missing elemental facts]; *People v. Neal* (1984) 159 Cal.App.3d 69, 72-74 [holding that since the *facts supporting the enhancement were fully and accurately alleged* the mere citation to an erroneous statutory section in the accusatory pleading did not deprive defendant of due process of law].)

Accordingly, appellant's conviction in count 2 for the attempted willful, deliberate, and premeditated murder of Whiteside must be reversed, and the conviction reduced to attempted murder. (*People v. Toro, supra*, 47 Cal.3d at p. 973 [defendant may not be convicted of a crime neither charged nor necessarily included in a charged offense]; *In re Hess, supra*, 45 Cal.2d at pp. 174-175.)

/ / /

III.

APPELLANT'S CONVICTION IN COUNT 2 FOR ATTEMPTED WILLFUL, DELIBERATE, AND PREMEDITATED MURDER OF LATASHA WHITESIDE MUST BE REVERSED, AND THE CONVICTION REDUCED TO ATTEMPTED MURDER, BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF "WILLFUL, DELIBERATE, AND PREMEDITATED," THEREBY DEPRIVING APPELLANT OF HIS RIGHTS TO JURY TRIAL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

A. INTRODUCTION

Appellant was convicted in count 2 of the attempted willful, deliberate, and premeditated murder of Latasha Whiteside (Pen. Code, §§ 187, subd. (a), 664). (CT 8:2158; RT 34:2991.) The "willful, deliberate, and premeditated" allegation of section 664, subdivision (a) constitutes an element of the offense of attempted willful, deliberate, and premeditated murder. (*People v. Seel, supra*, 34 Cal.4th at p. 541.)

The jury was instructed on the elements of attempted murder, but was not instructed on the elements of attempted *willful, deliberate, and premeditated* murder. (RT 33:2803-2806 [attempted murder defined], 33:2790-2794 [premeditation and deliberation defined, but only in connection with the Haney homicide].)

As explained below, the instructional omission was prejudicial because there was substantial evidence that the attempted killing of Whiteside was not planned, but instead was the result of a rash and hasty action.

B. THE TRIAL COURT IS REQUIRED TO CORRECTLY INSTRUCT THE JURY SUA SPONTE ON THE GENERAL PRINCIPLES OF LAW RELEVANT TO THE ISSUES RAISED BY THE EVIDENCE, AND AN ERROR IN FAILING TO DO SO IS REVIEWED ON APPEAL DESPITE DEFENSE COUNSEL'S ACTIONS

The issue is properly raised on appeal despite the fact that trial defense counsel neither requested instruction on attempted willful, deliberate, and premeditated murder nor objected to the instructional omission. (RT 33:2738-2750.) In every criminal case, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) This necessarily includes correct instruction on all essential elements of the charged offense. (*People v. Wickersham, supra*, 32 Cal.3d at p. 323.)

The trial court has a sua sponte duty to correctly instruct the jury, and its instructions and comments to the jury are properly reviewed on appeal without objection below. (Pen. Code, § 1259;[11] *People v. Brown* (2003) 31 Cal.4th 518, 539; *People v. Roehler* (1985) 167 Cal.App.3d 353, 394-395 ["Appellate courts review the instructions to a jury regardless of objection because to do otherwise would reduce litigation to a hypertechnical game of some sort."].)

---

[11] Section 1259 provides in part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

The sua sponte obligation to correctly instruct "reflect[s] concern both for the rights of persons accused of crimes and for the overall administration of justice." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 324; *People v. Carpenter* (1997) 15 Cal.4th 312, 380-381 [defendant may challenge on appeal the preponderance of the evidence standard for other crimes evidence without objection]; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1291 [court may review lying in wait murder instruction without objection at trial].)

The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given. (*People v. Breverman, supra,* 19 Cal.4th at p. 154; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10; see also *People v. Barton, supra*, 12 Cal.4th at pp. 196, 199-203 [trial court must instruct on heat-of-passion and unreasonable self-defense theories of manslaughter, if supported by evidence, even when defendant objects on the basis that such instructions would conflict with his defense].)

Nor does trial defense counsel's comments concerning instructions invite the error with respect to the instructions. (See *People v. Valdez* (2004) 32 Cal.4th 73, 115; *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; see also *People v. Barton, supra*, 12 Cal.4th at p. 198 ["[t]he doctrine of invited error does not ... vindicate the decision of a

trial court to grant a defendant's request not to give an instruction that is otherwise proper: the error is still error"].)

C. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF WILLFUL, DELIBERATE, AND PREMEDITATED

In *People v. Seel, supra*, 34 Cal.4th 535, this Court held that the premeditation allegation of section 664, subdivision (a) constitutes an element of the offense of attempted premeditated murder. (*Id.* at p. 541.) "Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.)

Here, the trial court instructed the jury on the elements of attempted murder, in relevant part, as follows:

> The defendant is accused in count 2 of having committed the crime of attempted murder, in violation of section 664 and 187 of the Penal Code.
>
> Every person who attempts to murder another human being is guilty of a violation of Penal Code section 664 and 187.
>
> Murder is the unlawful killing of a human being with malice aforethought.
>
> In order to prove attempted murder, each of the following elements must be proved:
>
> 1. A direct but ineffectual act was done by one person toward the killing of another human being; and
>
> 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being. [RT 33:2803-2804.]

The trial court further defined willful, deliberate, and premeditated murder, but it explicitly limited the instruction to the Haney homicide as charged in count 7. (RT 33:2790-2794.) The trial court entirely omitted any instruction on the essential element of "willful, deliberate, and premeditated" relating to the charge of attempted murder.

D. APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE CONSTITUTIONAL ERROR CANNOT BE PROVEN HARMLESS BEYOND A REASONABLE DOUBT

Jury instructions provide essential guidance to the jury. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [66 S.Ct. 402, 90 L.Ed.2d 350]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.)

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. [*Carter v. Kentucky, supra*, 450 U.S. at p. 302.]

Failure to adequately instruct the jury upon matters relating to proof of any element of the charge violates the defendant's federal (6th and 14th Amendments) and California (Art. I, § 15 and § 16) constitutional rights to trial by jury and due process. (See *Carella v. California* (1989) 491 U.S. 263, 270 [105 S.Ct. 218, 109 L.Ed.2d 218] ["misdescription of an element of the offense ... deprives the jury of its factfinding role" and thus is "not curable by overwhelming record evidence of guilt"] (conc. opn. of Scalia, J.); *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124

L.Ed.2d 182]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Apprendi v. New Jersey, supra*, 530 U.S. 466; *People v. Flood, supra*, 18 Cal.4th 470, 490; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [erroneous instructions defining the elements of a crime violate the due process clause of the 14th Amendment]; *Rose v. Clark* (1986) 478 U.S. 570, 580-581 [106 S.Ct. 3101, 92 L.Ed.2d 460] [the failure to adequately instruct upon an element of the offense violates the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment and the Fourteenth Amendment right to due process]; *People v. Hernandez* (1988) 46 Cal.3d 194, 211; see also *People v. Macedo* (1989) 213 Cal.App.3d 554, 561 ["Conflicting or inadequate instructions on intent are closely related to instructions that completely remove the issue of intent from the jury's consideration ... [and] constitute federal constitutional error ..."].) Accordingly, because willfulness, deliberateness, and premeditation are essential elements of the charge of a violation of sections 187, subdivision (a) and 664, the trial court's failure to correctly instruct on these principles violated appellant's federal constitutional rights to trial by jury and due process.

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; see *People v.*

Sengpadychith (2001) 26 Cal.4th 316, 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

Under Article VI, section 13 of the California Constitution, a judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice." As interpreted by this Court, the provision means that a reversal may not be awarded absent a showing "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1959) 46 Cal.2d 818, 836; *People v. Blakeley* (2000) 23 Cal.4th 82, 85.)

Beyond whether appellant harbored the specific intent to kill, the prosecution could not prove the crime of attempted deliberate and premeditated murder absent proof beyond a reasonable doubt establishing the elements of premeditation and deliberation. (*People v. Seel, supra*, 34 Cal.4th at p. 541.) Premeditation and deliberation cannot be inferred merely from the commission of another dangerous act

but, rather, "must be affirmatively proved by direct evidence or by solid inference." (*People v. Belton* (1980) 105 Cal.App.3d 376, 381; see also *People v. Snyder* (1940) 15 Cal.2d 706, 708; *People v. Miller* (1935) 2 Cal.2d 527, 532-533.)

Deliberation and premeditation require a level of reflection greater than that required to merely form the intent to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26.) To establish deliberation and premeditation, the intent to kill must be formed upon a preexisting reflection and result from careful thought and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*Ibid.*) Planning, motive, and an exacting method of attack are factors which can assist in the determination of deliberation and premeditation; however, these factors are not a prerequisite to a deliberation and premeditation finding, nor are they exclusive. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

Although the prosecutor argued the evidence supported a finding of premeditation and deliberation (RT 33:2845), there was substantial evidence that the attempted killing of Whiteside was not planned, but instead was the result of a rash and hasty action. For example, Whiteside was not shot immediately upon entering Coleman's residence, nor was she shot immediately after the sexual assault. (RT 26:1603-1605, 27:1715, 1723-1728, 1784, 1865-1866, 1869.) After the sexual assault, Whiteside was bound with a telephone cord (RT 27:1732-1734), which reasonably

suggests that the gunman intended for Whiteside to live. It was only as the gunman was exiting Coleman's residence that he hastily fired a shot in Whiteside's direction, grazing her ear with the bullet. (RT 27:1738-1739, 1810, 1859-1863.)

Accordingly, the evidence gives rise to a reasonable inference that the gunman acted without the requisite premeditation and deliberation necessary for a conviction for attempted premeditated murder. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 695 [even a shooting at close range does not necessarily demonstrate an intent to kill]; see also *Braxton v. United States* (1991) 500 U.S. 344, 351-353 [111 S.Ct. 1854, 114 L.Ed.2d 385] [shooting "at a marshal" establishes "a substantial step toward [attempted murder], and perhaps the necessary intent" [emphasis in original].) The prosecution thus will be unable to prove that the failure to instruct the jury on the essential element of "willful, deliberate, and premeditated" was harmless beyond a reasonable doubt.

/ / /

IV.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FINDING IN CONNECTION WITH COUNT 9, ATTEMPTED ROBBERY OF CHARLES FOSTER, THAT THE GUNMAN HARBORED THE SPECIFIC INTENT TO STEAL, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTION FOR ATTEMPTED ROBBERY AS A DENIAL OF DUE PROCESS (CAL. CONST., ART. 1, § 15; U.S. CONST., 5TH, 8TH, & 14TH AMENDS.)

A. INTRODUCTION

Appellant was found guilty in count 9 of the attempted second degree robbery of Charles Foster. (RT 34:2998-2999.) As explained below, however, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that the gunman harbored the specific intent to steal, an essential element of the offense of attempted robbery.

B. STANDARD OF REVIEW

Faced with a challenge to the sufficiency of the evidence, the court reviews "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [emphasis added]; *People* v. *Samuel* (1981) 29 Cal.3d 489, 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence."

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citing *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation omitted.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett, supra*, 69 Cal.2d 122, explained, "our task ... is twofold. First, we must resolve the issue in the light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements ... is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' [*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577 (citation omitted).]

The federal standard of review, under principles of federal due process, entails a determination of whether, upon review of the entire record in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused ...." (*Id.* at p. 315.)

"'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence. [*People v. Morris* (1988) 46 Cal.3d 1, 21 (citations omitted).]

Moreover, in capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-646 [100 S.Ct. 2382, 65 L.Ed.2d 392]; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422 [115 S.Ct. 1555, 131 L.Ed.2d 490]; *Burger v. Kemp* (1987) 483 U.S. 76, 785 [107 S.Ct. 3114, 97 L.Ed.2d 638]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [113 S.Ct. 2112, 124 L.Ed.2d 306].) Moreover, even in non-capital cases, a conviction that is based on unreliable and/or untrustworthy evidence violates the constitutional guarantee of due process. (See *White v. Illinois* (1992) 502 U.S. 346, 363-364 [112 S.Ct. 736, 116 L.Ed.2d 848] ["Reliability is ... a due process concern"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [94 S.Ct. 1868, 40 L.Ed.2d 431] [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City*

of Louisville (1960) 362 U.S. 199, 204 [80 S.Ct. 624, 4 L.Ed.2d 654].) A conviction unsupported by substantial evidence denies a defendant due process of law. (*Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean* (1988) 46 Cal.3d 919, 932.)

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN THE FINDING THAT THE GUNMAN HARBORED THE SPECIFIC INTENT TO STEAL

Robbery is the taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Pen. Code, § 211; *People v. Bonner* (2000) 80 Cal.App.4th 759, 763.) "Robbery occurs when any type of personal property is removed from the victim; an essential element of robbery is the intent to permanently deprive the victim of possession of the property." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 418.) In order to establish attempted robbery, the defendant must have the specific intent to commit robbery and have committed a direct overt act toward its commission. (Pen. Code, § 21a; *People v. Bonner, supra*, 80 Cal.App.4th at p. 764; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.)

An attempt to commit a crime consists of a specific intent to commit the crime, and a direct but ineffectual act done towards its commission, i.e., an overt ineffectual act which is beyond mere preparation yet short of actual commission of the crime. (*People v. Medina* (2007) 41 Cal.4th 685, 694; *People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

"An attempt connotes the intent to accomplish its object, both in law (Pen. Code, § 21a) and in ordinary language." (*People v. Lyons* (1991) 235 Cal.App.3d 1456, 1461; *People v. Smith* (1997) 57 Cal.App.4th 1470, 1481.) Since intent is inherently difficult to prove by direct evidence, intent may properly be inferred from "'the act itself, together with its surrounding circumstances ....'" (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.) When the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. (*People v. Bonner, supra*, 80 Cal.App.4th at p. 764.)

"[W]hen the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway ...." (*People v. Dillon* (1983) 34 Cal.3d 441, 455.) If the defendant commits all the acts necessary to commit a crime but is unsuccessful merely because of an extraneous or fortuitous circumstance, the defendant is criminally liable for the attempted offense. (*People v. Staples* (1970) 6 Cal.App.3d 61, 66.)

In the instant case, the evidence shows that the gunman approached Foster, engaged him in dialogue, and then shot him. (RT 30:2346-2347.) There was no evidence that the gunman requested money or property from Foster. Nor is there evidence that the gunman either reached for the piece of paper that Foster was holding or reached for Foster's wallet. (RT 30:2327, 2346-2347, 31:2425.) Indeed, neither the

time-lapse photographs taken by the ATM cameras, nor the testimony of eyewitness Manzanares, support an inference that appellant attempted to take any property from Foster. (RT 30:2344-2347, 31:2426, 2449-2450, 2457, 32:2548; People's Exhibit 42.)

The evidence reveals no more than a homicide that occurred at the location of an ATM. (RT 30:2346-2347.) An inference of an intent to steal made from only the fact that the shooting occurred at an ATM is entirely speculative. This is particularly true here where there was no evidence that the gunman's actions were interrupted (i.e., the gunman was not prevented from taking Foster's property because of the arrival of the police or another intervening event). The evidence suggests that the gunman accomplished his purpose (i.e., a homicide, perhaps motivated by gang rivalry), and thus serves to defeat an inference that the gunman had an additional intent to steal that was not acted upon.

Cases finding sufficient evidence of a criminal attempt have emphasized the clear nature of evidence of the defendant's criminal intent. For example, in *People v. Parrish* (1948) 87 Cal.App.2d 853, the court found substantial evidence to support the defendant's conviction for attempted murder of his wife. The defendant engaged an associate to help kill his wife. They went to the wife's house. The defendant had a loaded gun and listened outside a window to make sure she was home. The defendant sent his associate into the house with instructions to choke his wife, and then let the defendant into the house so he could kill her. The associate was a police informant.

Officers arrived before the defendant could get into the house. (*Id.* at p. 855.) The appellate court found that the defendant's conduct outside the house, along with his clear intent, was sufficient to constitute an attempt. (*Id.* at pp. 855-856 [defendant's intent to kill was revealed in his out-of-court statement that he intended to kill his wife].)

In *People v. Bonner, supra*, 80 Cal.App.4th 759, the defendant was convicted of two counts of attempted robbery, with the victims being a hotel manager and his assistant. The defendant had formerly worked at the hotel, and knew that the manager and assistant routinely took a large deposit of hotel receipts to the bank on Monday at the beginning of each month, using an elevator to get to the manager's car in the hotel garage. (*Id.* at p. 761.) The defendant went to a laundry room on the garage level on the first Monday of the month, wearing a mask and carrying a pistol. However, he was discovered by other employees and fled from the scene before coming into contact with the intended victims. (*Id.* at pp. 761-762.) The appellate court rejected the defendant's argument that since he never came into actual contact with the victims there was insufficient evidence of attempted robbery. (*Id.* at p. 764, fn. 3.) "It was [the defendant's] clear intention to rob [the manager and assistant manager]. He made detailed preparations for the crime, went armed to the scene, placed a mask over his face, waited in hiding moments before his victim's approach, and gave up the

enterprise only when discovered by other hotel employees. The evidence was sufficient to convict appellant of attempted robbery. [Citations.]" (*Id.* at p. 764, fn. 3.)

> ... It was appellant's admitted intent to stop the two at gunpoint and take the money from their possession. Since appellant intended to rob two victims, and since he undertook acts beyond mere preparation directed at robbing the two hotel managers, he could properly be convicted of two counts of attempted robbery. [*Id.* at p. 765.]

Bonner also rejected the defendant's argument that his intentions might have changed before he actually confronted the victims:

> The evidence clearly showed appellant's intent to rob both the manager and assistant manager. Appellant did not merely prepare to rob the two, he engaged in acts that would ordinarily result in the commission of the crime but for an interruption. [*Ibid.*]

As explained in *Bonner*, when the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. (*Id.* at p. 764.) Whenever the defendant's design to commit a crime is clearly shown, "'slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.' [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 698.)

The lack of evidence of an intent to steal also was noted by the trial court during the following discussion with the prosecutor regarding jury instructions:

Mr. McCormick: Well, he [i.e., the gunman] walked up on him [i.e., Foster] with a shirt wrapped around his head to conceal his identity.

The Court: And then shot him in the head and walked away. The eyewitnesses say nothing about the logical thing happening and the guy goes to the wallet.

Mr. McCormick: That's true. [RT 32:2690.]

Given the lack of evidence to support a specific intent to steal, the gunman's actions in committing a homicide at the location of an automatic teller machine, without more, are insufficient to constitute an attempted robbery. The jury could not reasonably infer, absent speculation, that the gunman harbored the specific intent to steal. (See *People v. Morris* (1988) 46 Cal.3d 1, 21 ["A reasonable inference ... may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work .... A finding of fact must be an inference drawn from the evidence rather than ... a mere speculation as to probabilities without evidence."]; *People v. Reyes, supra*, 12 Cal.3d at p. 500; *People v. Trevino* (1985) 39 Cal.3d 667, 698-699.) Accordingly, appellant's conviction in count 9 should be reversed.

/ / /

V.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN APPELLANT'S CONVICTION FOR THE FIRST DEGREE MURDER OF CHARLES FOSTER, COUNT 8, UNDER THE FELONY-MURDER THEORY, THEREBY REQUIRING REVERSAL OF APPELLANT'S MURDER CONVICTION AS A DENIAL OF DUE PROCESS (CAL. CONST., ART. 1, § 15; U.S. CONST., 5TH, 8TH, & 14TH AMENDS.)

A. INTRODUCTION

The jury convicted appellant of the first degree murder of Charles Foster (count 8) on the theory of felony-murder. (CT 8:2164; RT 33:2787-2788, 34:2997-2998.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that Foster was murdered during the commission of an attempted robbery, thereby defeating the felony-murder conviction.

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, are set forth in section IV.B, *ante*, and incorporated herein.

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN THE FINDING THAT FOSTER WAS MURDERED DURING THE COMMISSION OF AN ATTEMPTED ROBBERY

Under the felony-murder doctrine, all murder that is committed in the attempted perpetration of robbery is first degree murder. (Pen. Code, § 189.) The doctrine

disposes of the need for the mens rea requirements of malice in order to find first-degree murder. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1086, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

A conviction of first degree murder under the felony-murder attempted robbery theory requires that the elements of attempted robbery be proved beyond a reasonable doubt. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [the prosecution must prove all elements of the underlying felony beyond a reasonable doubt and must so instruct the jury upon request].) The intent required for felony-murder is the specific intent to commit the underlying felony. (*People v. Jones* (2003) 29 Cal.4th 1229, 1256; *People v. Cantrell* (1973) 8 Cal.3d 672, 688, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12.)

As explained in section IV, *ante*, the evidence is insufficient as a matter of law to sustain a finding of an attempted robbery. Accordingly, appellant's conviction in count 8 for the first degree murder of Charles Foster on the theory of felony-murder must be reversed.

/ / /

VI.

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO *SUA SPONTE* INSTRUCT THE JURY IN CONNECTION WITH COUNT 8 (CHARLES FOSTER) ON EXPRESS-MALICE SECOND DEGREE MURDER, A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Appellant was charged in count 8 with the first degree murder of Charles Foster (Pen. Code, §§ 187, subd. (a), 189). (CT 1:150.) During a discussion between the prosecutor and court on theories of guilt on count 8, the prosecutor stated his preference that the jury be instructed only on felony-murder. (RT 32:2688.) The trial court suggested, however, that instruction on express-malice murder might be warranted because attempted robbery was "not necessarily the only inference [from the evidence]." (RT 32:2689.)

Defense counsel initially agreed to instruction only on the felony-murder theory of first degree murder. (RT 32:2691.) Defense counsel then requested an instruction on manslaughter, and stated that if the court were willing to instruct on manslaughter, then the defense would request instruction on express-malice murder. (RT 32:2691-2692.) The court stated there was no evidence to support instruction on manslaughter. (RT 32:2692.) Defense counsel acquiesced to submit count 8 to the jury on the theory of felony-murder only. (RT 32:2707, 33:2717-2718.)

Subsequently, count 8 was submitted to the jury on the theory of first degree felony-murder. (RT 33:2787-2788; CT 8:2116.)

B. THE TRIAL COURT IS REQUIRED TO INSTRUCT THE JURY *SUA SPONTE* ON ALL LESSER INCLUDED OFFENSES, AND ON ALL THEORIES OF LESSER INCLUDED OFFENSES, SUPPORTED BY THE EVIDENCE

In every criminal case, even absent a request, and there was none here, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.) This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. (*Ibid.*; *People v. Turner* (1990) 50 Cal.3d 668, 690.) The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given. (*People v. Breverman, supra,* 19 Cal.4th at p. 154; see also *People v. Barton, supra*, 12 Cal.4th at pp. 196, 199-203 [trial court must instruct on heat-of-passion and unreasonable self-defense theories of manslaughter, if supported by evidence, even when defendant objects on the basis that such instructions would conflict with his defense].)

In *Beck v. Alabama, supra*, 447 U.S. 625 and *Hopper v. Evans* (1982) 456 U.S. 605 [102 S.Ct. 2049, 72 L.Ed.2d 368], the high court held that due process and the Eighth Amendment required that a jury in a death penalty case be instructed on offenses warranted by the evidence because the failure to do so "diminish(es) the

reliability of the guilt determination (*Beck v. Alabama, supra*, 447 U.S. at p. 638) and violates the Eighth Amendment.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. [*Id.* at p. 637.]

The sua sponte instructional rule derives from the broad interests served by it. This Court described these interests as follows:

> As we have said, insofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the "strategy, ignorance, or mistakes" of *either* party from presenting the jury with an "unwarranted all-or-nothing choice," encourages "a verdict ... no harsher *or more lenient* than the evidence merits" [citation], and thus protects the jury's "truth-ascertainment function" [citation]. "These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice." [Citation.] [*People v. Breverman, supra*, 19 Cal.4th at p. 153.]

In a murder prosecution, the trial court has a sua sponte duty to instruct on all lesser necessarily included offenses supported by the evidence. This includes the duty to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied. (*Id.* at pp. 153-154.)

In other words, a trial court errs if it fails to instruct, sua sponte, on lesser included offenses that find substantial support in the evidence. (*Id.* at p. p. 162.) "'Substantial evidence' in this context is "evidence from which a jury composed of

reasonable [persons] could ... conclude[]" that the lesser offense, but not the greater, was committed." (*Ibid.*)

Moreover, there can be no claim that appellant invited the error. (*People v. Valdez* (2004) 32 Cal.4th 73, 115; *People v. Cooper, supra*, 53 Cal.3d at pp. 830-831; see also *People v. Barton, supra*, 12 Cal.4th at p. 198 ["[t]he doctrine of invited error does not ... vindicate the decision of a trial court to grant a defendant's request not to give an instruction that is otherwise proper: the error is still error"].)

C. EXPRESS-MALICE SECOND DEGREE MURDER IS A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER AS CHARGED IN COUNT 8

To determine whether a lesser offense is necessarily included in the charged offense, one of two tests must be met: the "elements" test or the "accusatory pleading" test. The elements test is satisfied when "'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.'" (*People v. Anderson* (1975) 15 Cal.3d 806, 809-810, quoting *People v. Francis* (1969) 71 Cal.2d 66, 73; *People v. Reed* (2006) 38 Cal.4th 1224, 1231.) Stated differently, if a crime cannot be committed without also necessarily committing another offense, the latter is a necessarily lesser included offense within the former. (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467.) The accusatory pleading test states that a lesser offense is included within the greater charged offense "'if the charging allegations of the accusatory pleading include language describing the offense in such a way that if

committed as specified the lesser offense is necessarily committed.'" (*People v. Toro* (1989) 47 Cal.3d 966, 972, quoting *People v. Geiger* (1984) 35 Cal.3d 510, 517, fn. 4.)

Count 8 of the information alleges that "in violation of Penal Code section 187(a) ... [appellant] "did willfully, unlawfully, and *with malice aforethought* murder Charles Foster, a human being." (CT 1:150 [italics added].) Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional element of premeditation and deliberation necessary for first degree murder. (Pen. Code, §§ 187, subd. (a), 189; *People v. Jeter* (1964) 60 Cal.2d 671, 675; *People v. Thomas* (1945) 25 Cal.2d 880, 903-904.) Thus, the charging allegations of the information include language describing the offense of first degree murder in count 8 in such a way that if committed as specified the lesser offense of express-malice second degree murder (the unlawful killing of a human being with malice aforethought) is necessarily committed. Accordingly, aside from the unsettled issue whether express-malice second degree murder is a lesser included offense of felony-murder under the elements test (*People v. Valdez, supra*, 32 Cal.4th at p. 115, fn. 17 ["we do not address here whether second degree murder is a lesser included offense of felony murder"]),[12] here, at the very least, second degree murder is a lesser included

---

[12] A logical application of this Court's decisions compels the conclusion that express-malice second degree murder is a lesser included offense of both premeditated and felony-murder because they are both part of the "one offense" of first degree murder. Express-malice murder and felony-murder are merely different theories of the same offense – first degree murder. (*People v.*

offense under the accusatory pleading test.

D. THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF EXPRESS-MALICE SECOND DEGREE MURDER BECAUSE SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT A FINDING OF THE LESSER OFFENSE AND THE FAILURE TO SO INSTRUCT FORCED THE JURY INTO AN UNWARRANTED ALL-OR-NOTHING CHOICE TO CONVICT OF THE GREATER OFFENSE OR ACQUIT

In determining whether the trial court prejudicially erred in failing to sua sponte instruct the jury on express-malice second degree murder the issue is whether the jury could have reasonably concluded that appellant committed second degree murder but not robbery felony-murder, *not* whether the robbery evidence was sufficient to sustain the robbery felony-murder conviction. (See *People v. Breverman, supra*, 19 Cal.4th at p. 162.)

Where the issue on appeal is the failure of the trial court to give an instruction favorable to the defense, as here, the evidence is *not* viewed in the light most favorable to the judgment. (See *People v. King* (1978) 22 Cal.3d 12, 15-16 [appellate review "of the evidence introduced at trial is necessarily one emphasizing matters which would

---

Hughes (2002) 27 Cal.4th 287, 369.) Second degree murder is a lesser included offense of first degree murder. (*People v. Cooper, supra*, 53 Cal.3d at p. 827; *People v. Wickersham, supra*, 32 Cal.3d at p. 326.) The duty to instruct sua sponte on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories of the same offense are supported by the evidence. (*People v. Breverman, supra*, 19 Cal.4th at p. 160.) Given these holdings, this Court may conclude that second degree murder is a lesser included offense of both express-malice and felony-murder, as they are both part of the "one offense" of first degree murder.

justify such instruction, rather than the customary summary of evidence supporting the judgment."].) Instead, because "[d]efendants have a constitutional right to have the jury determine every material issue presented by the evidence, and a trial court's failure to instruct on lesser included offenses denies them that right[]" (*People v. Cash* (2002) 28 Cal.4th 703, 736; *People v. Lewis* (2001) 25 Cal.4th 610, 645), if there is any doubt whether the evidence warranted the instruction, doubts as to the sufficiency of the evidence must be resolved in favor of the accused. *(People v. White* (1986) 185 Cal.3d 822, 830, overruled on other grounds in *People v. Santamaria* (1994) 8 Cal.4th 903, 922; *see also, People v. Burnham* (1986) 176 Cal.App.3d 1134, 1140.)

In a capital case, the failure to instruct on a noncapital lesser included offense where supported by the evidence violates the Due Process Clause and the Eighth Amendment. (*Beck v. Alabama, supra*, 447 U.S. at p. 634; *Honkies v. Reeves* (1998) 524 U.S. 88, 90 [118 S.Ct. 1895, 141 L.Ed.2d 76]; *Schad v. Arizona* (1991) 501 U.S. 624, 646-647 [111 S.Ct. 2491, 115 L.Ed.2d 555] [under the facts of this case, instruction on second degree murder provided a sufficient "third option" to withstand a *Beck* challenge to trial court's failure to instruct on other lesser included offenses].)

In the instant case, the evidence shows that the gunman approached Foster, engaged him in dialogue, and then shot him. (RT 30:2346-2347.) There was no evidence that the gunman requested money or property from Foster. Nor is there any evidence that the gunman reached for the piece of paper that Foster was holding or that

he reached for Foster's wallet. (RT 30:2327, 30:2346-2347, 31:2425.) Indeed, neither the time-lapse photographs taken by the ATM cameras, nor the testimony of eyewitness Manzanares, support an inference that appellant tried to take any property from Foster. (RT 30:2344-2347, 31:2426, 2449-2450, 2457, 32:2548; People's Exhibit 42.)

Aside from the issue whether the evidence is sufficient as a matter of law to sustain the robbery felony-murder conviction, the jury was free to accept all, none, or some of the evidence in support of the prosecution's case. (See *People v. Jeter* (1964) 60 Cal.2d 671, 675-676 [second degree murder issue squarely posed if jury believed only that portion of the defendant's testimony which negated commission of robbery but accepted the prosecution's testimony in all other respects].) It is within the province of the jury to assess and weigh all of the evidence independently. Accordingly, the jury could have found from the absence of evidence as to the gunman's intent to steal that the prosecution failed to prove beyond a reasonable doubt the underlying felony of attempted robbery.

Moreover, the record contains substantial evidence from which the jury reasonably could find that the gunman killed Foster without premeditation or deliberation. This is so because the nature of the killing itself (i.e., gunshot wounds to the head) would not preclude a finding that appellant acted upon impulse. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1345 [the circumstance that the manner of killing,

ligature strangulation, might be somewhat more time-consuming than other methods, for example, firing a weapon, does not obviate the conclusion that defendant might not have premeditated or deliberated before killing the victims."].)

The trial court's comments also show that substantial evidence warranted instruction on the offense of express-malice murder. The trial court commented about the evidence in these words, in part:

> You have some evidence, how strong it is is up to the jury, but you have evidence of some sort of an argument taking place, verbal argument. And the only thing there to suggest a robbery is the fact that the guy is at the A.T.M. window.
>
> You have no words of demand or property taken as far as we know. [¶]
>
> And then [the gunman] shot him in the head and walked away.
>
> The eyewitnesses say nothing about the logical thing happening and the guy goes to the wallet. [¶]
>
> I mean it - I think I probably know what happened. Most people die at ATM's, it is probably a robbery. But here you have evidence that something else could have been going on.
>
> Some sort of fight. I don't know.
>
> Anyway, on that one, if they want to go felony murder only, what do you want to do on that?
>
> First or second on that one? [RT 32:2690.]

The trial court's explicit statement that the evidence supports instruction on express-malice murder is persuasive evidence on the issue. (See *People v. Baker*

(1954) 42 Cal.2d 550, 573 ["The fact that an instruction on intoxication (though inadequate) was given, indicates that the trial judge had satisfied himself that the evidence was ... sufficient to put the question 'within the province of the jury.' His judgment on this question would seem to settle all doubts on the matter."], quoting *People v. Coyne* (1949) 92 Cal.App.2d 413, 416-417; *People v. Hill* (1898) 123 Cal. 47, 52; see also *People v. Vincent* (1892) 95 Cal. 425, 428; *People v. Griggs* (1941) 17 Cal.2d 621, 625; *People v. Blake* (1884) 65 Cal. 275, 278; *People v. Sanchez* (1950) 35 Cal.2d 522, 527-529.)

Finally, a trial court's failure to instruct on a lesser included offense suggested by the evidence requires reversal unless the factual question posed by the omitted instruction was necessarily resolved adversely to appellant under other properly given instructions. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352.) This type of error "cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would have convicted the defendant of the lesser included offense." (*Id.* at p. 352.)

Indeed, the danger in failing to give instructions on lesser included offenses is that the jury may reach an unreliable verdict because it is placed in an all or nothing position. In explaining why lesser included offenses are important in capital cases, the high court stated:

> "[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an

> instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." [*Beck v. Alabama, supra*, 447 U.S. at p. 634; *Keeble v. United States* (1973) 412 U.S. 205, 212 [93 S.Ct. 1993, 36 L.Ed.2d 844].]

The pressures which create this risk affect the reliability of the fact-finding process and "thereby undermine the reasonable doubt standard." (*People v. Geiger, supra,* 35 Cal.3d at p. 520, overruled on another point in *People v. Birks* (1998) 19 Cal.4th 108.)

> [I]t is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause. [*People v. Wickersham, supra*, 32 Cal.3d at p. 325 citing *People v. Graham* (1969) 71 Cal.2d 303, 319.]

With the all-or-nothing instructions here, appellant was exposed to the "'substantial risk that the jury's practice will diverge from theory.'" (*Beck v. Alabama, supra*, 447 U.S. at p. 634.) There were no comparable instructions which could have permitted the jury to find appellant guilty of the lesser offense of express-malice second degree murder (i.e., an intentional murder perpetrated without premeditation and deliberation). (Pen. Code, § 189; *People v. Thomas* (1945) 25 Cal.2d 880, 903-904.) On count 8, the jury thus was forced to either convict appellant of the charged

offense or acquit. The jury's options were thus severely restricted. (*People v. Barton, supra*, 12 Cal.4th at p. 196 [jury denied opportunity to decide whether the defendant was guilty of lesser included offense established by evidence].)

Appellant's conviction in count 8 should be reversed.

/ / /

VII.

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING OFFICER MARTIN MARTINEZ'S TESTIMONY THAT RECOUNTED LATASHA WHITESIDE'S OUT-OF-COURT STATEMENTS, WHICH INCLUDED DOUBLE HEARSAY AS TO WHAT CHARLES COLEMAN TOLD WHITESIDE, THEREBY WARRANTING REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1 THROUGH 6 FOR A VIOLATION OF STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS (CAL. CONST., ART. 1, § 15; U.S. CONST., 5TH, 8TH, & 14TH AMENDS.)

A. FACTUAL AND PROCEDURAL BACKGROUND

The prosecutor elicited numerous inculpatory hearsay statements from Los Angeles Police Officer Martin Martinez recounting the full details of what Latasha Whiteside told him occurred at the Coleman residence. (RT 26:1611-1647.)

Trial defense counsel repeatedly objected to the statements as inadmissible hearsay. (RT 26:1611-1613, 1623, 1624.) The trial court overruled the objections on the grounds the statements were admissible as either spontaneous statements or excited utterances. (RT 26:1619.) Defense counsel moved to strike the offending testimony. (RT 26:1638-1639, 1645.) The motion was denied. (RT 26:1640, 1646-1647.)

Whiteside's out-of-court statements to Officer Martinez, which were made over the course of a lengthy interview, were inadmissible hearsay. The statements were offered to prove the truth of the matter asserted. The statements did not qualify as spontaneous statements and/or excited utterances because the statements were made after Whiteside had been moved away from the location where she was initially found, and they were thoughtfully made in response to police questioning.

Moreover, although Whiteside was later called by the prosecution and testified to much of the substance of Officer Martinez's hearsay testimony, Whiteside's credibility was impermissibly bolstered by the hearsay testimony. Here, the prosecution will be unable to prove beyond reasonable doubt that the admission of the hearsay statements did not affect the verdicts because Whiteside's testimony formed the linchpin of appellant's conviction in counts 1 through 6 as she was the only percipient witness to the events.

B. THE INCULPATORY HEARSAY STATEMENTS

Officer Martinez testified on direct examination that he was on patrol at approximately 3:00 a.m. on July 1, 1996, when Whiteside ran into the street and flagged him down. (RT 26:1607-1610.) Martinez then escorted her to the north side of the curb on Slauson Avenue. (RT 26:1610.) Martinez testified that he and his partner "were able to calm her down and try to ascertain information about what had occurred and what her experience was all about." (RT 26:1610.)

The prosecutor then asked him what Whiteside said occurred. (RT 26:1611.) Trial defense counsel objected as hearsay, which was overruled. (RT 26:1611.) Martinez testified that Whiteside said her friend had been shot in the head and killed, and that she had been raped by the gunman. (RT 26:1612-1613.)

Over defense hearsay objection (RT 26:1613), Martinez further testified that Whiteside described the shooter as an African-American man approximately 27 years

old, approximately 5 feet 9 inches tall, 180 pounds, bald, wearing a black jacket and white T-shirt. (RT 26:1613-1614, 1617.) She told Martinez that the gunman had a stainless steel handgun that he held in his hand. (RT 26:1618.) She told Martinez that other individuals were involved. She described a second person as an African-American man with a ponytail, about 5 feet 6 inches tall, 140 pounds, approximate 26 years old, wearing a white, long sleeved shirt, and gray, khaki pants. (RT 26:1614.) Martinez testified that shortly after the interview he prepared a police report containing the identifications of the suspects as described by Whiteside. (RT 26:1616-1617.)

Following a short recess, the trial court explained that "the reason I was overruling the objection to the statements of the young lady [i.e., Whiteside] is because the court feels that the People laid a foundation that they were excited utterances given the description given by the officer, the shrieking, hysterical female running into the traffic." (RT 26:1619.)

Over defense hearsay objections (RT 26:1623-1624), Martinez further testified as follows:

> She told me that she had arrived home with Mr. Coleman and she was assisting him up the stairs to the front door of the residence.
>
> Suspect One appeared from the alley which is adjacent to the house north of the residence and he was displaying a handgun at that point.

They both looked in his direction and the suspect responded: I thought it was somebody else.

Then he concealed the gun in the jacket pocket.

At that point suspect two walked along the sidewalk coming to the residence on foot from the south.

Coleman apparently at that point asked if he could be assisted up to the residence. [RT 26:1623-1624.] [¶]

He asked if he could be assisted up into the house.

Suspect One actually did assist victim Coleman up the stairs and into the residence.

She walked ahead and as she walked into the residence, she sat on the couch.

Suspect One actually pushed the wheelchair into the living room floor. And as he did so, suspect two stood in the doorway.

Suspect One at which time armed himself with the same handgun he had displayed earlier and he put the gun up to victim Coleman's head and he pulled the trigger once and he had no response. It was misfired.

He pulled the trigger again, again aiming it at victim Coleman's head. Nothing occurred.

And she went on to say that he again pointed the gun at victim Coleman's head a third time which there was a discharge at which time victim Coleman fell to the floor off his wheelchair on to the living room floor. [RT 26:1624-1625.]

Martinez further testified that Suspect One was the gunman. (RT 26:1625.) According to Whiteside, Suspect One then took her into the bedroom, overturned the mattress, and threw it on her. (RT 26:1626-1627.)

Trial defense counsel renewed the hearsay objection. The court overruled it stating, in part, "What I want you to do is not indicate what you believe may have gone on but relay what the young lady may have said. Go ahead." (RT 26:1627.)

Martinez testified that Whiteside said as the suspects entered the bedroom they removed socks from the bed and placed the socks on their hands. (RT 26:1628.) After the mattress was removed, the gunman started to remove his pants. (RT 26:1628.) He walked Whiteside into the back area of the kitchen by the washing machine. (RT 26:1628-1629.) Martinez further testified:

> Suspect One had dropped his pants and brought Mrs. Whiteside's head towards his groin forcing her to commit the act of oral copulation.
>
> Shortly after that, after a few minutes lapsed, he basically had her kneel down somewhat in a fetal position.
>
> As she was in that position, he committed the act of rape, penetrating her vaginal area in that position.
>
> That also took place for a few minutes as she described it to me.
>
> She said that suspect one then turned her over on to her back and then continued to rape her. [¶]
>
> ... As this act is taking place in the kitchen area, actually the back portion of the kitchen area, she heard suspects two and three's voices at which time he stopped what he was doing and he pulled his pants up. [RT 26:1629-1630.]

Whiteside told Martinez she overheard one of the suspects – other than the gunman – state something to the effect of, "We found it." (RT 26:1631.) Martinez testified:

Suspect One then proceeded to remove a telephone cord from the residence that was attached apparently to the phone.

He had her lay face down on the living room floor tying her hands behind her back.

As her hands were tied behind her back, suspect one still armed with his handgun fired one additional round striking victim one, Coleman. Apparently, she described it as he was hit in the head.

Then suspect one walked over to her direction and fired one additional round striking her in the side of the head, which apparently was an injury that she suffered to her ear, her left side. [¶]

She said she laid there motionless. She did not want to move. She was afraid to move. She was hoping that they would leave and she basically lied there lifeless until she was assured that all suspects had left the location. [¶]

She basically told me that it took a little while, but apparently she struggled and was able to get herself free from the tie of the phone cord. As she was able to do that, she ran out of the residence and shortly thereafter she located us. [RT 26:1632-1633.]

C. THE TESTIMONY OF OFFICER MARTINEZ WAS NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The hearsay rule presumes hearsay statements are inadmissible because they are not made under oath, are not subject to cross-examination, and the jury does not have the opportunity to view the declarant's demeanor as the statement is made. (*People v. Duarte* (2000) 24 Cal.4th 603, 610;

People v. Ortiz (1995) 38 Cal.App.4th 377, 387 [hearsay statements are inadmissible "when they are offered to prove the truth of the matter asserted"].)

One exception to the hearsay rule, Evidence Code section 1240, provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318, citing *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

"[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker." (*People v. Farmer, supra*, 47 Cal.3d at p. 903.) To be admissible as a spontaneous declaration, "the statement must be the product of a reaction to a stimulus (an exciting event such as a robbery) and not the product of processing information in a deliberative manner." (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181.)

The statements made by Whiteside were not spontaneous, but instead were made in response to police questioning and upon thoughtful reflection. On cross-examination, Martinez testified that after making contact with Whiteside he directed her away from traffic and adjacent to a service station. (RT 26:1636-1638.) As he was getting her "out of the street and adjacent to the service station[,]" she was yelling and very frantic. (RT 26:1641.) He could not understand a lot of what she was saying, except he did hear her say, "My friend was just killed." (RT 26:1641.)

He spent approximately 30 minutes interviewing Whiteside adjacent to the service station. (RT 26:1641.) He then transported her to Coleman's residence in his police vehicle, where he interviewed her as she remained seated in the vehicle. (RT 26:1642.) The interview at Coleman's residence lasted approximately two hours. (RT 26:1642.) During that time, she spoke with paramedics at the scene, gave the

paramedics information so she could receive medical treatment, and received medical treatment for the injury to her ear. (RT 26:1643-1644.)

Martinez testified on cross-examination, in part:

Q: Now in the beginning when you said she was in the street, you couldn't understand what she was saying. She was screaming and carrying on. Is that right?

A: That's correct.

Q: At the gas station you were able to understand because she was more coherent to you?

A: Yes.

Q: And over the course of the two hours she was able to calmly relate descriptions and things that went on in the house and give you what it is that you have testified to today?

A: That is correct.

Q: And you were able to understand what she was saying?

A: Yes.

Q: And it followed a chronological time and sequence of events?

A: We were able to establish that, yes. [RT 26:1644-1645.]

Trial defense counsel again moved to strike the hearsay portions of Martinez's testimony on the ground that Whiteside's out-of-court statements did not qualify as a spontaneous statement. (RT 26:1645.) The court denied the motion stating, "The fact that one is able to relate an event in chronological order and at some point during those two hours you elicited that she was able to calmly relate events does not deprive the

statement of the character necessary. The objection is noted and overruled." (RT 26:1646.)

Martinez subsequently testified that at the end of the interview, Whiteside was still shocked, shaking, and crying, but "no where near the like as she was when we first confronted her." (RT 26:1659-1660.)

The circumstances surrounding Whiteside's statements to Officer Martinez – aside from the initial statement that "[m]y friend was just killed" (RT 26:1641) – prove that Whiteside had the opportunity to reflect between the time of the incident and the time she made the statements. Rather than providing a basis for their trustworthiness, the statements were made by Whiteside as part of a deliberative process – i.e., one of thoughtfully responding to police questioning rather than being a mere product of the startling occurrence. Accordingly, admission of the statements was an abuse of discretion because there is no substantial evidence to support the finding that the statements were admissible under Evidence Code section 1240.

The statements also were not offered for, nor were they admissible as, either prior consistent (Evid. Code, § 1236) or inconsistent (Evid. Code, § 1235) statements. The statements do not meet the statutory requirements for prior consistent or inconsistent statements.

Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is

consistent with his testimony at the hearing and is offered in compliance with Section 791." Section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." Appellant did not present any evidence of an inconsistent statement by Whiteside. (*Ante*, pp. 19-21.) Moreover, there was no allegation that the trial testimony of Whiteside was fabricated or influenced by bias or other improper motive. (*Ante*, pp. 5-12, 19-21; see *People v. Hitchings* (1997) 59 Cal.App.4th 915, 921.)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Here, there was no suggestion that any of the statements set forth above were inconsistent with trial testimony.

D. APPELLANT WAS SEVERELY PREJUDICED BY ADMISSION OF THE NUMEROUS HEARSAY STATEMENTS RECOUNTING THE ENTIRE INCIDENT AND IDENTIFICATION OF THE GUNMAN

The admission of hearsay statements requires reversal for state law error if there is a reasonable probability of a result more favorable to the defendant in the absence of the error. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [reversal of conviction only if there is a reasonable probability of a result more favorable to the defendant in the absence of the error]; *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [*Watson* standard applicable to state law error].)

Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [emphasis in original].) Thus, prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*) In applying the *Watson* test, it is important to note that an evenly balanced case is one which the defendant is entitled to win. Indeed, *Watson* itself so provides: "But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

Moreover, state trial error giving rise to the deprivation of a federal constitutional right – here the right to due process – is evaluated under the *Chapman* harmless error analysis. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Although a state court's erroneous application of state law does not, standing alone, violate the federal constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *Ortiz v. Stewart* (9th Cir. 1998) 149 F.3d 923, 934.) Further, even correct applications of state law by state courts may violate the Due Process Clause:

> While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural rules and evidentiary rules may countenance processes that do not comport with fundamental fairness. The issue ... is whether the state proceedings satisfied due process. [*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.]

State court procedural or evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving

the defendant of the fundamentally fair trial guaranteed by due process." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The high court stated over five decades ago:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. [*Brinegar v. United States* (1949) 338 U.S. 160, 174 [69 S.Ct. 1602, 93 L.Ed.2d 1879].]

Emotionally charged evidence can undermine a defendant's right to a fair trial. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385; *Jammal v. Van de Kamp, supra*, 926 F.2d at pp. 920-921; *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044.)

The hearsay statements at issue here were emotionally charged because they recounted – in graphic detail – the killing of Coleman and the sexual and physical assault on Whiteside. The hearsay statements included statements that Whiteside's friend (Coleman) had been shot in the head twice and died, Whiteside had been raped and forced to orally copulate the gunman, and then she was shot after being tied with a telephone cord. (RT 26:1612-1613, 1624-1625, 1629-1630, 1632.)

In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, the Seventh Circuit held that admission of evidence that a state witness received threats that were not connected to the defendant, but sanctioned by the state court on the theory that it was relevant to

explain the witness' nervousness, violated federal due process by undermining the right to a fundamentally fair trial. (*Id.* at p. 970.) The defendant was convicted by a jury in an Indiana state court of aiding a bank robbery for which co-defendants Kennis Butler and Rodney Phillips were convicted in the same trial. The Indiana Supreme Court affirmed their convictions after reviewing numerous alleged errors. Thereafter, Dudley filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, asserting, among other things, that the admission of prejudicial and irrelevant evidence violated his Fourteenth Amendment rights. (*Id.* at p. 968.) Edward Pointer, originally a codefendant who agreed to testify for the state in exchange for a reduced sentence, was called as a state witness against defendant. Pointer testified, in part, that the previous night he received some threatening telephone calls, which made him nervous to testify. (*Id.* at p. 969.) The Seventh Circuit recounted the colloquy between counsel and the state trial court over the evidence:

> At sidebar counsel objected to that line of questioning and asked that it be stricken, moving for a mistrial on the basis that the state was trying to prejudice the defendants by linking the anonymous threats to them. There was nothing, counsel argued, to show that the defendants had anything to do with the alleged phone call threats. The prosecutor defended the question as an attempt to explain the demeanor of the witness and how the witness felt about testifying. In reply, defense counsel argued that the prejudicial effect outweighed any potential relevance to Pointer's demeanor. The prosecutor then added in justification of the testimony that there had been no showing as to who made the phone calls. Defendant's counsel explained that that was exactly his point, a point which also concerns us. [*Ibid.*]

The state trial court denied the motion for mistrial and refused to strike the testimony, ruling that the testimony was relevant and admissible to explain Pointer's "extreme nervousness." (*Ibid.*) The Indiana Supreme Court held that the trial court did not abuse its discretion in admitting the evidence, adopting the trial court's explanation that the testimony about the anonymous phone calls was necessary to explain Pointer's "extreme nervousness." (*Id.* at p. 970.) "The district judge subsequently found that the Constitution was not implicated by this exchange because it was a very small incident in a fairly lengthy proceeding and did not amount to a denial of fundamental fairness." (*Ibid.*)

The Seventh Circuit reversed the district court and granted the petition for writ of habeas corpus, ruling:

> ... Pointer's threat testimony could only reflect adversely on the petitioner even though the threats were not traced to him or his codefendants, except by innuendo. The fact that the supreme court decided this and other issues does not end our own inquiry; in reviewing the denial of the petition for a writ of habeas corpus we must consider these issues in their constitutional context. .... [¶]
>
> ... The record strongly suggests that the evidence of threats was intended more to prejudice the defendants, including petitioner, than to explain away any nervousness of the witness. We believe that more was at issue in the present case than a mere abuse of discretion as found by the state supreme court. This error appears to us to be of constitutionally significant proportions. When the prejudicial effect of the testimony is weighed against its necessity, even assuming the witness's nervousness was extreme, which seems to exaggerate the record, we find that the resulting prejudice mandates relief. .... The admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from "evidential harpoons." We find the error

> amounts to a violation of the petitioner's fourteenth amendment right. .... [¶]
>
> ... This "evidential harpoon" error, to borrow the words of the Indiana appellate court in a prior case, cannot be considered harmless when it could totally undermine the defense offered. Viewed as a whole, the petitioner's trial was constitutionally unfair. The petitioner deserves the writ, but he also deserves to be retried. .... [*Id.* at pp. 971-972.]

Whether viewed under either the federal *Chapman* standard or the state *Watson* standard, the severity of the prejudice flowing from Officer Martinez's hearsay statements recounting a killing and vicious sexual and physical attack cannot be gainsaid. They also materially enhanced Whiteside's credibility, which was the central issue in the case on counts 1 through 6 because Whiteside was the only eyewitness to the events. The statements bolster Whiteside's credibility because instead of first evaluating Whiteside credibility as she testified to the events, Whiteside's words were spoken through an authoritative figure (i.e., a police officer) as matters of established historic fact. The prosecution will be unable to prove beyond a reasonable doubt that the guilty verdicts in counts 1 through 6 were surely unattributable to the error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Appellant's convictions in counts 1 through 6 should be reversed.

/ / /

VIII.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO INTRODUCE IRRELEVANT, HIGHLY PREJUDICIAL VICTIM-IMPACT EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL, INCLUDING EVIDENCE THAT LATASHA WHITESIDE WAS THE VICTIM OF A PRIOR MOLESTATION AND RAPE, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1 THROUGH 6

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Prosecution witness Latasha Whiteside was the only eyewitness to the offenses charged in counts 1 through 6, relating to the Coleman homicide and the sexual assault on Whiteside. (*Ante*, pp. 5-11.)

During the prosecutor's redirect examination of Whiteside, and over defense relevancy objection, the court permitted the prosecutor to elicit testimony about the origin of Whiteside's friendship with Charles Coleman. (RT 27:1835-1836.)

Whiteside testified that she became best friends with Coleman because she had been molested and raped by someone else and Coleman protected her from further harassment. (RT 27:1836-1837.) Whiteside testified:

> .... He had helped me out in a different situation.
>
> April of that same year I was molested by somebody.
>
> I was raped by somebody else. [¶]
>
> That same person used to come around my house. That same person came around my house all the time.
>
> Charles had told him that I better not see him again.

I never seen him after that.

So it is like from then on he became a real close friend because I didn't know what this other person might have done to me. So in my mind he probably saved my life.

I don't know what was in this other man's life after he did what he did. And when I told Charles, he had told him I better not ever tell him that I seen him again.

And I never did. [RT 27:1836-1837.]

Whiteside also recounted a heartwarming story of a night when she and her sisters had stayed at Coleman's house, and Coleman's brother and mother came over the next morning. (RT 27:1835-1837.)

The defense relevancy objections were overruled (RT 27:1835-1836), and then when defense counsel objected to testimony about the unrelated rape the court did not rule on the defense objection, instead permitting the prosecutor to continue with the line of questioning. (RT 27:1837.)

B. THE TRIAL COURT ERRED BY ADMITTING VICTIM-IMPACT EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL, AND ITS ADMISSION DEPRIVED APPELLANT OF THE DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL

Victim-impact evidence is inadmissible at the guilt phase of a capital trial. (*People v. Salcido* (2008) 44 Cal.4th 93, 151; see *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; *People v. Frye* (1998) 18 Cal.4th 894, 974-975.) This is so because such evidence is irrelevant to the jury's determination of guilt or innocence. (Evidence Code, § 350 ["No evidence is admissible except relevant evidence."].) Relevant

evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court has broad discretion in determining the relevance of evidence (*ibid.*), but it "lacks discretion to admit irrelevant evidence." (*People v. Scheid* (1997) 16 Cal.4th 1, 14; see *People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

The admission of irrelevant, highly prejudicial victim-impact evidence, as here, denies a defendant the constitutional right to due process. "An important element of a fair trial is that a jury consider only relevant and competent evidence ...." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476].) The admission of irrelevant evidence, and even the admission of relevant evidence, will offend due process where the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 70; *Spencer v. Texas* (1967) 385 U.S. 554, 562-564 [87 S.Ct. 648, 17 L.Ed.2d 606] ["{T}he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."]; Cal. Const., art. I, § 15; U.S. Const., 5th & 14th Amends.; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Defense counsel's relevancy objections were well founded because the prior molestation and rape had no tendency in reason to prove or disprove any disputed fact in the case. For example, the prosecutor did not assert, nor could he have, that the prior sexual assault was relevant to appellant's intent or motive in connection with the instant offenses. The prior sexual assault was committed by a third party, not appellant.

C. APPELLANT WAS SEVERELY PREJUDICED BY THE ERRONEOUS ADMISSION OF THE VICTIM-IMPACT EVIDENCE DURING THE GUILT PHASE BECAUSE THE TESTIMONY INFLAMED THE JURY'S PASSIONS, THEREBY WARRANTING REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1 THROUGH 6 FOR A VIOLATION OF STATE EVIDENTIARY RULES AND DUE PROCESS

Under California law, a reversal may not be awarded absent a showing "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1959) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.)

Moreover, state trial error giving rise to the deprivation of a federal constitutional right – here the right to due process – is evaluated under the *Chapman* harmless error analysis. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. at p. 279.)

Although a state court's erroneous application of state law does not, standing alone, violate the federal constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Brinegar v. United States*, *supra*, 338 U.S. at p. 174; *Ortiz v. Stewart* (9th Cir. 1998) 149 F.3d 923, 934.)

By eliciting Whiteside's testimony about suffering a prior molestation and rape, and by eliciting her testimony recounting the heartwarming story of a night when she and her sisters had stayed at Coleman's house, the prosecutor inflamed the jury's passions through irrelevant and inadmissible victim-impact evidence. The testimony encouraged the jury to return a verdict of guilty based on passion, not one based on a reasoned evaluation of the relevant evidence.

Whether viewed under either the federal *Chapman* standard or the state *Watson* standard, appellant was severely prejudiced from Whiteside's victim-impact testimony. Whiteside's credibility was the central issue in the case on counts 1 through 6 because she was the only eyewitness to the events. Her victim-impact testimony materially bolstered the sympathy that the jury would naturally feel for her, and made it likely that the jury would convict appellant of the instant offenses, which included an offense for raping Whiteside, because of the sympathy they felt for her, especially considering that the prior molestation and rape apparently were not prosecuted. The prosecution thus will be unable to prove beyond a reasonable doubt that the guilty verdicts in counts 1

through 6 were surely unattributable to the error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Appellant's convictions in counts 1 through 6 should be reversed.

/ / /

IX.

THE STATE FORENSIC LABORATORY REPORTS PREPARED BY ANALYST GLEN HALL FOR USE IN APPELLANT'S CRIMINAL PROSECUTION ARE "TESTIMONIAL" EVIDENCE SUBJECT TO THE DEMANDS OF THE CONFRONTATION CLAUSE AS SET FORTH IN *CRAWFORD V. WASHINGTON* (2004) 541 U.S. 36, AND THUS THE ADMISSION OF DR. ROBIN COTTON'S TESTIMONY ABOUT THE SUBSTANCE OF THE REPORTS DEPRIVED APPELLANT OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION

A. INTRODUCTION AND PROCEDURAL BACKGROUND

At the request of the prosecution, Cellmark conducted DNA analysis and comparison of vaginal swabs from Whiteside, and bloodstain cards from appellant and Whiteside, using PCR forensic analysis. (RT 29:2154-2155.) The DNA testing began on May 6, 1997 and was completed on June 30, 1997. (RT 30:2198.)

Dr. Robin Cotton, director of laboratory for Cellmark, testified that the forensic analysis was performed by Cellmark analyst Glen Hall, and memorialized in two written reports prepared by him, dated June 2, 1997 and June 30, 1997. (RT 29:2066, 30:2219, 2228, 2230.) Cotton testified that Hall's written findings were then reviewed by Cellmark analysts Charlotte Ward and Jennifer Reynolds. (RT 30:2219, 2291.)

Cotton testified about the substance of the forensic laboratory reports prepared by Hall for use in appellant's trial. She testified that the blood card containing whole blood from appellant was compared with the DNA from the sperm fraction of the vaginal swab. Several loci on the DNA were tested, and all matched appellant, meaning he could not be excluded as a donor. (RT 30:2186-2191.) The blood card

containing whole blood from appellant also was compared with the DNA from the non-sperm fraction of the vaginal swab, revealing a match across the types for each locus, consistent with those types from Whiteside. (RT 30:2189.) Whiteside could not be excluded as the contributor of the DNA in the non-sperm fraction, which was consistent with the swab having been taken from her. (RT 30:2189.) Cotton further testified that in the first report, Hall arrived at a statistical probability of 1 in 8,000, which was based on information for DQA1, LDLR, GYPA, HBGG and D7S8. (RT 30:2228.) In the second report, Hall added the results of tests of three additional loci, CSF, TPOX, THO1 and XY, which resulted in a statistical probability of 1 in 17 million. (RT 30:2216, 2230.) In conclusion, Cotton testified that in African-Americans the grouping of characteristics common to appellant and the sperm fraction of the vaginal swab would occur in about 1 in 17 million people. (RT 30:2193.)

B. THE ISSUE IS COGNIZABLE ON DIRECT APPEAL EVEN ABSENT OBJECTION IN THE TRIAL COURT BECAUSE *CRAWFORD* WAS DECIDED AFTER APPELLANT'S TRIAL AND IS APPLIED RETROACTIVELY TO CASES PENDING ON APPEAL

Trial defense counsel did not object to Cotton's testimony on the grounds asserted here (i.e., that Cotton's testimony about the substance of Hall's reports violated his federal Sixth Amendment right to confront and cross-examine Hall). No objection was necessary, nor would it have been appropriate, because *Crawford* was not decided until several years after appellant's trial.

Until 2004, when the United States Supreme Court decided *Crawford* v. *Washington* (2004) 541 U.S. 36, the scope of a defendant's Confrontation Clause rights was delineated by *Ohio v. Roberts* (1980) 448 U.S. 56, which "conditions the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." (*Crawford, supra*, 541 U.S. at p. 60 (internal quotation marks omitted).) Any out-of-court statement was constitutionally admissible so long as it fell within an exception to the hearsay rule or, if that exception was not firmly rooted, the court found that the statement was likely to be reliable. (See *White v. Illinois* (1992) 502 U.S. 346, 366 [112 S.Ct. 736, 116 L.Ed.2d 848] (Thomas, J., concurring in part and concurring in the judgment) (noting that the *Roberts* line of cases tended to "constitutionalize the hearsay rule and its exceptions"); *Lilly v. Virginia* (1999) 527 U.S. 116, 140 [119 S.Ct. 1887, 144 L.Ed.2d 117] (Breyer, J., concurring) ("The Court's effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage ....").

Crawford abrogates *Roberts* with respect to prior *testimonial* statements by holding that such statements may never be introduced against the defendant unless he or she had an opportunity to cross-examine the declarant, regardless of whether that statement falls within a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. (*Crawford v. Washington, supra*, 541 U.S. at pp. 61, 68.)

Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The rule announced in *Crawford* is such a rule, and it consistently has been applied retroactively to cases, such as the instant one, pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208; *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; see *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

C. APPELLANT WAS DEPRIVED OF THE SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN DR. ROBIN COTTON WAS PERMITTED TO TESTIFY ABOUT THE SUBSTANCE OF THE FORENSIC LABORATORY REPORTS PREPARED BY GLEN HALL

Appellant's Sixth Amendment right to confrontation was violated by Cotton's testimony about the substance of the forensic laboratory reports prepared by Hall because forensic laboratory reports prepared in contemplation of prosecution are testimonial under *Crawford v. Washington, supra*, 541 U.S. 36 and appellant did not have the opportunity to cross-examine Hall.

In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. (*Id.* at pp. 54, 68.) The Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Id.* at p. 68.) Nonetheless, the Court did provide some guidance concerning the concept. It emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure" – particularly "its use of ex parte examinations" and "sworn ex parte affidavits" as evidence against the accused. (*Id.* at pp. 50, 52, fn. 3.) Accordingly, "formal statement[s] to government officers" and other statements produced with the "[i]nvolvement of government officers ... with an eye toward trial" are paradigmatically testimonial statements. (*Id.* at pp. 51, 56, fn. 7.) At the same time, the Court noted that certain hearsay evidence that was admissible at the time of the Founding was nontestimonial. Such hearsay included "business records [and] statements in furtherance of a conspiracy." (*Id.* at p. 56.)

The focus of the *Crawford* Court in determining whether a statement is testimonial was whether the impetus for its production was supplied by officers of the government. The involvement of government officers in producing a statement can be a key factor in determining whether that statement is testimonial. (*Id.* at p. 53.) Here, the sole impetus for the production of Hall's forensic reports was the prosecution's

request for DNA analysis. (RT 29:2154-2155, 30:2198.) The reports were thus prepared with the understanding that they would be used at a later trial. Consequently, the reports constitute testimonial evidence under *Crawford*. Since Hall's statements in his report were not given under oath and subject to cross examination by the defense at any prior point in the case, appellant was denied the Sixth Amendment right of confrontation when Cotton presented this evidence to the jury.

Appellant recognizes that in *People v. Geier* (2007) 41 Cal.4th 555, 603-607, this Court held that scientific evidence memorialized in routine forensic reports are not testimonial under *Crawford* when the reports represent the contemporaneous recordation of observable events which was generated as part of a standardized scientific protocol, citing *Crawford* and *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224].[13] This Court set forth a three-part test for determining

---

[13] Many of our sister states have reached a conclusion contrary to *People v. Geier, supra*, 41 Cal.4th 555. For example, five state supreme courts have held that forensic laboratory reports prepared in contemplation of prosecution are testimonial. (See *Hinojos-Mendoza v. People* (Colo. 2007) 169 P.3d 662 [laboratory report identifying presence of illegal drug]; *State v. March* (Mo. 2007) 216 S.W.3d 663 [same], cert. dismissed, 169 L.Ed.2d 256 (Oct. 5, 2007); *Thomas v. United States* (D.C. 2006) 914 A.2d 1 [same]; *State v. Caulfield* (Minn. 2006) 722 N.W.2d 304 [same]; *City of Las Vegas v. Walsh* (Nev. 2005) 124 P.3d 203 [affidavit from nurse who drew blood to conduct blood alcohol analysis].) Intermediate courts in five other states also have held that such laboratory reports are testimonial. (See *State v. Laturner* (Kan. Ct. App. 2007) 163 P.3d 367 [report certifying presence of illegal drug]; *State v. Moss* (Ariz. Ct. App. 2007) 160 P.3d 1143 [report alleging presence of illegal drugs in blood sample]; *Johnson v. State* (Fla. Dist. wCt. App. 2005) 929 So.2d 4 [certificate of chemical analysis], rev. granted, 924 So.2d 810 (Fla. 2006); *State v. Miller* (Or.

whether the evidence is testimonial. The evidence "is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*People v. Geier, supra*, 41 Cal.4th at p. 605.) This Court found that in connection with testimony about the DNA report at issue in that case, the report was not testimonial because although the first and third criteria of the test were met the second criteria was not met. (*Id.* at p. 606.)

Appellant respectfully submits that this Court reached this conclusion by misconstruing the United States Supreme Court's holding in *Davis*. This Court held that because the lab analyst recorded her observations regarding the analysis of the DNA samples while she was performing the tasks necessary to making the analysis, her actions constituted the contemporaneous recordation of observable events and was akin to the statements found nontestimonial in *Davis*. (*People v. Geier, supra*, 41 Cal.4th at pp. 606-607.) *Davis* does not support this holding.

Ct. App. 2006) 144 P.3d 1052 [same], opinion adhered to on reconsideration, 149 P.3d 1251 (Or. Ct. App. 2006); *Deener v. State* (Tex. App. 2006) 214 S.W.3d 522 [same], rev. denied (Tex. Crim. 2007).) Other courts, however, have held that forensic laboratory reports prepared in contemplation of prosecution are not testimonial. (See *State v. Forte* (N.C. 2006) 629 S.E.2d 137 [DNA analysis]; *State v. Dedman* (N.M. 2004) 102 P.3d 628 [blood alcohol analysis]; *Pruitt v. State*, 954 So.2d 611 (Ala. Crim. App. 2006) [certificate of drug analysis]; *People v. Meekins*, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) [DNA analysis].)

In *Davis*, the high court found statements to be nontestimonial when they are made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. On the other hand, they are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Davis v. Washington, supra*, 126 S.Ct. at pp. 2273-2274.) Using this standard, the high court found nontestimonial a domestic disturbance victim's recorded statements during her call to a 911 emergency operator because she was speaking about events as they were actually happening, rather than describing past events; she was facing an ongoing emergency; and her call was plainly a call for help against a bona fide physical threat. Consequently, the circumstances of the victim's interrogation objectively indicated the primary purpose was to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events potentially relevant to a later criminal prosecution. (*Id.* at pp. 2276-2277.)

Extracting from *Davis* that it supports the proposition that any contemporaneous recordation of an event, even when done for the purpose of future criminal prosecution, is a nontestimonial statement indicates the extent to which this Court misapplied the Confrontation Clause. This Court's opinion removes the "primary purpose" component of the equation that the high court used in both *Crawford* and *Davis*. Pursuant to this

Court's reading of *Davis*, a police officer's report prepared at the crime scene would qualify as a nontestimonial statement as long as it was made contemporaneously with the officer's examination of the crime scene. Likewise, an officer's contemporaneous recordation of any statements made at the crime scene would qualify as nontestimonial. *Crawford* and *Davis* do not support this view.

In *Davis*, the primary purpose served by obtaining the witness's statement was to address an ongoing emergency. There is no ongoing emergency when a laboratory analyst is conducting tests to be used in a future prosecution. The primary purpose in that instance is to create evidence, which is a quintessentially testimonial function. Here, Hall's forensic analysis was conducted to establish a past event – the identity of the man who raped Latasha Whiteside – that is potentially relevant in a criminal prosecution. (See *Davis v. Washington, supra*, 126 S.Ct. at pp. 2273-2274.)

In *Crawford*, the Court observed that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly aware." (*Crawford v. Washington, supra*, 541 U.S. at p. 56, fn. 7.) Forensic reports like the ones at issue here fall within this class of evidence. It is a report prepared at the behest of law enforcement for use at a later trial and is offered in lieu of live testimony. (*People v. Geier, supra*, 41 Cal.4th at p. 605; *City of Las Vegas v. Walsh* (Nev. 2005) 124 P.3d 203, 208.)

Moreover, the reports are not admissible as business records because they were prepared in anticipation of litigation. (See *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227, 236 [holding that an autopsy report was admissible as a business record because it was not made in anticipation of litigation]; *United States v. Bahena-Cardenas* (9th Cir. 2005) 411 F.3d 1067, 1075 [holding "that [a] warrant of deportation is nontestimonial because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter"]; *Palmer v. Hoffman* (1943) 318 U.S. 109, 113 [63 S.Ct. 477, 87 L.Ed. 645] [holding that an accident report prepared by a railroad did not qualify as business record because it was prepared in anticipation of litigation]; *United States v. Blackburn* (7th Cir. 1993) 992 F.2d 666, 670 [holding that a report was inadmissible because it "was not kept in the course of a regularly conducted business activity, but rather was specially prepared at the behest of the FBI and with the knowledge that any information it supplied would be used in an ongoing criminal investigation"]; *United States v. Stone* (5th Cir. 1979) 604 F.2d 922, 925-26 [holding that an affidavit prepared by a United States Treasury Department official was inadmissible because it was prepared in anticipation of litigation].)

Here, Hall's forensic laboratory reports are testimonial because they were created solely for use in appellant's criminal prosecution and they present ex parte attestations aimed at helping to prove appellant's guilt. Cotton's testimony about the

substance of Hall's reports thus deprived appellant of the Sixth Amendment right of confrontation.

D. THE JURY'S CONSIDERATION OF THE DNA EVIDENCE LINKING APPELLANT TO THE COMMISSION OF THE ASSAULT ON WHITESIDE AND KILLING OF COLEMAN WARRANTS REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1 THROUGH 6 BECAUSE THE PROSECUTION WILL BE UNABLE TO PROVE BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DID NOT CONTRIBUTE TO THE JUDGMENT

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

The DNA evidence strongly and directly linked appellant to the assault on Whiteside and killing of Coleman. (RT 30:2186-2191, 2193, 2216, 2228, 2230.)

Cotton's testimony about the results of the DNA analysis performed by Hall was presented to the jury as persuasive evidence identifying appellant. The prosecutor argued to the jury during closing summation, in part:

> So they do DNA testing.
>
> Without trying to get into it, because it is like magic, it is phenomenal what science leads us to and I will not try to understand all the intricacies. I know that somebody, if they are Type A will leave Type A blood and Type B will leave Type B blood.
>
> But this defendant left his sperm. He left his sperm inside of her.
>
> Now it is amazing, but it is factual that you can then take this defendant's blood and you can compare it and analyze it. It is amazing. It really is. You can analyze it and make comparisons of all of these genetic markers and verify that that (sic) is the person that raped the person and you can check all these little areas. [¶]
>
> What happens when you run the sperm fraction?
>
> The sperm fraction from the person that raped her, from the rape kit taken the night that the rape occurred, every single allele, every one, right down the line, whether it is a one in 36 chance, every single time where he could have been dropped out he wasn't.
>
> Why? Because he did it.
>
> How do you know he did it? Because she told you he did it. She was the one who was raped by him. She knows he did it.
>
> The sperm and the DNA is simply corroborative to you so you understand and you can feel comfortable with the facts, the truth in this case, the truth as to who raped her. The truth as to who killed Charles Coleman. [RT 33:2849-2850.]

During closing rebuttal argument, the prosecutor reemphasized the strength of the DNA evidence, and pointed to the statistical probability of a match (1 in 17 million). (RT 33:2953-2955.)

Properly understood, the *Chapman* standard for constitutional error makes it very difficult for the prosecution to demonstrate that the error was harmless. To understand what the *Chapman* test truly means, it is instructive to review the facts in *Chapman*. Although the facts were not fully recited by the Court, they can be found in the antecedent opinion of this Court in *People v. Teale* (1965) 63 Cal.2d 178. Early in the morning on October 18, 1962, Chapman, Teale and Adcox were seen outside the bar where Adcox was employed as a bartender. Later that morning, Adcox' body was found in a remote area. He had been shot in the head three times. Adcox was killed with .22 caliber bullets. Chapman had purchased a .22 caliber weapon six days earlier. In close vicinity to the body, the police found a check which had been signed by Chapman. Blood found in the defendants' car was the same type as Adcox. Hairs matching those of Adcox were found in the car along with fibers from his shoes. The government also presented that Teale stated that he and Chapman had robbed and killed Adcox. Chapman gave a false statement to the police that she was in San Francisco at the time of the killing. The statement was proven false by the fact that Chapman had registered at a Woodland motel shortly after Adcox was killed. At trial, neither defendant testified. The prosecutor repeatedly argued to the jury the silence of the

defendants could be used against them. On this record, the Court found reversible error, stating that

> absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. [*Chapman v. California*, *supra*, 386 U.S. at p. 26.]

The reversal of the convictions when viewed in light of the strength of the government's case (which included a confession, evidence of opportunity to commit the crime, incriminating forensic evidence, and evidence of consciousness of guilt), leads to the inescapable conclusion the Supreme Court intended that it would be very difficult for the government to show that a federal constitutional error was harmless. *Chapman* contemplates an inquiry into the impact which the particular error has had on the instant jury. This is true regardless of the weight of the evidence because *Chapman*

> instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. ... Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. [*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.]

As the foregoing quotation reveals, the mere existence of strong government evidence does not necessarily mean the error is harmless. To the contrary, if the government has committed a fundamental constitutional error bearing a substantial

impact, then reversal is compelled. This is so since it is the government's burden to show the guilty verdict "was surely unattributable to the error." (*Id.* at p. 279; accord *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Accordingly, even when the evidence against a defendant is strong a particular error may still require reversal in light of its power to influence the jury. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892 [review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record but also "the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact"].) This sentiment also was held by Justice Harlan:

> Finally, if I were persuaded that the admission of the gun was 'harmless error,' I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was 'harmless' in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result. [*Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.).]

Chapman and it progeny thus require a close and careful assessment of the actual impact which an error has had on the jury's deliberative process. The appellate court must be ever mindful the government bears a heavy burden of persuasion in showing the error did not affect the jury. In this regard, the United States Supreme Court has made the difficulty of the government's task quite clear: the guilty verdict

must have been "*surely* unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 (emphasis added).)

Here, the prosecution will not be able to prove that Cotton's testimony about the substance of Hall's forensic laboratory reports was harmless beyond a reasonable doubt. Identity was the sole contested issue. (*Ante*, pp. 5-11, 19-21.) There were only two pieces of evidence linking appellant to the assault on Whiteside and killing of Coleman: the DNA evidence and Whiteside's eyewitness identification. (*Ante*, pp. 5-11.) Cotton gave extensive testimony about the DNA analysis performed by Hall and the results of that analysis (RT 30:2186-2230), concluding that in African-Americans the grouping of characteristics that is common to appellant and the sperm fraction of the vaginal swab from Whiteside would occur in about 1 in 17 million people. (RT 30:2193.) This was a powerful conclusion that corroborated Whiteside's identification of appellant in a way that may have enabled the jury to forgo a critical analysis of the eyewitness identification. Indeed, in closing summation the prosecutor urged the jury to use the DNA evidence to make them "feel comfortable with the facts [i.e., the eyewitness identification] ...." (RT 33:2850.) Accordingly, the prosecution will be unable to prove that the error – admission of Cotton's DNA testimony – was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.) Reversal of appellant's convictions in counts 1 through 6 is required.

/ / /

X.

APPELLANT WAS DENIED THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL, DURING OPENING STATEMENT, CONCEDED APPELLANT'S PRESENCE AT THE SCENE OF THE MURDER OF CHARLES COLEMAN AND RELATED OFFENSES, THEREBY REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS IN COUNTS 1 THROUGH 6

A. INTRODUCTION AND PROCEDURAL BACKGROUND

During opening statement to the jury during the guilt phase trial, defense counsel stated that the evidence would show that appellant was present at the scene of the homicide of Charles Coleman. (RT 26:1585.) Defense counsel stated during opening statement, in part:

> You will hear plenty from the defense, but a lot of it comes in cross-examination.
>
> The givens are this:
>
> Mr. Banks admitted to the police when he was questioned that he was present at the Coleman murder.
>
> He denied that he was the shooter.
>
> He denied raping Ms. Whiteside.
>
> But he did admit that he was present.
>
> At the end of this, you will get aider and abettor instructions – [.] [RT 26:1585 (emphasis added).]

The prosecutor immediately objected to counsel's opening statement and, outside the presence of the jury, explained that he did not intend to introduce into evidence the

statement to the police, and thus there was no basis for counsel's statement to the jury. (RT 26:1585-1586.) Defense counsel stated that the statement to the police was an admission, and she assumed the prosecutor would offer it into evidence during trial. (RT 26:1586.) The court cautioned defense counsel to move to another area of her opening statement. (RT 26:1587.)

The following day during presentation of the prosecution's case-in-chief, defense counsel moved for a mistrial based on her own incompetence. (RT 27:1662.)

> I thought about my opening statement and in truth had I known that the prosecution did not intend to use any of Mr. Banks'[] statements I would certainly not have told the jury that he has admitted that he was present.
>
> There will be a mistrial motion based on my incompetence. [RT 27:1662.]

Defense counsel argued that despite the fact that the jury is instructed that the statements of counsel are not evidence, when she made the concession during opening statement it was "something that they perked up their ears at." (RT 27:1664.)

The court denied the motion for mistrial, stating:

> I don't see any incompetence in your actions or even assuming that your actions fell below that of a competent advocate, which I don't find, but even assuming that were true this does not deprive the defendant of any meritorious defense that he may have available to the charges or any of the charges. [RT 27:1664-1665.]

Prior to closing summation, the court instructed the jury that statements made by counsel during the trial are not evidence. (RT 22:2759.) During closing argument,

defense counsel cautioned the jury that what was said during opening statement is not evidence in the case. (RT 33:2876.)

As explained below, where, as here, there is an abandonment of the defendant resulting in a breakdown of the adversarial process, reversal is required because prejudice is presumed under *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657]. Alternatively, defense counsel's concession of appellant's presence at the scene of the offenses charged in counts 1 through 6 prejudicially denied him the right to effective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].

B. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER *UNITED STATES V. CRONIC* (1984) 466 U.S. 648 WHEN DEFENSE COUNSEL ABANDONED HIM DURING HER OPENING STATEMENT BY CONCEDING HIS PRESENCE AT THE SCENE OF THE OFFENSES CHARGED IN COUNTS 1 THOUGH 6. COUNSEL'S CONCESSION, WHICH EFFECTIVELY CONCEDED HIS GUILT OF THOSE OFFENSES, REQUIRES PER SE REVERSAL OF THOSE CONVICTIONS

Under both the Sixth Amendment to the federal Constitution and Article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422 [discussing both state and federal constitutional rights].)

The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. To comply with

constitutional standards counsel must perform as would a "reasonably competent" attorney "acting as his diligent conscientious advocate."[14] (*United States v. De Coster* (D.C. Cir. 1973) 487 F.2d 1197, 1202; accord, *People v. Pope, supra,* 23 Cal.3d at p. 423.) Unless the defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 343 [100 S.Ct. 1708, 64 L.Ed.2d 333.)

Whether a defendant has been denied effective assistance of counsel is normally evaluated against the two-part test announced in *Strickland v. Washington, supra,* 466 U.S. 668. Defendant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness, and (2) counsel's deficient representation prejudiced defendant, i.e., there is a reasonable probability that the result would have been more favorable to defendant absent counsel's omission. (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.)[15]

---

[14] To meet this standard counsel should undertake only those actions that a reasonably competent attorney would undertake and before counsel undertakes to act at all he must make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (See *In re Hall* (1981) 30 Cal.3d 408, 426; *People v. Frierson* (1979) 25 Cal.3d 142, 166.) It is constitutionally required that counsel make "all significant decisions in the exercise of reasonable professional judgment." (*Strickland v. Washington, supra,* 466 U.S. at pp. 690-691.)

[15] This standard has been described as "a significant, but something less than 50 percent, likelihood of a more favorable ruling." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48.)

In *United States v. Cronic*, *supra*, 466 U.S. 648, however, decided on the same day as *Strickland*, the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel. (*Id.* at p. 654.) The Court held that a claim of ineffective assistance of counsel may be made without any showing of prejudice where there has been an actual breakdown in the adversary process at trial. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659.)

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable. [*Id.* at p. 659.]

This Court has affirmed this long-standing principle of presumed prejudice:

> We recognize that in some cases ineffective assistance must be presumed "without inquiry into the actual conduct of the trial" because "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small" that the cost of litigating the issue is unjustified. [*People v. Bonin* (1989) 47 Cal.3d 808, 844, quoting *United States v. Cronic*, *supra*, 466 U.S. at pp. 659-660; see *People v. Snow* (2003) 30 Cal.4th 43, 111-112.]

In *Cronic*, the high court explained that: "The right to the effective assistance of counsel is ... the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (*Id.* at pp. 656-657 [fns. omitted].) Thus, "[t]here are ... circumstances

that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. [¶] Most obvious, of course, is the complete denial of counsel. ... Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.* at pp. 658-659.)

The high court gave some examples of the type of constitutional error where prejudice will be presumed: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659, fn. 25.) After briefly describing *Davis v. Alaska* (1974) 415 U.S. 308 [39 L.Ed.2d 347, 94 S.Ct. 1105], in which counsel was prevented from cross-examining a crucial prosecution witness, the *Cronic* court held: "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." (*United States v. Cronic*, *supra*, 466 U.S. at p. 659, fn. 26 .) As explained below, defense counsel's concession of appellant's presence at the scene of the murder of Charles Coleman and related offenses (counts 1 through 6) was error at least of equal magnitude to where counsel is prevented from cross-examining a crucial prosecution witness or is absent from trial, because trial counsel in

the present case was affirmatively advocating a guilty verdict whereas in the other examples trial counsel merely failed to advocate the defendant's position.

Actual or constructive denial of the assistance of counsel at a critical stage of the proceedings is legally presumed to result in prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.) Opening statement to the jury is one such critical stage of the criminal proceedings. (See *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1075.)

Appellant recognizes that in *Florida v. Nixon* (2004) 543 U.S. 175 [125 S.Ct. 551, 160 L.Ed.2d 565] the high court held that in a capital trial defense counsel's concession that defendant was guilty of murder does not give rise to automatic prejudicial ineffective assistance of counsel under *Cronic* but, instead, the proper analysis is the *Strickland* standard of reasonableness. (*Id.* at pp. 190-191.) The high court stated:

> On the record thus far developed, Corin's concession of Nixon's guilt does not rank as a "fail[ure] to function in any meaningful sense as the Government's adversary." .... Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. [(*Id.* at p. 190-191 (citation and footnote omitted).]

There, counsel had informed the defendant of the strategy that counsel believed to be in the defendant's best interest, which was to admit guilt and focus on the penalty

phase of the trial. (*Id.* at pp. 181-182.) The high court held:

> Counsel therefore may reasonably decide to focus on the trial's penalty-phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. [*Id.* at p. 192.]

The instant case is distinguishable from *Florida v. Nixon, supra*, because there defense counsel made a strategic decision to concede guilt and focus on the penalty phase, whereas here trial defense counsel's decision to concede appellant's presence at the Coleman murder and related offenses charged in counts 1 through 6 was an uninformed blunder, not based on a strategic decision. Defense counsel explicitly stated that she would not have made the concession had she not incorrectly assumed that the prosecutor would introduce appellant's statement to the police. (RT 26:1586-1587, 27:1662.) Accordingly, the decision to concede appellant's presence at the Coleman murder cannot be justified as strategic. (See *Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 948 [choice cannot be justified as strategic where counsel failed to investigate]; *People v. Morris* (Ill. 2004) 807 N.E.2d 377, 406 [counsel's actions which were the product of a "mistaken belief" cannot be justified as a strategic choice].)

Defense counsel's concession that appellant was present "at the Coleman murder" (RT 26:1585) resulted in an abandonment of counsel's role as an advocate and, in fact, assisted the prosecution. The result was a breakdown in the adversarial process.

> The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." [*United States v. Cronic*, *supra*, 466 U.S. at p. 656, *quoting Anders v. California* (1967) 386 U.S. 738, 743 [87 S.Ct. 1396, 18 L.Ed.2d 493].]

Defense counsel's abandonment of his client at this critical stage of the proceedings denied appellant effective assistance of counsel, and is sufficient to give rise to a presumption of prejudice. (See *Rickman v. Bell* (6th Cir. 1997) 131 F.3d 1150, 1152-1154 [prejudice presumed because defense counsel presented the most damaging evidence in the case]; *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1074 [prejudicial per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute during closing arguments]; *State v. Carter* (Kan. 2000) 14 P.3d 1138, 1141-1143 [counsel ineffective in murder case for conceding defendant's involvement despite defendant's protestations of innocence; counsel was attempting, in light of strong state evidence, to show that defendant was guilty of felony murder in the course of armed robbery but not premeditated murder; while this may have been strategy, defense counsel betrayed the defendant by overriding his plea of not guilty; counsel abandoned his client, which required the presumption of prejudice under *Cronic*]; *State v. Harrington* (N.J. 1998) 708 A.2d 731, 735 [counsel ineffective in murder case charged as purposeful murder and, alternatively, felony murder for conceding the defendant's guilt of armed robbery]; *Jones v. State* (Nev. 1994) 877 P.2d 1052, 1054 [trial counsel found ineffective during direct appeal for admitting in closing argument that defendant was guilty of second

degree murder where defendant had testified he did not kill victim and did not consent to trial counsel's admission of guilt]; *People v. Woods* (Ill. App. Ct. 1986) 502 N.E.2d 1103, 1107 [counsel ineffective in burglary case for conceding in closing argument that defendants were guilty of theft which contradicted their theory of innocence which had been maintained throughout trial; prejudice presumed].)

Without the requisite adversarial testing, there can be no confidence in the adversary system to provide just results. Appellant was denied his constitutional right to effective assistance of counsel. Defense counsel's concession that appellant was present at the scene of the Coleman murder and related offenses (counts 1 through 6) gives rise to a presumption of prejudice. Reversal is required.

C. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STANDARD ANNOUNCED IN *STRICKLAND V. WASHINGTON* (1984) 466 U.S. 668 BECAUSE A REASONABLE PROBABILITY EXISTS THAT DEFENSE COUNSEL'S DEFICIENT REPRESENTATION OF APPELLANT CAUSED AN ERRONEOUS RESULT

The trial court erred in failing to grant a mistrial based on ineffective assistance of counsel because even if defense counsel's performance is measured under the prejudice component of *Strickland*, there is only one inescapable conclusion: appellant was severely prejudiced by counsel's concession that appellant was present "at the Coleman murder" (RT 26:1585) and related offenses (counts 1 through 6).

To prevail on a claim of ineffective assistance of counsel, appellant must show "counsel's representation fell below an objective standard of reasonableness," and "the

deficient performance prejudiced the defense." (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-688.) Further, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Id.* at p. 697.)

"Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Sanchez* (1995) 12 Cal.4th 1, 41.) The totality of counsel's deficient representation must be considered to determine whether the evidence sufficiently undermines confidence in the outcome. (*Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 637.)

Defense counsel's concession that appellant was present at the murder of Coleman substantially lessened the prosecution's burden of proof on the contested issue of the identity of the person that killed Coleman and raped Whiteside. The prosecution presented evidence that a gunman and one or two accomplices were present at the Coleman murder and related offenses charged in counts 1 through 6. (*Ante*, pp. 5-11.) The only eyewitness to the events was Latasha Whiteside. (*Ante*, pp. 5-10.) Although she identified appellant as the gunman, the defense impeached the accuracy of the identification by evidence of the stressful nature of the events, inconsistencies in the description of the gunman, and the fact that the gunman and the accomplices were of

the same race (*ante*, pp. 6-8, 19-20), thereby giving rise to the possibility of mistaken identification. Moreover, although the prosecution presented DNA evidence showing that appellant could not be excluded as a donor of the DNA on the sperm fraction of the vaginal swabs taken from Whiteside (RT 30:2186-2191), the defense presented substantial evidence undermining the strength of the DNA evidence. (*Ante*, pp. 21-23.) Further, the DNA evidence was erroneously admitted. (*Ante*, § IX.)

Thus, there was evidence that would give rise to a reasonable inference that appellant did not commit the offenses charged in counts 1 through 6. The prosecution's burden of proof beyond a reasonable doubt means that a defendant is not required to put forward any theory of innocence, or to explain the incriminating evidence in order to be entitled to an acquittal. Accordingly, a juror can appropriately conclude that only incriminatory inferences "appear" to be reasonable, and yet also conclude that a conviction is unwarranted because there are insufficient incriminating inferences to establish guilt beyond a reasonable doubt. It was within the jury's province to find that the evidence was insufficient to prove beyond a reasonable doubt that appellant committed the murder of Coleman and the related offenses charged in counts 1 through 6.

The very essence of our adversary system of criminal justice demands partisan advocacy to ensure just results. (*Penson v. Ohio* (1988) 488 U.S. 75, 81 [109 S.Ct. 346; 102 L.Ed.2d 300; *Strickland v. Washington*, *supra*, 466 U.S. at p. 685 ["The Sixth

Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."]; *Herring v. New York* (1975) 422 U.S. 853, 862 [95 S.Ct. 2550; 45 L.Ed.2d 593 ["The very premise of our adversary system ... is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free."].)

Nor did the court cure the prejudice by its instruction to the jury that statements made by counsel during the trial are not evidence. (RT 22:2759.) The court did not immediately admonish the jury to disregard defense counsel's concession, nor would have such an admonition cured the harm. (See *People v. Coleman* (1992) 9 Cal.App.4th 493, 496-497 [prejudice to appellant from counsel's misstatement of facts during opening statement was not cured by admonition to the jury to disregard the opening statement].)

Without the requisite adversarial testing, there can be no confidence in the adversary system to provide just results. Appellant was denied his constitutional right to effective assistance of counsel. Counts 1 through 6 should be reversed.

/ / /

XI.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE ALLEGATION THAT THE MURDER OF CHARLES FOSTER WAS COMMITTED DURING THE COMMISSION OF AN ATTEMPTED ROBBERY, THEREBY REQUIRING THAT THE TRUE FINDING BE SET ASIDE AS A DENIAL OF DUE PROCESS (CAL. CONST., ART. 1, § 15; U.S. CONST., 5TH, 8TH, & 14TH AMENDS.)

A. INTRODUCTION

The jury found true the special circumstance allegation that the murder of Charles Foster was committed during the commission of an attempted robbery. (RT 34:2998-2999.) As explained below, however, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain the finding that Foster was murdered during the commission of an attempted robbery.

B. STANDARD OF REVIEW

The standard of review in assessing a claim of insufficiency of the evidence, the heightened verdict reliability requirement in a capital trial, and the California and federal constitutional violations that result from a conviction unsupported by the requisite evidence at trial, are set forth in section IV.B, *ante*, and incorporated herein.

C. THERE IS INSUFFICIENT EVIDENCE, WHICH IS REASONABLE, CREDIBLE, AND OF SOLID VALUE, TO SUSTAIN THE FINDING THAT FOSTER WAS MURDERED DURING THE COMMISSION OF AN ATTEMPTED ROBBERY

The felony-murder robbery special circumstance consists of the following elements: (1) The murder was committed while the defendant was engaged in the

commission or attempted commission of a robbery or during the immediate flight after the commission or commission of a robbery by the defendant or to which the defendant was an accomplice; (2) the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. (*People v. Kimble* (1988) 44 Cal.3d 480, 501; CALJIC No. 8.81.17.)

The true finding of a felony-murder attempted robbery special circumstance requires that the elements of attempted robbery be proved beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 105-106.) "[I]f the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' ... and commits the murder to advance that independent purpose, the special circumstance is present." (*People v. Navarette* (2003) 30 Cal.4th 458, 505.) As explained in section IV, *ante*, the evidence is insufficient as a matter of law to sustain a finding of an attempted robbery. Accordingly, the felony-murder attempted robbery special circumstance must be reversed.

Moreover, the felony-murder attempted robbery special circumstance is not adequately established if the attempted robbery was merely incidental to the commission of the murder or was to facilitate escape therefrom. (*People v. Green* (1980) 27 Cal.3d 1, 59, overruled on another point by *People v. Martinez* (1999) 20 Cal.4th 225, 235-238.) This determination involves proof of the defendant's intent. A

murder is not committed during an attempted robbery within the meaning of the statute unless the accused has "killed in cold blood in order to advance an independent felonious purpose ...." (*People v. Green*, *supra*, 27 Cal.3d at p. 61.) "A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder ... because its sole object is to facilitate or conceal the primary crime.'" (*People v. Thompson* (1980) 27 Cal.3d 303, 322, citing *People v. Green*, *supra*, 27 Cal.3d at p. 61.)

Here, there is no evidence that the gunman either asked Foster for any money or, once he shot Foster, that he reached into Foster's pockets to look for Foster's wallet. (RT 30:2327, 30:2346-2347, 31:2425.) Nor is there any evidence that the gunman killed merely to effect an escape from an attempted robbery. The issue is whether the gunman killed to advance an independent felonious purpose of attempting to steal Foster's property or, instead, whether any intended theft was "merely incidental to achieving the murder." (*People v. Navarette, supra*, 30 Cal.4th at p. 505.) Viewing the record as a whole in the light most favorable to the jury's verdicts, it is impossible to conclude, absent speculation as to the gunman's intent, that the prosecution sustained its burden of proof on this issue. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not

evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.)

Moreover, this is not a case where the special circumstance finding can be upheld on the basis that the defendant took substantial property. (See *People v. Hughes, supra*, 27 Cal.4th at p. 357 [when a defendant "kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery."].) Here, appellant took no property.

Nor is this a case where the special circumstance finding can be upheld on the basis that the defendant shot the victim and then searched the victim for property to steal. (See *Ibid.* [Even "'[i]f a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money.'"].)

Accordingly, substantial evidence does not support the true finding on the felony-murder attempted robbery special circumstance, thereby requiring that it be set aside.

/ / /

XII.

THE TRIAL COURT'S INSTRUCTIONS TO THE GUILT-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1 – THE DISAPPROVED "JUROR SNITCH" INSTRUCTION – VIOLATED APPELLANT'S RIGHTS TO JURY TRIAL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

The trial court instructed the jury in the language of CALJIC No. 17.41.1,[16] the disapproved juror snitch instruction requiring jurors to report each other for perceived misconduct during deliberations. (RT 33:2823-2824.) The trial court admonished the jurors as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation. [RT 33:2823-2824.]

The United States Supreme Court has not rendered a decision on the constitutionality of CALJIC No. 17.41.1 or a similar jury instruction requiring jurors to report misconduct. This Court reviewed CALJIC No. 17.41.1 and found that it did not violate a defendant's Sixth Amendment right to a jury trial because the constitutional

---

[16] At the time of appellant's trial, CALJIC NO. 17.41.1 provided: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

right does not require "absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct," or "constitute[] an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*People v. Engelman* (2002) 28 Cal.4th 436, 443.) Nonetheless, this Court exercised its supervisory power and directed that CALJIC No. 17.41.1 not be given in future trials due to the potential to lead members of the jury to "shed the secrecy of deliberations" and to "draw the court unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations." (*Id.* at p. 447.)

The trial court's instruction to the jury during voir dire deprived appellant of his rights to a jury trial and due process by chilling jury deliberations because the instruction invades the secrecy of jury deliberations and chills free and open debate, especially by jurors who hold a minority view. Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (*United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.) The instruction here pointedly told each juror that s/he is not guaranteed privacy or secrecy. At any time, the deliberations might be interrupted and a fellow juror may repeat his/her words to the judge and allege some impropriety, real or imagined, which the fellow juror believed occurred in the jury room. The jurors are not only threatened with exposure, they are also left to wonder what consequences will follow exposure. This uncertainty will likely cause jurors to forego independence of mind, conceal concerns they may have about the

state's evidence, and hurry toward consensus. In short, the instruction assures the jurors that their words might be used against them, and that candor in the jury room might be punished. The instruction, therefore, chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp.* (2nd Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.)

United States v. Thomas (2nd Cir. 1997) 116 F.3d 606 is an exegesis on the importance of jury secrecy and freedom of speech in the jury room. There, a juror, unsolicited by any instruction, told the judge that another juror had expressed an intention to disregard the law read to them. The judge interviewed the jurors singly in chambers, and then discharged the accused juror. The defendants were convicted. On appeal, they complained about the discharge of the juror, and the court reversed the convictions. Although the court agreed that a juror who intends to disregard or "nullify" applicable law is subject to dismissal, it decided that the possibility of jury nullification is a "lesser evil" than "broad-ranging judicial inquisitions into the thought processes of jurors." (*Id.* at p. 623.) The *Thomas* court stated the general rule that:

> No one - including the judge presiding at a trial - has a "right to know" how a jury, or any individual juror has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. [*Id.* at p. 618.]

Moreover, "Juror privacy is a prerequisite of free debate, without which the decision-making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 (citation omitted).) Free jury discourse is so important that, as a matter of policy, post-verdict inquiry into the deliberative process is highly disfavored. (See, e.g., *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747.)

The Supreme Court of the United States has recognized that the jury retains the power to render a not-guilty verdict even where acquittal is inconsistent with the law given by the court. (See *Dunn v. United States* (1932) 284 U.S. 390, 393-394.) The court also noted that when a jury renders a verdict at odds with what the court would have rendered, it is usually because the jurors are serving the very purpose for which they were called to serve. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 157 [88 S.Ct. 1444, 20 L.Ed.2d 491].) Indeed, "the jury's fundamental function is not only to guard against official departures from the rules of law, but on proper occasions themselves to depart from unjust rules or their application." (Kadish & Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, p. 53 (1973).)

Accordingly, the chilling effect that the instruction necessarily had on jury deliberations – stifling free expression during the deliberative process – deprived appellant of his federal constitutional rights to jury trial and due process, thereby warranting reversal of his convictions.

/ / /

XIII.

THE TRIAL COURT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW, BY ITS REPEATED ERRONEOUS RULINGS AGAINST THE DEFENSE AND REMARKS DISPARAGING DEFENSE COUNSEL

Throughout this case, beginning well before trial and continuing through the second penalty phase, the trial court made repeated one-sided rulings and remarks directed against defense counsel and appellant, disparaging counsel and weakening the defense's ability to present evidence countering the charges against appellant.

When trial is by jury, a "fair trial in a fair tribunal" requires the judge to refrain from conduct that can prejudice the jury. "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) The judge's comments "must be accurate, temperate, nonargumentative, and scrupulously fair." (*Id.* at p. 1232.) It may not "create the impression that it is allying itself with the prosecution." (*Id.* at p. 1233.) "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.'" (*Id.* at p. 1237.) In *Sturm*, "the trial judge's conduct ... constituted misconduct" because "in the presence of the jury ... he ... conveyed the impression that he favored the prosecution." (*Id.* at p. 1238.)

It is not just the appearance of bias expressed in the presence of the jury that is a problem, however. A judge makes many rulings out of the presence of the jury, rulings

often deferred to if within the court's discretion. "Due Process clearly requires" that those rulings be made by "a judge with no actual bias against" the defendant (*Bracy v. Gramley* (1997) 520 U.S. 899, 905) – i.e., one who is "impartial and disinterested" (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [100 S.Ct. 1610, 64 L.Ed.2d 182]).[17]

"This requirement of neutrality ... safeguards [one of] the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations...." It is the cornerstone of the "guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law...." (*Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242.) "Without th[at] ... basic protection ..., a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.... Adjudication by [a] biased judge ... necessarily render[s] a trial fundamentally unfair." (*Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. U.S.* (1942) 315 U.S. 60, 71 [62 S.Ct. 457, 86 L.Ed. 680].) Defendants, consequently,

---

[17] Accord, *Rose v. Clark* (1986) 478 U.S. 570, 577 [106 S.Ct. 3101, 92 L.Ed.2d 460] ["The State of course must provide a trial before an impartial judge"]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1140 ["Under the due process clause of the federal Constitution, [a] defendant is entitled to an impartial trial judge"]; *Cooper v. Superior Court In and For Los Angeles County* (1961) 55 Cal.2d 291, 301 ["The judge's function as presiding officer is preeminently to act impartially"].)

> especially defendants facing death – have a right under the Due Process Clause to a ... judge who takes seriously his responsibility to conduct fair proceedings, a judge who looks out for the rights of even the most undeserving defendants. [*Bracy v. Schomig* (7th Cir. 2002) 286 F.3d 406, 419 (en banc).]

The judge has to rise to the level demanded by the Constitution no matter how the defendant acts. As will be discussed, the record shows that trial defense counsel was respectful to the judge at all times. However, even if it is "contemptuous conduct by a party or attorney that ... provoke[s] a trial judge", if the upshot is that "he cannot 'hold the balance nice, clear, and true between the state and the accused' [citation]", then he may not preside. (*Taylor v. Hayes* (1974) 418 U.S. 488, 501 [94 S.Ct. 2697, 41 L.Ed.2d 897] [reversing where judge became "embroiled in a running controversy with petitioner"].)

In the present case, throughout trial the judge displayed animosity toward appellant. In addition, the judge repeatedly disparaged defense counsel before the jury, selectively overruled defense objections, and made numerous rulings that favored the prosecution over the defense. These rulings include the errors described above (*ante*, §§ I, and VI - VIII) and the several additional erroneous matters identified below, including 1) the rejection of mental health issues affecting appellant, holding hearings outside of appellant's presence, and threats of cell extraction, 2) interruption of defense counsel's opening statement and admonishing the jury, and 3) accusing defense counsel of bad faith in questioning the prosecution's expert witness Dr. Robin Cotton.

A. REJECTION OF MENTAL HEALTH ISSUES AFFECTING APPELLANT, HOLDING HEARINGS OUTSIDE OF APPELLANT'S PRESENCE, AND THREATS OF CELL EXTRACTION

Beginning during pretrial proceedings, and continuing through the trial, the judge refused to accept that appellant suffered from serious mental illness, which affected his ability to attend court hearings and assist in his defense.

On February 24, 1998, trial defense counsel told the judge that appellant was heavily medicated and that she needed time to address the issue of appellant's medication. (RT 14:335.) Trial defense counsel stated:

> Mr. Banks is heavily medicated.
>
> He is now in the mental health ward and they unstrapped him to come to court today. So I would need –
>
> I would like two weeks to find out exactly what the situation is with this medication. [RT 14:335.]

At the next session on March 18, 1998, and despite substantial evidence of appellant's mental illness and the fact that he was having an adverse reaction to the prescribed medication, the judge held a hearing in appellant's absence. (RT 14:340-350.) The judge stated that appellant was not present because he refused to leave his cell, and that the sheriff's deputies were willing to extract him from his cell and bring him to court. (RT 14:340-341.) Defense counsel informed the judge that appellant 1) had a long history of mental health problems, 2) was "heavily medicated", and 3) did not feel well enough that day to concentrate, or even to walk, due to the medication he

was being given. (RT 14:340-341.) The judge also was informed that appellant was in the mental ward, he had made suicide attempts, and that he was afraid that in his current condition he might hurt someone. (RT 14:342-343.)

Despite substantial evidence that appellant was suffering from serious mental health issues, the judge indicated a desire to continue the proceedings without appellant, stating, "There is no rule that I know of that says that a person has to be present during all the pretrial proceedings in a death case ...." (RT 14-344.) The judge decided against a forcible cell extraction, but warned trial defense counsel:

The Court: [¶] I will give him a pass today.
When you speak to your client next time, tell him this:
That he can't set the pace over here. And, really, if necessary, I hate to put a bunch of deputies there because they get injured and so forth. Likewise, your client may be injured --

Ms. Wilensky: I asked the court that at the beginning because I have sized up the situation and I know that we are best avoiding it.

The Court: There are lots of ways to get him over here and one is to use the taser through the bars and knock him out and put him in a straight jacket and get him here. That is probably the best way to do it because if they have to go in five or six deputies and everybody is in a cramped area trying to get your client out, somebody will get hurt and it might as well be your client and not the deputies. I have seen extreme cases where they drugged them through their food to get them out. The simplest thing is for him to get here to court so that I can speak to him and, if necessary, accept his waiver [of the right of personal presence] for certain purposes. [RT 14:348-349.]

The judge did not end the hearing, however, but instead issued tentative rulings on a number of significant defense motions, including a motion to dismiss the

indictment – all outside appellant's presence and without a personal waiver from him. (RT 14:349-383.)

At the hearing on April 21, 1998, the judge was informed that appellant was absent because he overdosed and was in the hospital, having attempted suicide three times. (RT 17:454-455.) Defense counsel moved for a continuance of the May 13th trial date, citing appellant's condition, but the request was promptly denied. (RT 17:454-455.)

On May 4, 1998, appellant was absent from court after another suicide attempt, having "disintegrated very rapidly." (RT 18:504.) Appellant indicated at the previous court hearing, however, that he desired to be present at all hearings in his case. (RT 18:505-506.) The judge then heard from the bailiff about the situation at lockup, and commented, "Who else is going to think there is a conspiracy going on with Mr. Banks?" (RT 18:505.)

On August 3, 1998, appellant was absent because "they had to pump his stomach last night" and thus he is "a medical miss[-]out". (RT 22:601.) The judge commented:

> He seems to want to come to court when he wants to come to court and when he does not, he doesn't. He either injures himself, although none of his injuries are life threatening. He comes sometimes and other times he does not. The sad fact is that we have to try the case at some point. I don't know how we can keep jurors on call forever. We have 200 jurors coming in on Wednesday or 150 on Wednesday. So we are going to do something with them. I don't think it is appropriate to send a pack of jurors away and say: [¶]

> Typically a guy cannot waive his presence. Typically cannot do so. But -- nor I suspect can a defendant stall things forever. [RT 22:606-607.]

Trial defense counsel responded:

> Your honor, I am concerned about the court's characterization. Mr. Banks is mentally ill. He is brain damaged and mentally ill and he doesn't understand and work on the same level that we do and most of the other defendants do. He has had a long, long history of suicide attempts, not just since this case has happened. He has had a long history of doing damage to himself. [RT 22:607.]

The judge responded, "Apparently unsuccessfully." (RT 22:607.) The judge then stated that he would not characterize appellant's conduct as "suicide attempts" because "[i]f a guy has been trying to kill himself his entire life, one would suspect that one would succeed." (RT 22:608.) The judge appeared entirely unconcerned with appellant's mental health issues, and how those issues were adversely affecting his ability to proceed with trial and give meaningful assistance to counsel.

The following day, August 4, 1998, appellant was in the courthouse in lockup. He was unable to come to court, however, because his jaw was locking up (apparently a side effect of psychotropic medication). (RT 22:617.) Paramedics were called to assist. (RT 22:617.) The judge insisted, however, on going forward with the trial, despite the fact that the judge recognized that "the defendant may have some problems that are beyond the ability of this court to diagnose ...." (RT 22:618.) Trial defense counsel then explicitly stated that she was "concerned that the court has this [negative] attitude about Mr. Banks." (RT 22:620.) Counsel explained:

> Mr. Banks has been in the mental health division of the county jail almost his entire incarceration. The jail seems to think something is wrong with him. They medicate him. In fact, I am amazed that they medicate him and they don't watch if he takes the pills so he can try the suicide attempts. It seems that that can be prevented at the jail. Somebody needs to watch that he swallows his pills. [RT 22:620.]

The judge then asserted that appellant was competent to stand trial, and asked counsel what she would suggest. (RT 22:620-621.) Counsel suggested that since "we know that he is organically brain damaged, there is medication that may be able to help him get through each day better." (RT 22:621.) Counsel also suggested a new evaluation by the doctors at the University of Southern California. (RT 22:622.) The court rejected these suggestions, stating that "[t]here is not a thing wrong with this fellow when he is in court." (RT 22:622.) The judge ended the hearing by stating that they would proceed with voir dire the following day, even in appellant's absence. (RT 22:625-626.)

On the trial date, August 5, 1998, appellant was not present in court, having become ill. (RT 23:627.) The judge dismissively characterized appellant's condition as "apparently what Mr. Banks is claiming." (RT 23:627.) The judge stated that appellant had refused to come to court. (RT 23:628-629.) The judge proceeded with trial in appellant's absence, made a finding that he had voluntarily absented himself from court, and ruled that the handing out of questionnaires and questioning of prospective jurors for hardship could be done outside of appellant's presence. (RT 23:645-647.)

Later that day, when appellant was present in court, the judge lectured appellant and threatened forcible cell extraction. (RT 23:652-654.) Appellant explained, "It wasn't that I was refusing to come to court this morning. I did not refuse. What it is is (sic) that I am still waiting for this medication to get out of my system. When I woke up I was real dizzy. I didn't tell them that I didn't want to come to court." (RT 23:656.) The judge refused the explanation, stating, "I have a hard time believing that." (RT 23:656.) Later, the judge told appellant that if he did not come to court, then the prospective jurors would be told that any delay in the proceedings is due to appellant's "recalcitrance" and refusal to attend. (RT 23:749.)

On August 12, 1998, the proceedings began approximately one hour late, with appellant present at 10:30 a.m. (RT 26:1452.) In the presence of the prospective alternate jurors, the judge apologized for the delay, stating, "There was a problem obtaining the presence of the defendant in a timely fashion this morning. He is now here and we can go forward." (RT 26:1452.)

B. INTERRUPTION OF DEFENSE OPENING STATEMENT

At the beginning of the trial, the court improperly interrupted defense counsel's opening statement and admonished the jury. During defense counsel's opening statement at guilt phase, without waiting for an objection from the prosecutor, the trial court interrupted her and admonished that "this is not closing argument". (RT 26:1591.)

The interruption and admonition were inappropriate because defense counsel was properly explaining to the jurors that the homicides were three separate cases and that the jurors needed to decide them separately. (RT 26:1591.)

C. ACCUSING DEFENSE COUNSEL OF BAD FAITH IN QUESTIONING AN EXPERT WITNESS

The trial court also made erroneous accusations that defense counsel was questioning a prosecution expert witness in bad faith and based on facts not in evidence.

During her cross-examination of the prosecution's DNA expert, Dr. Robin Cotton, defense counsel established that two reports had been prepared by Cellmark analyst Glen Hall, one on June 2, 1997 and one on June 30, 1997. (RT 30:2228, 2230.) In the first report, Hall, calculating the probability of a random match between petitioner's DNA profile and that found on the male fraction of the DNA samples obtained in the rape examination of Latasha Whiteside, arrived at a random match probability of 1 in 8,000, which was based on information for five loci, DQA1, LDLR, GYPA, HBGG and D7S8. (RT 30:2228.) In the second report, Hall added results from additional loci (CSF, TPOX, THO1 and XY), which resulted in a random match probability of 1 in 17 million. (RT 30:2216, 2230.)

The judge admonished defense counsel about her cross-examination of Cotton, suggesting that defense counsel questioned Cotton in bad faith about Hall's reports. After establishing that two reports were written by Hall, the prosecutor stipulated that

the second report was generated at the request of the prosecution for additional testing. (RT 30:2229.) The stipulation was accepted by the judge. (RT 30:2229.) Defense counsel then questioned Cotton, in part, as follows:

Q: You used the same database in - did Glen Hall use the same database, if you know, for the first group of testing that he did?

A: Yes, he did.

Q: Okay. When he continued on with testing did he do more DQA1 and the LDLR?

A: No. No.

Q: What was the additional things he did for the June 30th report?

A: He did CSF, TPOX, THO1 and X Y.

Q: So basically under the first set of testing, the prosecution indicated they didn't like the statistics. [RT 30:2230.]

The prosecutor objected "to that characterization." (RT 30:2230.) Instead of succinctly ruling on the objection, the judge commented as follows, in the presence of the jury:

> Look, this is so objectionable. What the lady said was the following: They tested several loci and stopped, were asked to do more and said fine and kept going and kept up with their results. So, please, counsel, I assume you understand and please do not ask questions that misstate the evidence in the case or that assume facts not shown by the evidence in the case. Please don't do that. [RT 30:2230-2231.]

The judge's comment implicitly affirmed the testimony of Dr. Cotton, while at the same time denigrating trial defense counsel for having misstated the evidence.

Outside the presence of the jury, the judge further pursued the matter as an issue of defense counsel's violation of ethical duties, as follows:

> We are outside the presence of the jury.
>
> Counsel, let me ask you a question about one of the questions that you asked the witness.
>
> I am curious as to whether your question was prompted by a misunderstanding or by something else.
>
> I am quite curious.
>
> You asked the last witness at one point whether additional testing was carried out based on the fact that the prosecution was unhappy with the result. [RT 30:2234-2235.]

Trial counsel explained that when she received the first report, it appeared to be a final report, wherein analyst Hall arrived at a statistical probability of 1 in 8,000. (RT 30:2235-2236.) The report was in the same format at the second report, wherein analyst Hall arrived at a statistical probability of 1 in 17 million. (RT 30:2236.) The judge interrupted counsel, stating:

> I am talking about today, now, asking questions of a witness in front of a jury and I am concerned about it.
>
> There is a lot of leeway that counsel have, but intentionally misleading a jury is not among them. So you tended to imply by your question that what had happened was a particular result was obtained, scrapped, a retest took place and now there is a greatly heightened probability against your client at the request of the People. [RT 30:2236.]

Defense counsel explained that she asked the question in good faith, which was based on a belief that the prosecution did not like the statistical probability results of

the first test, and so did additional testing. (RT 30:2237.) The judge responded that the implication of the question was that "they did it [i.e., the test] wrong the first time and then had to scrap it." (RT 30:2237.) The judge was incorrect; there was no such implication in trial defense counsel's questions of Dr. Cotton. The questions simply asked about the motivation behind doing additional testing that resulted in a statistical probability of 1 in 17 million. (RT 30:2230.)

D. REVERSAL OF APPELLANT'S CONVICTIONS IS REQUIRED

The above actions by the trial court, along with the other rulings against the defense described in the previous sections of this brief, above, require reversal of appellant's convictions.

"[S]ome constitutional errors require reversal without regard to the evidence in the particular case." One of those errors is "adjudication by [a] biased judge", which "necessarily render[s] a trial fundamentally unfair. The State, of course, must provide a trial before an impartial judge, [citation], with counsel to help the accused defend against the State's charge, [citation].... Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, [citation], and no criminal punishment [imposed following such a trial] may be regarded as fundamentally fair. Harmless-error analysis ... presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." (*Rose v. Clark, supra*, 478 U.S. at pp. 577-578.)

Appellant "did not get to present evidence and argument before an impartial judge" at the guilt phase. The judgment must be reversed in its entirety without the need for harmless-error analysis. (*Ibid.*; accord, *Sims v. Rowland* (9th Cir. 2005) 414 F.3d 1148, 1153 ["trial before a biased judge is an archetypal example of a constitutional error that necessarily renders a trial fundamentally unfair and, for that reason, is not amenable to harmless error analysis"].)

Harmless error analysis would yield the same result. This brief argues that the rulings were plainly unconstitutional and an abuse of discretion and require reversal. At the very least, however, the exercise of discretion was subject to the "erroneous or distorted conception of the facts or the law ...." (*Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242.) It is very likely that in the absence of the appearance of bias – as shown by the judge's repeated erroneous rulings against the defense and remarks disparaging defense counsel – the errors complained of in this brief would not have occurred. It is likely, for instance, that the trial court:

– would have sustained the defense *Batson/Wheeler* objection to the prosecutor's peremptory challenges against three Black prospective jurors;

– would not have permitted the prosecution to admit sympathetic evidence concerning Whiteside's friendship with Coleman and an unrelated rape of Whiteside;

– would not have admitted Officer Martin Martinez's testimony that recounted Latasha Whiteside's out-of-court statements, which included double hearsay as to what Charles Coleman told Whiteside;

– would not have accused defense counsel – in the presence of the jury – of questioning prosecution witness Dr. Robin Cotton in bad faith and based on facts not in evidence; and,

– would not have failed to *sua sponte* instruct the jury in connection with count 8 (Charles Foster) on express-malice second degree murder, a lesser included offense of first degree murder.

The judge's appearance of bias was conveyed to the jurors directly. By denigrating trial defense counsel, and repeatedly ruling on objections in ways that favored the prosecution, the judge "in the presence of the jury ... conveyed the impression that he favored the prosecution ...." (*People v. Sturm, supra*, 37 Cal.4th at p. 1238.)

The errors deprived appellant of his rights to a fair trial and due process of law. (U.S. Const., Amends. VI and XIV; Cal. Const. Art. I, sections 7, 15, 16.) "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors

"denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"].)

Even with the judge's actions, the jury acquitted appellant of one of the homicides charged against him, the murder of Michael Haney (Count 7). Given the closeness of the guilt evidence, and for the specific reasons set out in the arguments that address the foregoing rulings and omissions, it is reasonably possible and reasonably probable that, without them, or one or more of them, the jury would not have convicted appellant of one or both of the remaining homicides. At the very least, it is reasonably probable that the cumulative effect of the judge's conduct adversely affected the guilt verdict. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244; see generally, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15.) Appellant's convictions must therefore be reversed.

///

XIV.

THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS IN THIS CASE REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

Appellant's convictions should be reversed due to the cumulative prejudice caused by numerous errors, which operated together to deny appellant the due process right to a fundamentally fair trial.

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297] [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361] [*Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.15 ["{T}he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness ...."].)

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal is appropriate when "the sheer number of ... legal

errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845; see also *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

In a close case which turns on the credibility of witnesses, as here, anything which tends to discredit the defense witnesses in the eyes of the jury or to bolster the story told by the prosecution witness, "requires close scrutiny when determining the prejudicial nature of any error." (*People v. Briggs* (1962) 58 Cal.2d 385, 404; see also *United States v. Carroll* (6th Cir. 1994) 26 F.3d 1380, 1384 [curative instruction not sufficient where conflicting testimony was virtually the only evidence]; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806 [improper vouching for a key witness' credibility by the prosecutor in a close case]; *People v. Taylor, supra,* 180 Cal.App.3d at p. 626 [error requires reversal in "close case where credibility was the key issue"].)

> In a close case ... any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. [*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.]

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) "Where a trial court commits an evidentiary error, the error is not necessarily rendered harmless by the fact there was other, cumulative evidence properly

admitted." (*Parle v. Runnels, supra*, 505 F.3d at p. 928; see (1973), *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [69 S.Ct. 716, 93 L.Ed. 790] [holding that, in a close case, erroneously admitted evidence – even if cumulative of other evidence – can "tip[ ] the scales" against the defendant]; *Hawkins v. United States* (1954) 358 U.S. 74, 80 [concluding that erroneously admitted evidence, "though in part cumulative," may have "tip[ped] the scales against petitioner on the close and vital issue of his [state of mind]"].)

Here, there is a substantial record of serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284. These rulings include the errors separately identified in Arguments I - XII and the numerous rulings by the trial court against the defense described in Argument XIII, including 1) the court's interruption of defense counsel's opening statement and admonition to the jury, 2) erroneous evidentiary rulings concerning Whiteside's friendship with Coleman and an unrelated rape of Whiteside, and 3) erroneous accusations that defense counsel was questioning prosecution witness Robin Cotton in bad faith and based on facts not in evidence.

In view of the substantial record of the cumulative errors described above, the prosecution cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [the combination and cumulative impact of the guilt phase errors in this

case] might have contributed to [appellant's] conviction." (*Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant's convictions should be reversed.

/ / /

PENALTY PHASE AND SENTENCING ISSUES

XV.

APPELLANT'S REMOVAL FROM THE COURTROOM DURING THE ENTIRE PENALTY PHASE RETRIAL REQUIRES REVERSAL OF THE VERDICT OF DEATH FOR A VIOLATION OF HIS STATE STATUTORY RIGHTS, AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, JURY TRIAL, TO PRESENT A DEFENSE, TO CONFRONTATION, TO A PENALTY DETERMINATION BASED ON ALL AVAILABLE MITIGATING EVIDENCE, AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 5TH, 6TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant was removed from the courtroom for disruptive behavior for the entire penalty phase retrial. As explained below, the removal order was an abuse of discretion, and it prejudicially deprived appellant of the statutory and constitutional rights to be present at trial, to assist counsel, to present a defense and evidence in mitigation, to confront witnesses, to receive a fair trial, and to a reliable penalty determination.

Appellant was well-behaved for the entire guilt and first penalty phase trials, apparently having been medicated throughout. Appellant had no prior incident of misbehavior in the courtroom.[18] Then, during the beginning of the penalty phase retrial

---

[18] Appellant recognizes that the record reflects that on March 18, 1998, appellant refused to leave his cell to come to court because he was ill. (RT 14:340-341.) This is not courtroom misbehavior. However, during colloquy with the court, trial defense counsel requested that appellant *not* be physically extracted from his cell, stating that the previous time the court was in session he "started to act out." (RT 14:341.) Defense counsel's statement, however, is not

when appellant apparently was not medicated, he unexpectedly threw fecal matter in the direction of the trial judge as the prospective jurors were exiting the courtroom. (RT 43:4491, 4497.) Appellant was removed from the courtroom. (RT 43:4491-4492.) Thereafter, the trial court never once engaged appellant in any dialogue relating to whether, and/or under what conditions, he would be permitted back inside the courtroom for his penalty trial.

Appellant was excluded from the entire penalty phase retrial, except for a brief moment on the day following his initial removal, when the judge ordered him brought into the courtroom, outside the presence of the jury, to inquire whether he desired to hear the proceedings from inside lockup. (RT 44:4719-4721.) Appellant spat at the judge; and defense counsel explained that he was still not receiving medication and was frustrated that the court impeded his ability to communicate with his defense counsel. (RT 44:4719-4721.) The judge had already ruled that appellant would be removed for the duration of the trial, and the only issue addressed during this brief courtroom appearance was whether a speaker would be placed in lockup so appellant could hear the proceedings. (RT 44:4719-4721.)

B. PROCEDURAL BACKGROUND

On March 9, 1999, as the prospective jurors from the first panel were exiting the courtroom following a recess in voir dire, appellant stated, "You're evil. Evil.

---

supported by the record. (RT 14:334-339.)

Demon." (RT 43:4491.) Appellant was taken into lockup. (RT 43:4491.) The court immediately called for the prospective jurors to stay in the courtroom and retake their seats. (RT 43:4491.) Once seated, and outside appellant's presence, the court admonished the prospective jurors to disregard what occurred. (RT 43:4491-4492.) After each of the prospective jurors affirmed they could do this, the jury was excused and exited the courtroom. (RT 43:4492-4493.)

The court then stated that appellant had made a "bomb of fecal matter that he launched" in the presence of the jurors; it struck counsel table, the bench, and the wall behind the court. (RT 43:4497.) During the following colloquy between the trial court and defense counsel, the court stated that appellant was being removed from the courtroom for the duration of the penalty phase retrial:

The Court: I think we need to get the cleaning crew up here.
I don't think we need more than that.
But I think your client is going to have a hard time convincing the court that he will be present during the balance of the trial, Ms. Wilensky.

Ms. Wilensky: I need to find --
Can I find out first if he is being medicated. That has been a problem on and off.
Last I heard, they were going to medicate him again.
We got through the first trial fine, but he was on medication the entire time. And the court knows that the last few weeks I have been concerned about this.
I have to find out. If he is not being medicated, it may be a whole different ballgame.

The Court: *I doubt very much that anything that Mr. Banks says or does at this point is going to convince the court that he will be in our*

presence during the trial.

This is not the way that I conduct trials.

What happens is this.

Mr. Banks is absolutely -- you tell me if I'm wrong -- I noticed nothing with Mr. Banks today in terms of his demeanor or his ability to cooperate with counsel and the ability to control himself until the very end of court when counsel made a point that she did not like the way the questioning was going and thought there was some unfairness in the questioning.

Mr. Banks responded with his objection which was acting out and screaming and cursing and throwing fecal matter at the court in the presence of the jury.

So that tells me Mr. Banks is capable of controlling himself when he wishes and when things do not go the way he thinks they should, Mr. Banks acts out.

So this is a long history with Mr. Banks, not this particular behavior, but coming to court when he pleases and things of this nature and refusing to come and the court having to get orders to remove him from the cell and playing those games with him.

We will not continue to play the games with Mr. Banks.

My intention is to have Mr. Banks far removed from the proceedings until concluded. Anything else today?

Ms. Wilensky: No.

Mr. McCormick: No.

The Court: All right. We are off the record. [RT 43:4498-4500 (emphasis added).]

Thereafter, the court held true to its stated intention to remove appellant *from the proceedings until concluded* because appellant was not thereafter permitted to step foot inside the courtroom with the jury present.

Several times during the course of the penalty phase retrial, however, the court explained its removal order. On Wednesday, March 10, 1999, appellant was not

brought to court. Trial defense counsel inquired of the court about its "intention about Mr. Banks and his presence?" The court responded, "Not to have Mr. Banks present." (RT 44:4504.) The court stated that if appellant desired to testify, then he could be brought forward. (RT 44:4504.)

The court also explained in some detail what occurred the previous day, stating:

> ... What happened yesterday I think is fairly clear. But as the jury was leaving, and with most jurors in the room, probably two or three may have made it out, I'm guessing, but that is my best recollection, the rest were strung out from the box to the door, Mr. Banks was seated in a position directly opposite the jury box and at the other side of the room and then both defense counsel and a gap in the counsel table and then the prosecution closest to the box and the jury box is on the court's right side, as the jury was filing out at the end of the day's proceeding, all but one juror, one had been asked to remain, as I recall, the defendant jumped up and began screaming at the court and reached into his pocket or his clothing, withdrew a bag of some sort, and I could not tell what was in it initially and threw things in the courtroom and in the direction of the court.
>
> It turned out that it was a bag filled with fecal matter and probably urine -- [RT 44:4504-4505.] [¶]
>
> And the items were spread rather thoroughly through the courtroom.
>
> Some of the matter ended up on counsel table by the defense attorney and others made it all the way to the rail in front of the jury box and the distance in between.
>
> A lot of fecal matter ended up in the well. A whole bunch on the front of the bench. Some behind the court and on the wall behind the court and on the books up here and computer and so forth.

The court was unscathed. I think all counsel were lucky as well.

That, to me, is a sufficiently outrageous act. I can't think of a more outrageous act in front of the jury in a death penalty trial doing what the defendant did.

It was obviously well thought out. Nothing that came out at the spur of the moment. He had a bag of feces in his pocket and unless he carries that around, he had that and let loose. Then after he was calm.

He said: I'm done or that's it,

or some words indicating that he was not interested in fighting and he went with the bailiff into lock up.

I don't think the court should have to put up with that nor should we subject jurors to that behavior, or counsel, although you are all thick skinned people and quite professional.

You have seen things in court before, but I don't think it is something that we need to put up with and I will not put up with it.

I will not let a defendant come in this courtroom and throw fecal matter in the direction of the participants to show his displeasure, or whatever his reasons. He has demonstrated to me in the past his unwillingness to follow the rules.

Last time, you might recall, I bent over backwards to not have the defendant injured when he would refuse to come to court.

Not one time did the court order him in or do a cell extraction. We finally got through trial No. 1.

We are in trial No. 2 and the pressure is back on and for whatever reason this incident occurred. It was at a relatively non-controversial part of the case.

So the court fears that no matter what precaution we take, there would be a huge potential for further disruption of this case by the defendant.

Really it was without warning. It is not something that you can see bubbling to the surface and do anything about, taking a break, when he acts.

He took me completely by surprise and I think probably counsel as well. He looked quite calm all day long.

I look at him when he comes out and I know what we are dealing with and he looked relatively calm and well behaved and then all of a sudden bang, there he went.

So I don't think it is appropriate to have him in here.

I can't think of a restraint, short of absolute mummification, which I don't propose, that would protect the participants and the integrity of the trial. [RT 44:4506-4508.]

Defense counsel explained that appellant was medicated through the first trial, and he was fine, but he stopped receiving his medication. (RT 44:4508-4510.) Defense counsel and the court noted, however, that the court had admonished appellant previously that if he did not behave in court, then he would be removed. (RT 44:4517.)

Thereafter, the trial court admonished the first panel of prospective jurors once again to disregard what occurred and to not discuss the matter. (RT 44:4525.)

Late in the afternoon on March 10, 1999, following voir dire of the second panel of prospective jurors and swearing of the jury, the following colloquy occurred:

The Court: And, Craig, is the defendant available?

Deputy Harvey: Yes.

The Court: Let's bring him out.

Ms. Wilensky: May I go back and talk to him?

The Court: No.

(Defendant Banks entered the courtroom.)

The Court: All right. On the record now. Outside the jury's presence. We have the defendant here. Both counsel are present. Let's see.

Mr. Banks, the court has decided that you will not be able to be with us for the trial based on that little incident yesterday afternoon and some other problems that we have had. However, if you wish, I will do the following. I think we can do it.

If you want a speaker wired up so that you can hear the proceedings as they take place, we can probably accomplish that.

What it will require is that you don't try to break the speaker or damage it or yell, or whatever, because if you are going to do that, then we will not bother because it takes time to wire up.

Do you want a speaker back there or not?

Ms. Wilensky: Could I have a minute with him?

The Court: Sure.
(Counsel conferred with her client .)

Ms. Wilensky: May we have a few minutes alone?

The Court: No. It is a straight forward statement. If he does not want one, he doesn't want one. If he does, he does. Do you want a speaker, Mr. Banks, so you can listen or not?
(No audible response)

The Court: Take Mr. Banks because he won't answer the court.

The Defendant: Shut up.

The Court: Let the record reflect that Mr. Banks spit on the court. Thank you, Mr. Banks. [RT 44:4719-4721 (emphasis added).]

Appellant was removed from the courtroom for the balance of the trial. The court explained appellant's conduct: "Mr. Banks became angry and tried to spit on the

court. I think he succeeded this time. That was a good shot. 12 feet away. I think he succeeded this time." (RT 44:4722.)

The court reiterated its earlier removal ruling: "The court's order from this morning will certainly stand. Look, counsel. You saw what I just saw. And -- I don't know. If you are going to ask me to control him, fat chance." (RT 44:4723.) The court further explained, "My ruling is that the defendant will not be here for the trial for the obvious reasons earlier stated and his continued acting up, spitting, et cetera, et cetera. But if he is needed by either side to be brought forward, make the request ahead of time. I will hear your argument and we will make arrangements and figure out how to do it. We will bring him forward for a short period of time. Undoubtedly, he will scream or do something, but we will deal with it." (RT 44:4725.)

The court admonished the jury not to consider the fact that appellant is absent from the courtroom, highlighting that this fact is "unusual in the extreme ...." (RT 44:4731.) The court instructed the jury:

> Your job is to set penalty, as you know.
>
> For reasons that I will ask you not to speculate about, but for things that have happened heretofore, including today, Mr. Banks will not be able to be with us during the proceedings. That is unusual in the extreme, but it is necessary and that's the court's decision in this case.
>
> I want you folks to do the following:
>
> That fact should not be utilized by this jury as an aggravating or mitigating factor in this case. It is a procedural fact that the defendant

will not be here. And if anybody has a question, it will be answered at the conclusion of this case and not sooner in all likelihood.

I will ask you folks to trust the court when I tell you that you are not to utilize this without further order of this court, to not use this for or against the defendant or for or against the prosecution.

Is everybody clear on that? [RT 44:4731.]

Thereafter, the court made some additional comments about the ruling. On March 11, 1999, during the testimony of prosecution witness Sandra Hess, the issue of identity arose. (RT 45:4800.) The court explained to the jury, "We are trying to avoid bringing Mr. Banks into the courtroom so she [i.e., Hess] may or may not identify him. (RT 45:4800.) The issue was resolved by stipulation. (RT 45:4801.)

On March 16, 1999, at the start of the defense case, trial defense counsel requested that appellant be permitted to hear the testimony. (RT 47:5154.) The court noted that the issue arose previously and appellant spit on the court. (RT 47:5155.) Trial defense counsel explained as follows that appellant's action were in response to a feeling that the court was not permitting consultation with counsel:

It was not over the right of the loud speaker.

What happened, if I may remind the court, I didn't realize he was coming out. I didn't realize he was on the floor and I didn't have a chance to talk to him and I hadn't seen him since the incident the day before.

I asked the court if I could have a few minutes with him and the court said no.

> He came out. Then he listened and he was quiet and calm and he listened to what the court said and then he and I spent a few minutes discussing it. And then he asked me if he could see me in the back and I again repeated it to the court and that is when the court said no again.
>
> That is when he got upset. It was not because of a loud speaker, but he felt the court was not allowing him to communicate with me. [RT 47:5155.]

The court agreed to inquire, following the court session that day, whether a speaker could be setup in lockup right outside the courtroom. (RT 47:5155-5156.)

The following day, March 17, 1999, appellant refused to come to court, but the court noted that since he had been "banned from the courtroom" a speaker system had been setup. (RT 48:5385.) The court also noted that if appellant desired to testify, then he would be brought into the courtroom. (RT 48:5385-5386.) Appellant was absent during the morning session the following day, March 18, 1999, but was brought into the building by the start of the afternoon session. (RT 49:5627, 5758.) The speaker system in fact was never setup, and so appellant did not hear any portion of his penalty phase retrial. (RT 51:6018-6019.)

On July 8, 1999, at the sentencing hearing and the hearings on the motions for new trial and modification of the death verdict, appellant was present in lockup with the speaker system so he could listen to the proceedings. (RT 51:6014.) Appellant requested permission to be present in the courtroom. The request was denied, except to the extent to which appellant desired to address the court regarding sentencing. (RT

51:6014-6015.) Appellant did not desire to address the court. (RT 51:6015.) The court stated:

> One reason that I am loathe to bring him forward is that we are under and have been for the last couple of months a restraining order issued by the federal court which precludes us from using one item that would control a person, could control a person who stands up or spits or throws something and that is the react belt.
>
> We are not allowed to use it.
>
> That leaves us with one less option which is gagging people, chaining them, and all of that stuff, which to me is the equivalent of absence.
>
> If you gag somebody and you shackle them, you are as good as absent in any event since you cannot communicate with counsel. [RT 51:6017.]

C. STANDARD OF REVIEW

Review of the trial court's removal order is de novo because the "trial court's decision entails a measure of the facts against the law." (*People v. Perry* (2006) 38 Cal.4th 302, 311, citing *People v. Waidla* (2000) 22 Cal.4th 690, 741.)

Appellant recognizes that appellate courts typically give deference "to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated." (*People v. Welch, supra*, 20 Cal.4th at p. 773, overruled in part on another ground in *People v. Blakeley, supra*, 23 Cal.4th at p. 89.) Yet, no such deference is warranted here because, as explained below, the trial court failed to conduct a meaningful hearing on the issue of appellant's removal, instead summarily removing appellant for the

duration of the trial, having neither given appellant prior adequate warning nor inquired of appellant whether he would continue disrupting the proceedings in the future, nor having considered less restrictive means short of full removal. (See *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636 [although an order granting a new trial is reviewed for abuse of discretion, when the order lacks adequate specification of reasons it is subject to independent review].)

D. APPELLANT'S EXCLUSION FROM THE PENALTY PHASE RETRIAL WAS AN ABUSE OF DISCRETION BECAUSE THE COURT FAILED TO ADEQUATELY WARN APPELLANT OF THE CONSEQUENCES OF MISBEHAVIOR, IT FAILED TO CONSIDER APPELLANT'S MENTAL CONDITION, IT FAILED TO CONSIDER LESSER MEANS OF RESTRAINT, IT FAILED TO GIVE HIM AN OPPORTUNITY TO RETURN TO THE COURTROOM AFTER A "COOLING OFF" PERIOD, AND IT FAILED TO CONDUCT A MEANINGFUL HEARING ON REMOVAL – I.E., ONE THAT PROPERLY WEIGHED THE SUBSTANTIAL DEPRIVATION OF CONSTITUTIONAL RIGHTS ARISING FROM THE REMOVAL ORDER

Appellant had a constitutional right to be present at the penalty phase retrial (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art 1, §§ 7, 15), as well as a right to

///

be present conferred by Penal Code sections 977[19] and 1043.[20] (*People v. Cole* (2004) 33 Cal.4th 1158, 1230; *People v. Waidla, supra*, 22 Cal.4th at pp. 741-742; *People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357 [the federal constitutional right arises from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment]; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S.Ct. 2658, 96 L.Ed.2d 631].) This requirement extends to any stage of the criminal proceedings that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. (*People v. Bradford, supra*, 15 Cal.4th at pp. 1356-1357.)

Appellant recognizes that the right to presence can be waived by a defendant's own courtroom disruptions. (*Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353]; *People v. Carson* (2005) 35 Cal.4th 1, 8-9.)

---

[19] Penal Code section 977, subdivision (b)(1) states: "In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

[20] Penal Code section 1043, subdivision (a), states: "Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial."

In *Illinois v. Allen, supra*, for example, the high court held that there are three constitutionally permissible ways to deal with an obstreperous defendant: (1) bind and gag him; (2) cite him for contempt; (3) remove him from the courtroom *until he promises to behave himself.* (*Id.* at p. 345 [emphasis added].) The court was particularly wary of approving binding and gagging because of the effect on the jury, the affront to the dignity of the court, and the impact on the ability to communicate with counsel. (*Id.* at p. 344.) Therefore, no person shall be tried while shackled and gagged except as a last resort. (*Ibid.*) It was not prejudicial error to remove defendant Allen, however, because he was verbally abusive, made threatening remarks to the judge, tore up his files, and threatened to prevent the trial from going forward. (*Id.* at pp. 345-347; accord, *People v. Carson, supra*, 35 Cal.4th at pp. 8-9 [removal warranted if defendant has been warned by the judge that he will be removed if he continues disruptive behavior and he nonetheless "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful to the court that his trial cannot be carried on with him in the courtroom."].)

Here, almost immediately after having removed appellant from the courtroom for throwing fecal matter, the trial court issued a final order of removal for the duration of the penalty phase retrial. (RT 43:4498-4500.) Although admittedly, the court was faced with a situation that might reasonably test a judicial officer's temperament, the trial court's hasty ruling was not a reasoned exercise of judgment on the matter

because, as explained below, it was made without adequate information and it was made prior to affording appellant the legal rights required for a reasoned exercise of judgment. (See *Tyars v. Finner* (9th Cir. 1983) 709 F.2d 1274, 1284 [shackling, restraining, or removal of an accused from a courtroom must be limited to cases urgently demanding that action, based upon a balancing of the defendant's rights to be present and to have an impartial jury with the need for orderly administration of justice.].)

The trial court did not warn appellant that he would be removed if he continued disruptive behavior. (RT 43:4491-4493, 4498-4500.) Yet, when making its removal ruling, the court implicitly acknowledged that appellant previously had not acted in this manner. (RT 44:4506-4508.)

In *People v. Sully* (1991) 53 Cal.3d 1195, after the guilt phase verdict was read, defendant became unruly and began shouting obscenities. (*Id.* at p. 1238.) He told the court to conduct the penalty phase without him. Two days later at the start of the penalty phase, defense counsel informed the court that defendant would continue disrupting the proceedings and desired to absent himself from the remainder of the trial. (*Id.* at pp. 1238-1239.) Defendant personally affirmed counsel's statements. (*Ibid.*) The penalty phase was then conducted without him. (*Ibid.*) On appeal, he argued, among other things, that his presence was required under Penal Code section 1043 and that the court was required to warn him as to the risks. (*Id.* at p. 1239.) This Court

held that a warning is given for the purpose of permitting the defendant a chance to correct his behavior, but no further warning was required because defendant specifically told the court that he would continue to disrupt the proceedings. (*Id.* at p. 1240.)

Here, appellant had not previously been removed from the proceedings because of misbehavior, nor had appellant ever misbehaved in court. In contrast to *People v. Sully*, *supra*, appellant was not previously warned by the trial court that he would be removed if he continued his disruptive behavior. Nor can such a warning be implied from the colloquy the following day when appellant spit. The issue at that time was not appellant's presence in the courtroom (that had already been determined), but whether a speaker would be available in lockup. (RT 44:4719-4721.) Accordingly, the trial court failed to adequately warn appellant.

Further, when confronted with the prospect that appellant's actions were, at least in part, caused by a lack of medication appellant had received during the guilt phase and first penalty phase trials, the court seemed entirely uninterested whether appellant was properly medicated, and did not even attempt to resolve this issue prior to making its removal order. (RT 43:4498-4500.)

Defense counsel pleaded with the court to refrain from making an exclusion order prior to making a determination whether appellant's sudden change in behavior was related to changes in prescribed medication for his mental illness and the side

effects of such medication. (RT 43:4498-4599.) Counsel stated, in part, "Can I find out first if he is being medicated? That has been a problem on and off. Last I heard, they were going to medicate him again. We got through the first trial fine, but he was on medication the entire time and the court knows that the last few weeks I have been concerned about this. I have to find out. If he is not being medicated, it may be a whole different ballgame." (RT 43:4498-4599.)

The record is replete with evidence of appellant's mental illness, and the changes in appellant's medication and its effect on his behavior. On February 24, 1998, defense counsel alerted the court, "Mr. Banks is heavily medicated. He is now in the mental health ward and they unstrapped him to come to court today. So I would need -- I would like two weeks to find out exactly what the situation is with this medication." (RT 14:335.)

On March 18, 1998, defense counsel informed the court that appellant was "very heavily medicated and he feels that he cannot concentrate and can't walk." (RT 14:341.) Defense counsel further informed court that day, "He is in the mental health unit. He has been shackled down through periods of the last few weeks. There were two suicide attempts." (RT 14:342.)

On April 21, 1998, after the court was notified that appellant had overdosed (RT 17:454), defense counsel stated, "This is the third suicide attempt in the last two weeks. The first one they pumped his stomach, second one they gave him something so he will

throw up because they saw he had gathered the pills. And now he tells me he is back in the hospital he tried again last night." (RT 17:454.)

On August 3, 1998, defense counsel informed the court, "I was told that he [appellant] is a medical missout because they had to pump his stomach last night." (RT 22:601.) Defense counsel further explained that appellant's behavior problems

> seem[] to coincide as to what medication they are experimenting giving him in custody. He was doing fine on a new medication the last month. Now what I want to find out from the jail is if they started to change the medication again because they have been attempting to try to find medication that will stem the self-deconstructive (sic) behavior that he has. [RT 22:609.]

The following day, appellant was in lock-up at the courthouse, but was unable to proceed with the hearing because his jaw was locking up due to the medication he was taking. (RT 22:616-617.) The court was informed that jail personnel had requested paramedic treatment for appellant. (RT 22:617.) Again recounting for the court appellant's mental health history, defense counsel stated that appellant had been in the mental health division of the county jail "almost his entire incarceration." (RT 22:620.) When asked by the court about the diagnosis of the mental health division, counsel responded, "I have no idea. I have a bunch of jail records from last year that they experimented with various different medications. At one time they were giving him Prozac. I don't think the Prozac can help anybody who is organically brain damaged. ... My suggestion would be to ask USC to take a look at him now. USC does not now have doctors for a court appointment. They have certain doctors that are willing to

work while the program is shut down waiting for new doctors. They are a full service group. They have psychologists that redo the brain tests if the court wants. There is a whole bunch of things to be done to satisfy the court that he is not playing games." (RT 22:621-622.)

On August 5, 1998, defense counsel informed the court that when she saw appellant the previous day "he was heavily medicated and he was doing something that he has not done before when he has been medicated before." (RT 23:633.) Counsel continued, "He had that tremor that I have seen on other clients on anti-psychotic drugs. So I don't know what they did with changing his medication, but he did tell me that he did not feel good when I went in there. I don't know what the paramedics did. If they treated him, then indeed the man is sick." (RT 23:633.)

On September 2, 1998, the court heard the testimony of defense expert witness Dr. Michael Gold, wherein Dr. Gold testified that appellant was a "brain damaged individual." (RT 37:3465.) Dr. Gold testified that this fact was discovered during his own examination of appellant, and that it was corroborated by the medical history and neuro-diagnostic testing. (RT 37:3465.) Dr. Gold also testified that he would first treat appellant with medicine that stops convulsions or seizures to address appellant's epilepsy. (RT 37:3464.) Them, to the extent appellant has impulsivity or lack of control due to a temporal lobe injury, Dr. Gold would treat appellant using medication

to block impulsivity and block the hearing of voices and illogical thinking. (RT 37:3464.)

As shown above, the court was well aware of appellant's long history of mental illness and its effect on his behavior, including problems appellant had with changes in medication and side effects. Yet, when confronted with appellant's sudden, bizarre, and unprecedented acting out in court after sitting through months of trial without incident, and after counsel explained that appellant was not being medicated as he was during the first trial, the court ignored that information, made no inquiries, and responded angrily and punitively. Understandably, having feces thrown at one would challenge anyone's objectivity, but that does not excuse the court's failure to recognize, before, then, or at any point afterward, the isolated nature of this and the spitting incident and their relation to appellant's mental illness and lack of treatment.

The trial court also never gave appellant an opportunity to correct his behavior. (See *People v. Medina* (1995) 11 Cal.4th 694, 738-740 [defendant's continuous pattern of disruptive behavior in disregard of court's instructions warranted his exclusion from trial].) The court issued the removal order prior to questioning appellant whether he could conform his behavior in the future. (RT 43:4491-4497.) Indeed, the trial court never questioned appellant whether he could conform his behavior in the future and thus be permitted personal presence in the courtroom. Moreover, the trial court failed to recognize, and thus did not give due weight to, the fact that appellant's actions came

after a recess had been called in the proceedings, and thus his actions had minimal impact on the trial proceedings. (RT 43:4491-4493.) In fact, when asked about the incident, the record reveals that the prospective jurors actually did not see or hear much, other than a slight commotion. (RT 43:4492.)

The instant case stands in stark contrast to *People v. Medina, supra*, 11 Cal.4th 694, where this Court held that 1) the trial court did not err in allowing a disruptive defendant to waive the right to be present at trial and 2) repeated warnings as to future consequences were not necessary prior to each removal. (*Id.* at pp. 738-739.) There, the defendant was removed from the courtroom several times during jury selection because of his disruptive behavior. (*Id.* at pp. 736-737.) He was likewise removed during the prosecutor's opening statement. (*Id.* at p. 737.) He was ultimately removed for the remainder of the trial. (*Id.* at pp. 737-738.) Whereas in the instant case appellant was not warned about removal, the trial court in *Medina* continually warned defendant and asked if he would behave in the courtroom. (*Id.* at p. 736-739.) Moreover, defendant Medina made clear he would not alter his hostile behavior (*Id.* at p. 736 [defendant Medina states, "I ain't going to promise anything. I might get worse."]), whereas here the trial court never inquired whether appellant would alter his behavior.

The trial court also failed to meaningfully consider less intrusive forms of restraint short of full removal, such as shackling with leg and arm braces, combined

with being restrained out of the jury's presence while entering and leaving the courtroom, to keep things from being thrown. The trial court remarked, "I can't think of a restraint, short of absolute mummification, which I don't propose, that would protect the participants and the integrity of the trial. (RT 44:4506-4508.) Yet, as noted above, less intrusive forms of restraint were at the trial court's disposal, and the trial court was well aware of those forms of restraint. At the start of the guilt phase trial on August 5, 1998, the trial court explained to appellant:

> Given the injury to your arm, I had considered physical restraints to keep your hands in your lap. What I have decided is that I will not do that. That means there is a certain amount of trust being put on you. A lot of guys here on death cases are shackled. As long as everything operates the way it operated here today, that will not be necessary. [RT 23:831.]

Then, on September 11, 1998, in a discussion with the first penalty phase jury following the mistrial, Juror No. 1 asked, "We have seen on T.V. where defendants have been in court and they have had on handcuffs or whatever. We wondered why Mr. Banks wasn't." (RT 38:3775.) The trial court explained:

> The only time they bring them in handcuffs is - a lot of times we have guys restrained up here. We have all kinds of contrapments. That is normally when juries are not present.
>
> A lot of times at an arraignment a guy is brought in off the street and they arraign him and he is restrained, waist shackle or whatever.
>
> The law is the following: we have to follow the law. The law is that you cannot restrain in a visible way a defendant in front of a jury unless there is a manifest need for it. [¶]

> If a guy acts up and he is hitting his lawyer, we have seen that, or going after the D.A. or court or jury or just a maniac, and we have plenty of them, they are chained. Believe it.
>
> They have hooks in the floor, as a matter of fact, that are built in there for that purpose.
>
> There was no need in the case in the court's opinion to take any such action. Thankfully so. [RT 38:3775-3776.]

In *People v. Pena* (1992) 7 Cal.App.4th 1294, for example, the appellate court held that there was no abuse of discretion in excluding defendant from the courtroom following outbursts made in response to the prosecutor's allegedly improper closing argument. (*Id.* at p. 1310.) After certain questionable comments by the prosecutor during closing argument, defendant interrupted with an outburst and shouted an obscenity. (*Id.* at p. 1308.) While improper conduct by a prosecutor may understandably inflame a criminal defendant, this does not excuse a defendant's disruptive behavior. (*Id.* at p. 1309.) Significantly, however, the trial court employed less drastic means before ejecting defendant from the courtroom. The trial court admonished defendant first, and later gave him the option of leaving the courtroom or remaining under gag. (*Id.* at pp. 1309-1310) Here, in contrast to *Pena*, the trial court failed to meaningfully consider less intrusive forms of restraint before permanently removing appellant from his trial.

In sum, appellant's conduct did not warrant removal for the duration of trial because 1) the trial court did not personally address appellant to warn him about such

conduct, nor did the trial court personally address appellant about whether he would conform his behavior, 2) appellant had not engaged in prior courtroom misbehavior, 3) the conduct occurred when appellant was not medicated, which was an issue affecting appellant's behavior that the court did not consider in its ruling, 4) the trial court failed to consider less intrusive means, and erroneously considered removal more beneficial to appellant than being physically restrained in the courtroom, and 5) the trial court failed to give appellant any opportunity to return after a "cooling off" period. The trial court thus entirely failed to weigh the conduct and the prospect of future conformance with appellant's constitutional and statutory rights.

E. REMOVAL OF APPELLANT FROM THE COURTROOM FOR THE ENTIRE PENALTY RETRIAL REQUIRES REVERSAL OF THE DEATH VERDICT

Per se reversal of the death verdict is required because appellant's removal for the entire penalty retrial is correctly viewed as a structural defect in the trial.

In *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309 [111 S.Ct. 1246, 113 L.Ed.2d 302], the high court articulated two categories of constitutional error: "trial error" and "structural defects." As the high court summarized in *Brecht v. Abrahamson* (1993) 507 U.S. 619 [113 S.Ct. 1710, 123 L.Ed.2d 353], "trial error" is one that "'occurs during the presentation of the case to the jury,'" and can be assessed "'in the context of other evidence presented in order to determine [the effect that it had on the trial].'" (*Id.* at p. 629, quoting *Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-308 [alteration in original]). "Structural defects," by contrast, encompass "defects in the

constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." (*Arizona v. Fulminante, supra,* 499 U.S. at p. 309.) A common example of a structural defect is deprivation of the right to counsel. (See *id.*, citing *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799.) Harmless error inquiry cannot salvage a conviction in the presence of structural errors; automatic reversal is necessary "because they infect the entire trial process." (*Brecht v. Abrahamson, supra,* 507 U.S. at pp. 629-630.)

Applying the analysis set forth above, the trial court's removal of appellant for the entire penalty retrial results in a structural defect, reversible per se, because it infects the trial process by which a verdict is rendered. Moreover, in a capital case where the jury properly can use their view of the defendant during trial to influence their judgment whether he lives or dies, removal of the defendant from their view defies harmless error analysis because it cannot be determined whether their view of defendant would have resulted in a life sentence.

Appellant recognizes that typically, however, erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice.[21] (*Rushen v. Spain* (1983) 464 U.S. 114, 118-119 [104 S.Ct. 453, 78 L.Ed.2d 267]; *People v. Bradford, supra*, 15 Cal.4th at p.

---

[21] The issue whether structural error results from a defendant's absence during the presentation of the entire prosecution's case is pending review. (*People v. Concepcion*, rev. granted, November 15, 2006, S146288.)

1357.) Under the constitutional standard, a violation of the right to be present requires reversal of appellant's convictions unless it can be demonstrated that the error is harmless beyond a reasonable doubt. (*Rushen v. Spain, supra*, 464 U.S. at pp. 117-120; *People v. Hogan* (1982) 31 Cal.3d 815, 850; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

Here, even if reviewed under the constitutional standard of prejudice, the prosecution will not be able to prove that the exclusion of appellant from the penalty retrial was harmless beyond a reasonable doubt. In *United States v. Canady* (2nd Cir. 1997) 126 F.3d 352, for example, in the context of a bench trial where the district court reserved decision on the case and subsequently mailed the verdict to the defendant, the Second Circuit remanded for reading of the verdict in open court in the presence of the defendant. The Second Circuit held that failure of the district court to announce its verdict in open court violated defendant's right to be present at all stages of his criminal proceedings. (*Id.* at p. 359.) Significantly, the court also rejected the government's position that defendant's presence at the return of the verdict would serve no useful purpose. The court emphasized that several courts have pointed to the fact that the defendant's mere presence exerts a "psychological influence" on the jury and the judge; and that the announcement of the decision to convict or acquit "is neither 'of little significance' nor 'trivial'; it is the focal point of the entire criminal trial. ... 'While the

benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real'." (*Id.* at p. 364.)

Similarly, in *Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, 394, the Tenth Circuit held that a defendant's absence from the delivery of the jury instructions, closing arguments, and the rendition of the verdict, violated his due process rights. The court observed that the defendant's absence "deprived [him] of his due process right to exert a psychological influence upon the jury, completely aside from any assistance he might have provided to his counsel." (*Id.* at p. 396, fn. 5; see also *Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1049-1050 [finding a violation of rule 43 of the Federal Rules of Criminal Procedure and recognizing the role played by the defendant in exerting psychological influence over the jury].)

Here, appellant's removal deprived him of the ability to confront prosecution witnesses that gave material testimony in aggravation. For example, Sandra Hess testified about an incident at the California Youth Authority where appellant placed Hess in a choke-hold. (RT 45:4785-4788.) Hess testified that she was not able to breathe or talk. (RT 45:4788, 4794-4795.) Sergeant Richard Bee testified about another incident at the California Youth Authority. (RT 45:4825-4827.) Bee testified that appellant refused to comply with directives, resulting in a physical altercation in which Bee sprayed appellant with mace and, in response, appellant struck Bee in the chin and chest with his fist. (RT 45:4831.) Lashan Thomas testified about an incident

where appellant approached Luz Hernandez, asked for her purse, and then struck Hernandez on the head with a pipe when she refused his request. (RT 45:4904-4905.) Deputy Roberto Perovich testified about an incident where appellant's cellmate, Sevedeo Sanchez, was involved in an altercation with appellant in which Sanchez was left with a swollen, red face. (RT 46:4968.) Deputy Arthur Penate testified about an incident in which appellant threw feces and urine, striking Penate in the torso. (RT 46:4972.) Bridget Robinson testified about an incident while appellant was her boyfriend, where appellant physically and sexually assaulted Robinson. (RT 46:5113-5126.) Appellant was absent during all of this testimony, thereby depriving him of the right to confront his accusers. Moreover, appellant's absence from the proceedings deprived him of the ability to assist counsel in cross-examining these witnesses by, for example, alerting counsel to matters that were solely within his knowledge as a percipient witness to the events described by these witnesses.

Further, less severe action short of full removal, such as invisible restraints or shackling, body searches, and closer supervision by deputies as appellant entered and left the courtroom, would have prevented appellant from engaging in the conduct at issue here. By failing to implement less intrusive means to control appellant's behavior, the trial court denied appellant the ability to offer himself to the jury, together

with his youthful appearance,[22] in mitigation for a life sentence. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1420, citing *People v. Lanphear* (1984) 36 Cal.3d 163, 167 [sympathy for defendant may be based on jury's in-court observations]; RT 1220-1221 [guilt-phase prospective juror and the trial court comment about appellant's youthful appearance].)

Finally, substantial prejudice is shown by the fact that the jury in the first penalty trial – where appellant was present in the courtroom for the jury to view as a person for whom their sympathy could be invoked – deliberated for several days and could not agree on a death verdict. (CT 8:2219-2276; RT 38:3735-3772.) The strength and persuasive impact of a defendant being personally present in the courtroom to be seen by jurors charged with determining the defendant's fate is undeniable. (See *Lewis v. United States* (1892) 146 U.S. 370, 372 ["A leading principle that pervades the entire law of criminal procedure is that, after indictment, nothing shall be done in the absence of the prisoner"]; *Illinois v. Allen, supra*, 397 U.S. at p. 338 ["{o}ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present

---

[22] Youth, as measured by chronological age, is a mitigating factor. (Pen. Code, § 190.3, subd. (i); see e.g., *Abdul-Kabir v. Quarterman* (2007) 550 U.S. __ [127 S.Ct. 1654, 1672-1673, 167 L.Ed.2d 585]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [107 S.Ct. 1821, 95 L.Ed.2d 347] [youth at the time of crime mitigating]; *Jones v. Thigpen* (5th Cir. 1986) 788 F.2d 1101, 1103 [age 17]; *Norris v. State* (1983) 429 So.2d 688, 690 [age 19]; *Hitchcock v. State* (1982) 413 So.2d 741, 747 [age 20]; *People v. Osband* (1996) 13 Cal.4th 622, 708-709 [age may be considered a factor in mitigation or aggravation].)

in the courtroom at every stage of his trial."].) Although such differing results from the two trials are not conclusive, they are "a great deal more probative and convincing than the usual tools given to appellate courts on the issue of prejudice." (*People v. Ogunmola* (1985) 39 Cal.3d 120, 124-125; see *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [error occurring at the second penalty trial was prejudicial and reversible in view of the fact that at the first penalty trial, where the error did not occur, the jury could not agree on a death verdict].)

The prosecution thus will be unable to prove that removal of appellant from his penalty retrial was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at ap. 24.) Reversal of the death verdict is required.

/ / /

XVI.

THE TRIAL COURT PREJUDICIALLY ERRED BY REFUSING TO PERMIT APPELLANT TO PRESENT EVIDENCE OF INSTITUTIONAL FAILURE IN SUPPORT OF A LIFE SENTENCE, INCLUDING PROFFERED TESTIMONY OF DR. IRA MANSOORI THAT, TO NO AVAIL, HE RECOMMENDED NEUROPSYCHOLOGICAL TESTING WHEN APPELLANT WAS IN THE CARE OF THE CALIFORNIA YOUTH AUTHORITY THE ERROR DEPRIVED APPELLANT OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, TO A PENALTY DETERMINATION BASED ON ALL AVAILABLE MITIGATING EVIDENCE, AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 6TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Shortly before appellant began presentation of his defense case in mitigation, the trial court entered a blanket order excluding institutional failure as a defense theory in mitigation. The court pointedly told defense counsel:

> This case is about individualized assessment of blameworthiness and to some degree the defendant's background or any sympathetic aspect proffered to justify a sentence less than death.
>
> I don't understand how her [i.e., defense witness Linda Allen's] activities in any way bear upon it.
>
> If this is one of these "the system failed him type" of issue and here is proof of it, we will not hear it.
>
> If they had done this, then the other would have happened.
>
> We are not going to proceed in that fashion. [RT 47:5187.]

Defense counsel then sought clarification of the ruling, inquiring of the court, "If I choose to argue that the system has failed this young man and I can show that

through the evidence where the system also neglected him, is the court going to preclude me from doing that? (RT 47:5189.) The court responded, "You bet. The issue is not whether the system is a good one or bad one. The system is not on trial. What is at issue are the circumstances of these offenses and the other aggravating and mitigating factors that are here for the jury's consideration. How good a job or how bad a job any individual bureaucrat did or did not do is not an issue here." (RT 47:5189-5190.)

The trial court clarified its ruling:

> ... [W]e are not going to have testimony to prove that any particular agency or bureaucrat was less than stellar in their performance.
>
> They never are and that's thankfully not an issue for the jury to resolve.
>
> These cases do not turn on whether somebody could have done a better job. The issue is your client's situation at various points in time, not only the times the crimes were committed, but earlier than that, if they are relevant. ....
>
> Those things are all relevant, but not to shift the focus from Mr. Banks and the offenses and Mr. Banks' background to others that are just really defense targets as opposed to folks to get information from. [RT 47:5191-5192.]
>
> * * *
>
> I reiterate that the focus will be your client. It is his trial. It is not people versus DPSS, defense versus DPSS.
>
> We could go on forever and the defense could put on evidence that there was a failure of social programs due to somebody's vote in the

senate which caused Mr. Banks to kill two people, rape one, et cetera. [RT 47:5193.]

During the defense case in mitigation, Dr. Louis Weisberg, a psychiatrist, testified about his evaluation of appellant in 1988 when appellant was fifteen years old and in the custody of the California Youth Authority. (RT 48:5391-5400.) Dr. Weisberg's purpose in evaluating appellant, like all wards, was to diagnose mental and physical disorders and recommend appropriate treatment. (RT 48:5394-5395, 5399.) Dr. Weisberg diagnosed appellant as suffering from a conduct disorder, undifferentiated type, which meant he engaged in a broad range of severe anti-social activity. (RT 48:5398-5400.) He also believed that appellant could be suffering from organic brain dysfunction. (RT 48:5415.) He recommended 1) a neurological evaluation to rule out organicity (i.e., brain disorder) and seizure disorder and 2) an intensive treatment program. (RT 48:5399.) Yet, when asked about the institutional follow-through on his treatment recommendations, the trial court ruled that Dr. Weisberg's testimony was inadmissible. (RT 48:5395.) Trial defense counsel asked Dr. Weisberg, "And did you expect that if you made certain recommendations that the recommendations would be carried out? (RT 48:5395.) Before Dr. Weisberg could answer, however, the trial court sustained the prosecutor's relevancy objection. (RT 48:5395.)

Trial defense counsel also sought to present the expert testimony of Dr. Ira Mansoori. (RT 49:5747.) The trial court was familiar with Dr. Mansoori's proposed

testimony because Dr. Mansoori testified in the first penalty phase trial that as a staff psychologist with the California Youth Authority he evaluated appellant and recommended neuropsychological testing to determine whether appellant was suffering from "an organic neurological problem." (RT 37:3426.) Despite the trial court's familiarity with Dr. Mansoori's testimony, the court engaged defense counsel in the following colloquy, wherein the court ruled, in effect, that the same testimony that was presented without objection in the first penalty phase trial would be excluded in the penalty phase retrial:

The Court: ... Who do we have this afternoon?

Ms. Wilensky: Dr. Mansoori.

The Court: What does he say?

Ms. Wilensky: He is the --

The Court: 10 seconds.

Ms. Wilensky: After Dr. Weisberg's report, several years later he, again, told CYA that Kelvyn needed to be -- needed to have neuropsychological testing.

The Court: The relevance being what?

Ms. Wilensky: The relevance being that the problem was recognized at the time and they were recommending when Kelvyn was a youngster that these things be done because there was a feeling that he was -

The Court: Do we have testimony from the person who did the recommending?

Ms. Wilensky: Dr. Mansoori also spent more time with Kelvyn than Dr. Weisberg did. He testified at the last penalty hearing.

The Court: It is not relevant. .... [RT 49:5747-5748.]

At the court's request, trial defense counsel submitted a written offer of proof as to Dr. Mansoori's proposed testimony. (RT 49:5758-5761.) The offer of proof stated that 1) Dr. Mansoori is staff psychologist at CYA, 2) he evaluated appellant over the course of twelve sessions, 3) he prepared a written report, 4) appellant has a dysfunctional family background as both parents were drug addicts, 5) he recommended neuropsychological testing for appellant, 6) neuropsychological testing was not available at the California Youth Authority, although appellant could have been transferred to another institution for the testing, yet he was never transferred, 7) he prepared a parole evaluation report in which he recommended against parole, and, 8) appellant was happy and content when he learned that he would be denied parole and thus would be staying at California Youth Authority. (RT 49:5758-5760.)

The trial court ruled that Dr. Mansoori would be limited to testifying to the following: 1) the length of time that he was with appellant; 2) his relationship with appellant, including that they got along together and appellant was good to him; and, 3) appellant's response to the news from Dr. Mansoori recommending against release from the California Youth Authority. (RT 5763-5764.) The trial court ruled that the remainder of the proposed testimony was either irrelevant and/or cumulative. (RT 49:5763-5764.) The court reiterated that Dr. Mansoori would not be permitted to

testify that he recommended neuropsychological testing. (RT 49:5770.) Subsequently, Dr. Mansoori testified for the defense, but did not testify that he recommended neuropsychological testing for appellant. (RT 49:5774-5781.)

Following Dr. Mansoori's limited testimony, trial defense counsel stated that she was going to present the testimony of Verna Emery, a neighbor that reported appellant's mother (Ms. Sparks) to the Department of Public Social Services in January 1978 for her mistreatment and abuse of appellant. (RT 49:5771-5772, 5805-5806.) Ms. Emery is elderly and was ill on the day that defense counsel was going to call her as a witness. (RT 49:5771.) Defense counsel stated, "I would like to put her on because [due to the court's ruling] I'm not going to be allowed to elicit from Juanita Terry some of the things that I had hoped to get out of her testimony. But Ms. Emery will be able to provide the background." (RT 49:5771-5772.) The parties stipulated to Ms. Emery's testimony. (RT 49:5805-5807.) Subsequently, the defense presented the testimony of Ms. Terry, but abided by the trial court's earlier ruling and did not examine her on issues relating to institutional failure. (RT 49:5788-5796, 5799.)

Defense counsel presented the testimony of Mary Goldie, a former detective with the Pasadena Police Department. (RT 49:5782-5783.) Ms. Goldie testified that on January 21, 1977, while on assignment to the juvenile section at the police station, a woman by the name of Mrs. Berkins came in with appellant. Appellant was three years old. (RT 49:5783.) Mrs. Berkins was not a relative. Neither appellant's mother nor

father, nor any family member, could be located. (RT 49:5784-5785.) Ms. Goldie took appellant into protective custody and transported him to a shelter care home arranged through McClaron Hall, which is a facility for abused and neglected children. (RT 49:5785-5786.)

B. THE DEFENSE THEORY IN MITIGATION OF INSTITUTIONAL FAILURE, AND THE EVIDENCE PROFFERED IN SUPPORT THEREOF, WAS HIGHLY RELEVANT TO THE JURY'S PENALTY DETERMINATION, THE EXCLUSION OF WHICH REQUIRES REVERSAL OF THE DEATH VERDICT

This Court has long recognized that evidence of institutional failure may properly be presented by the defendant. (*People v. Mickle* (1991) 54 Cal.3d 140, 193; *People v. Brown* (2003) 31 Cal.4th 518, 577-578; *In re Andrews* (2002) 28 Cal.4th 1234, 1255, 1267 (Kennard, J., dissenting).)

In *People v. Mickle, supra*, 54 Cal.3d 140, for example, the defendant proffered testimony regarding the state's improper diagnosis and treatment of him at prior institutions. The trial court sustained the prosecutor's relevance objections to the following questions "about the psychological care defendant received before the instant crimes": (1) "what should have been done" for defendant during each hospital and prison stay? (2) how has the professional "perception" and "treatment" of pedophilia "changed" over the years? and (3) "what should have been done to safeguard the public" each time defendant was released from an institution? (*Id.* at p. 193.) The defendant argued that "evidence of the state's 'improper' diagnosis and treatment

should have been allowed in mitigation." (*Ibid.*) This Court responded to the defense argument, stating:

> We agree. The proffered evidence was relevant and admissible insofar as it suggested that defendant had sought and/or been denied treatment which might have controlled the same dangerous personality disorder that purportedly contributed to the instant crimes. The jury could reasonably view such fact as bearing on defendant's moral culpability. [*Ibid.*, citing *People v. Ramirez* (1990) 50 Cal.3d 1158, 1173.]

In *People v. Brown, supra*, 31 Cal.4th 518, this Court ruled that the trial court abused its discretion by restricting the testimony of a psychologist regarding the possibility that defendant was hyperactive as a child. Defense counsel sought to show that defendant may not have received appropriate treatment, which resulted in his poor scholastic performance, which in turn led him down the road to violence and crime. The trial court excluded the testimony. (*Id.* at pp. 577-578.) This Court ruled that the proposed evidence was relevant to factor (k), stating:

> The trial court seemed to labor under the misconception that, to be relevant, the witness's testimony would have to demonstrate a correlation between hyperactivity as a child and violent conduct later in life. Section 190.3, factor (k) evidence need not be that specific; it was sufficient that the sympathetic evidence of defendant's asserted untreated hyperactivity, which was relevant to his character, tended to extenuate the gravity of the crime. To find this evidence irrelevant would be to call into question much background and family history evidence commonly introduced in capital trials as mitigating evidence. [*Id.* at p. 578.]

Appellant also has a federal constitutional right to present all relevant defense evidence in mitigation, in furtherance of his rights to due process, to present a defense,

to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty. (*Abdul-Kabir v. Quarterman, supra*, 127 S.Ct. at pp. 1672-1673 [the jury was entitled to give meaningful consideration and effect to all mitigating evidence that could provide a basis for refusing to impose the death penalty based on moral culpability (regardless of a nexus between mitigation and the crime), and thus habeas relief was warranted because there was a reasonable likelihood that the instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence]; *Brewer v. Quarterman* (2007) 550 U.S. 286, 294 [127 S.Ct. 1706, 167 L.Ed.2d 622] [habeas relief granted because the jury was precluded from considering constitutionally required mitigating evidence as a basis for mercy]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Smith v. Texas* (2004) 543 U.S. 37 [125 S.Ct. 400, 160 L.Ed.2d 303] ["'low threshold test for relevance' {is} satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'"]; *Lambright v. Schriro* (9th Cir. 2007) 490 F.3d 1103, 1115 (*per curiam*), cert. denied, 128 U.S. 822 [169 L.Ed.2d 726] (2008)) [there is no requirement that mitigating evidence have some nexus to the crime, for "[i]f evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be

considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant"].

That evidence of institutional failure can be an important mitigating factor is confirmed by empirical evidence. (Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* (1998) 98 Colum. L.Rev. 1538 [confirming that many jurors attached mitigating weight to the failure of state institutions to have provided any real help or treatment to a defendant]; see also Freedman and Beck, *Institutional Failure in the Life Histories of Men Condemned to Death* (2000) 28 Journal of the American Academy of Psychiatry and the Law 86.)

In presenting a defense in mitigation that would resonate with the jurors, trial defense counsel sought to present evidence of institutional failure – i.e., that "the system has failed this young man" and it has "also neglected him ...." (RT 47:5189.) The defense theory in mitigation of institutional failure was particularly significant in appellant's case because he had been raised as a young child by various state institutions, not initially because of anything appellant had done, but because he was abused and abandoned by his mother at a tender age. (*Ante*, pp. 41-49.)

The defense sought to offer the jurors a view of appellant's social history, which included identifiable moments when appropriate intervention could have had a profound impact on his life. For example, the defense presented the testimony of Dr.

Weisberg that he examined appellant at the California Youth Authority and recommended a neurological evaluation (to rule out organicity and seizure disorder) and an intensive treatment program. (RT 48:5399.) Yet, the trial court sustained the prosecutor's objection to the question about institutional follow-through on his treatment recommendations. (RT 48:5395.)

Further, the defense unsuccessfully proffered the testimony of Dr. Mansoori that he evaluated appellant at the California Youth Authority and recommended neuropsychological testing to determined whether appellant was suffering from "an organic neurological problem," but the testing was never performed. (RT 49:5758-5760.) The missed opportunities for changing the trajectory of appellant's life, particularly since they involved state institutions whose role it was to provide assistance, was a powerful mitigating circumstance. Appellant was entirely denied the opportunity to present this powerful, highly relevant circumstance in mitigation for a life sentence. (RT 47:5189-5190, 49:5763-5764, 5770.)

Showing how institutions failed a defendant may neutralize the prosecutor's argument that the defendant was provided with opportunities to lead a productive life. (See, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 802 [in referring to defendant's prior felony convictions, prosecutor did not commit misconduct in arguing that defendant ignored help that was offered to him since "the availability of rehabilitative services through the criminal justice system" is a matter of common knowledge].)

Here, the prosecution argued in closing summation that appellant had not taken advantage of the opportunities provided to him in order to lead a productive life. The prosecutor argued, in part:

> And for some people when they look back on their conduct, they reflect on it and they think you know so far I have hit a woman in the head with a pipe. She has lost her baby. I tried to kill my teacher who was trying to help me. You know. I better take account of my life, maybe make something of myself and better do something for society.
>
> But he doesn't. He remains in CYA. Doesn't do anything positive. Doesn't get his education. Doesn't do anything but act in a violent and criminal manner the entire time he is there. [RT 50:5925.]

In view of 1) the fact that appellant was denied material assistance from the very institutions that were responsible for his care, 2) the powerful nature of such evidence in rebutting the prosecutor's argument that appellant chose his path and failed to take advantage of myriad opportunities provided by society, and 3) the substantial evidence that appellant presented in favor of a sentence to life in prison (*Ante*, pp. 36-49), there is a reasonable possibility that the error affected the verdict (see *People v. Lancaster* (2007) 41 Cal.4th 50, 94), nor will the prosecution be able to prove that the error in excluding the defense theory of institutional failure was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

Reversal of the death verdict is required.

/ / /

XVII.

THE TRIAL COURT PREJUDICIALLY ERRED BY ELICITING TESTIMONY FROM DEFENSE EXPERT WITNESS CARL OSBORNE SUGGESTING FUTURE DANGEROUSNESS, PERMITTING THE PROSECUTOR TO DO THE SAME, AND THEN OVERRULING THE DEFENSE OBJECTION TO THE PROSECUTOR'S ARGUMENT ON FUTURE DANGEROUSNESS, THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT FOR A VIOLATION OF CALIFORNIA LAW AND DEPRIVATION OF FEDERAL DUE PROCESS AND THE RIGHT TO A RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AMENDMENT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

During the defense direct examination of expert witness Dr. Carl Osborne, the trial court sua sponte elicited testimony from Dr. Osborne suggesting future dangerousness. (RT 49:5700-5701.) Dr. Osborne testified that several medications are available to control behavior. (RT 49:5700.) Defense counsel then asked Dr. Osborne whether appellant had "been given any of these medications in his life?" (RT 49:5700.) Dr. Osborne responded as follows:

> I think periodically he has been prescribed them.
>
> One of the things that Mr. Banks does that complicates the picture is that he selectively decides to take or not take the medication.
>
> The medications that I am referring to have to be taken on a very regular basis over long periods of time to create the type of situation that I was talking about, keeping a chemical lid on behavior.
>
> And to my knowledge, he has never been forced to take the medications.
>
> So he can turn them down when he wants. [RT 49:5700.]

The trial judge then asked Dr. Osborne, rhetorically, "They can't force him to take them in state prison either, can they?" (RT 49:5700-5701.) Dr. Osborne responded, "I believe there is a hearing in which they can, but I'm not certain." The judge commented, "They hold them down and make them take them?" To which Dr. Osborne again responded, "Usually they jab them with a needle." (RT 49:5701.)

Shortly thereafter, during the prosecutor's cross-examination of Dr. Osborne, the trial court permitted the prosecutor to do the same thing – i.e., elicit damaging testimony suggesting future dangerousness – and refused to hear defense counsel when she attempted to object to the testimony. The prosecutor started by asking Dr. Osborne about his work experience at Corcoran state prison and, specifically, whether he was "up in Corcoran writing psychiatric evaluations for parole – lifer parole hearings?" (RT 49:5733.) Dr. Osborne stated that he did not write any psychiatric evaluations. (RT 49:5733.) But the prosecutor continued his focus on future dangerousness, asking Dr. Osborne, "You did not write any life evaluations?" (RT 49:5733.) Moments later, the prosecutor directly cross-examined Dr. Osborne on the issue of future dangerousness, asking Dr. Osborne, "Is Mr. Banks still currently attempting to manipulate people?" (RT 49:5736.) Dr. Osborne responded, "Yes. He always will." (RT 49:5736.) The prosecutor continued, "Is he currently prone to violence?" (RT 49:5736.) Defense counsel objected and asked for permission to approach the bench.

(RT 49:5736.) The trial court overruled the objection and refused defense counsel's request to approach the bench. (RT 49:5736.)

After refusing defense counsel's request for a bench conference, the court permitted the prosecutor to engage Dr. Osborne in the following colloquy, which explicitly suggested that appellant would be a danger to other people if sentenced to state prison:

The Witness: Currently prone to violence? Mr. Banks has - I do not mean to be evasive here, but let me state fully that Mr. Banks has a long history of violent behavior over situations and over time. He will remain as violent as he always has been.

Q: Forever?

A: Barring something being done, not forever. One of the things that is wrong with Mr. Banks remits substantially, especially in terms of violent behavior when a person is in their forties.

Q: So we have to look forward to 16 more years of what we have seen in the past?

A: No. Mr. Banks, no matter what happens during this proceeding, will never be on the street again and violent behavior is very situational and specific.

Q: Well, Sandra Hess was in a custodial facility. Correct? So we have seen what he has done in a custodial facility with a teacher. Right?

A: As a child, yes. Or as a youth, yes.

Q: I thought this was a – a historical thing with him.

A: Well, let me clarify. Where he is going, there will not be a person like her available.

Q: Well, he is going something place where there are visitors. Correct?

A: Yes.

Q: There are guards. Correct?

A: Correct.

Q: There are nurses. Correct?

A: No. I don't know about state wide in the prison system.

Q: You don't know if there are nurses in the state prison facilities?

A: That is not what I said. I don't know if he is going to be going to a place in the state system where nurses are available.

Q: There are psychologists. Correct?

A: I don't know if each facility has psychologists either.

Q: You don't know who he will come in contact with. Correct?

A: No. I'm not sure what the outcome of this whole thing will be for him.

Q: But, certainly, beyond the prison population we normally think of, there are a lot of civilians in prison facilities including D.A.'s at times.

A: Yes. Yes. I believe so. My understanding of where he is likely to wind up –

Q: You know what? There's no question pending. Your experience with our prison system constitutes a two week stint at one prison that you went to. Is that correct?

A: Yes.

Q: Have you been to any of the other facilities?

A: Not yet. [RT 49:5737-5739.]

The prosecutor revisited the subject of future dangerousness during closing summation, arguing, over defense objection:

> The problem with putting Mr. Banks, who has no moral conscience, someplace, any place, even a prison, is there are teachers and counselors and guards and visitors and nurses and doctors, prison administrators, staff, secretaries, board of prison terms people, deputy district attorneys, there are other civilians that come into contact with people in the prison system as part of doing their daily routine.
>
> And Mr. Banks doesn't care who he victimizes. He doesn't care who his victim is. He will randomly select them and he will get rid of them and he will execute them and he has done so. You just look at what he has done. [RT 50:5955.]

Defense counsel objected to the argument. (RT 50:5955.) The court overruled the objection, however, before counsel could even state the grounds for the objection. The prosecutor then continued his argument:

> Remember one thing early on when Mr. Banks was interviewed by one of these CYA people and he was on his way to go to prison. He told the CYA person, after having attacked Luz Hernandez and choked Sandra Hess, that he can control himself if he wants to.
>
> Well, the problem here is Mr. Banks doesn't want to control himself. Mr. Banks wants to victimize anybody and everybody he can. And if you need any proof of it, look at what he has done on the inside and look at what he has done on the outside and that tells you everything you need to know about what kind of a person he is.
>
> He is so depraved, he is so uncaring, he is so unfeeling and he is such an absolute menace to any civilized society – [RT 50:5956.]

At a subsequent bench conference the trial court stated, "In terms of your other argument, I assume you wanted to approach to object to an argument about future dangerousness. Your objection is overruled because the court feels there is ample

evidence on the record from your own psychiatrist to support that argument." (RT 50:5957.)

B. THE EVIDENCE AND ARGUMENT ON FUTURE DANGEROUSNESS WERE IMPROPER AND HIGHLY PREJUDICIAL, REQUIRING REVERSAL OF THE DEATH VERDICT

Under California law, the prosecutor may not present expert evidence of future dangerousness as an aggravating factor. (*People v. Boyette* (2002) 29 Cal.4th 381, 446; *People v. Michaels* (2002) 28 Cal.4th 486, 540-541; *People v. Murtishaw* (1981) 29 Cal.3d 733, 773 [expert testimony furnishing psychological predictions of a defendant's propensity for future violence is inadmissible because its probative value is outweighed by the potential for prejudice].) The reasons are several: "(1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty; and (3) such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant." (*Id.* at p. 767.) The rationale applies with equal force where, as here, the trial judge – assisting the prosecution – elicits the very same evidence.

Nor may the prosecutor argue to the jury in closing summation, based on the same inadmissible expert testimony, that the defendant will be a danger in prison. (*People v. Ervin* (2000) 22 Cal.4th 48, 99 [argument regarding future dangerousness is

"permissible when based on evidence of the defendant's conduct rather than expert opinion"]; *People v. Thomas* (1992) 2 Cal.4th 489, 537.)

Expert testimony of future dangerousness is not barred by the federal Constitution. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 896-903 [103 S.Ct. 3383, 77 L.Ed.2d 1090]; *Jurek v. Texas* (1976) 428 U.S. 262, 274-276 [96 S.Ct. 2950, 49 L.Ed.2d 929].) Yet, under principles of federal due process and the right to a reliable penalty determination under the Eighth Amendment, in a capital case the prosecutor may not introduce inflammatory evidence having no bearing on the sentencing issue before the jury. (*Dawson v. Delaware* (1992) 503 U.S. 159, 168-169 [112 S.Ct. 1093, 117 L.Ed.2d 309].) Under California law (as shown above), expert testimony of future dangerousness is inadmissible, and thus it has no bearing on the sentencing issue before the jury. For this reason, the admission of such evidence in appellant's case deprived him of federal due process and the right to a reliable penalty determination under the Eighth Amendment.

Moreover, the arbitrary deprivation of appellant's right under California law to a sentencing hearing free of inadmissible testimony and argument on future dangerousness also gives rise to a violation of the right to due process under the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [103 S.Ct. 864, 74 L.Ed.2d

675] [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["The failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."]; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant was severely prejudiced by the court's error in itself eliciting expert testimony suggesting future dangerousness, permitting the prosecutor to do the same, and then overruling the defense objection to the prosecutor's argument on future dangerousness. The issue was raised when the trial judge asked Dr. Osborne the rhetorical question, "They can't force him to take them [i.e., medications to control behavior] in state prison either, can they?" (RT 49:5700-5701.) The prosecutor then seized on the issue of future dangerousness, cross-examining Dr. Osborne at length about appellant's potential to inflict future harm on personnel in a prison environment. (RT 49:5736-5739.) Finally, during closing summation, the prosecutor pointedly argued that if returned to state prison, then appellant would systematically execute those that he comes into contact with, including, among others, counselors, guards,

nurses, doctors, prison administrators, staff, secretaries, and visitors. (RT 50:5955-5956.)

The jurors were likely to have relied heavily on Dr. Osborne's expert testimony that appellant would be dangerous in the future, including that he would pose a danger to personnel within the prison system. Many studies involving mock and real jurors indicate that future dangerousness is a factor on which the penalty decision hinges. (See Constanzo & Constanzo, *Life or Death Decision: An Analysis of Capital Jury Decision Making Under The Special Issues Sentencing Framework* (1992) 18 Law and Human Behavior 151, 154; Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase* (1992) 16 Law and Human Behavior 185; Eisenberg & Wells, *Deadly Confusion: Jury Instructions in Capital Cases* (1992) 79 Cornell Law.Rev. 1.) In fact, future dangerousness is on the minds of most jurors in most cases. (See Blume, Garvey & Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"*(2001) 86 Cornell Law.Rev. 397.)

The error in permitting expert testimony on future dangerousness was exacerbated by the prosecutor's closing argument, which explicitly linked appellant's future dangerousness in prison to an appeal for a death verdict. The prosecutor argued:

> The problem with putting Mr. Banks, who has no moral conscience, someplace, any place, even a prison, is there are teachers and counselors and guards and visitors and nurses and doctors, prison administrators, staff, secretaries, board of prison terms people, deputy district attorneys, there are other civilians that come into contact with people in the prison system as part of doing their daily routine. .... He

> will randomly select them and he will get rid of them and he will execute them and he has done so. ...." [RT 50:5955.]

(See *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. James* (2000) 81 Cal.App.4th 1343, 1364, fn. 10 [closing argument cannot cure error in instruction but may exacerbate it]; *People v. Brady* (1987) 190 Cal.App.3d 124, 138 ["argument of the district attorney, if anything, compounded the defect"]; *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-1348 [convictions reversed based on instructional error, in part, because "the district attorney's closing argument exacerbated the court's instructional error"]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

The evidence of future dangerousness was highly prejudicial, particularly because it was elicited on cross-examination by the prosecutor as an opinion by the defense expert that appellant was too dangerous to be incarcerated in state prison. On cross-examination, Dr. Osborne conceded that appellant was currently prone to violence. (RT 49:5737.) Dr. Osborne testified, "... [L]et me state fully that Mr. Banks

has a long history of violent behavior over situations and over time. *He will remain as violent as he always has been.*" (RT 49:5737 [emphasis added].) The prosecutor then took it a step further, questioning Dr. Osborne in such a manner that appellant's propensity for violence was projected into the state prison environment, where appellant would have frequent access to numerous innocent people, including visitors, guards, psychologists, and even prosecuting attorneys, upon whom he would direct his violent behavior. (RT 49:5737-5739.) Accordingly, in view of the magnitude of the error, and the substantial evidence that appellant presented in favor of a sentence to life in prison (*Ante*, pp. 36-49), there is a reasonable possibility that the error affected the verdict (see *People v. Lancaster*, *supra*, 41 Cal.4th at p. 94), and the prosecution will be unable to prove that the error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

Reversal of the death verdict is required.

/ / /

XVIII.

THE TRIAL COURT PREJUDICIALLY ERRED BY STRIKING THE TESTIMONY OF DEFENSE EXPERT WITNESS DR. CARL OSBORNE THAT APPELLANT SUFFERED FROM ANTI-SOCIAL PERSONALITY DISORDER – RELEVANT MITIGATING EVIDENCE IN SUPPORT OF A LIFE SENTENCE – THEREBY DEPRIVING APPELLANT OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, TO A PENALTY DETERMINATION BASED ON ALL AVAILABLE MITIGATING EVIDENCE, AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 6TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

In the penalty phase retrial, Dr. Carl Osborne, Ph.D., a licensed psychologist with a specialty in clinical and forensic psychology, testified for the defense in mitigation. (RT 48:5591-5621, 49:5686-5746.) Dr. Osborne examined appellant for 18 hours, interviewed family members, reviewed relevant mental health documents from appellant's life, and conducted a number of tests on him, including the Wechsler Adult Intelligence Scale Third Edition, the Validity Indicator Profile, and the Wechsler Memory Scale. (RT 48:5595-5598.)

Dr. Osborne testified, without objection by the prosecution, that appellant suffered from, among other things, anti-social personality disorder. (RT 48:5603-5604, 5614, 5615-5620.) Trial defense counsel asked Dr. Osborne whether appellant was born with the disorder. (RT 48:5621.) Dr. Osborne responded that there was a new answer that he could give because recent research showed that this "is a genetically inherited problem." (RT 48:5621.) The court declared a recess until the following day,

stating it would hold a *Kelly-Frye*[23] hearing on the admissibility of Dr. Osborne's proposed testimony that anti-social personality disorder is heritable. (RT 48:5624-5625.)

The following day, Dr. Osborne testified at the *Kelly-Fry* hearing that he could not answer the question whether appellant was born with an anti-social personality disorder. (RT 49:5666.) Thereafter, trial defense counsel acknowledged that Dr. Osborne "cannot say whether he [i.e., appellant] was born with it at this point [in time]." (RT 49:5669.)

The trial court ruled that Dr. Osborne could not testify that anti-social personality disorder is genetically based, but that he could testify about a correlation between, for example, appellant's absent and abusive parents and the adverse impact on appellant. (RT 49:5673-5678.) The court further held that it would leave Dr. Osborne's testimony about anti-social personality disorder and permit cross-examination on it by the prosecution. (RT 49:5679-5680.)

As Dr. Osborne's direct examination resumed, however, the trial court sua sponte interrupted defense counsel's questioning, which it considered violated its previous order. (RT 49:5682.) The court thereafter struck the entirety of Dr. Osborne's prior testimony relating to anti-social personality disorder, and it limited further

---

[23] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

questioning of Dr. Osborne to matters unrelated to anti-social personality disorder. (RT 49:5685-5686.)

The court also admonished the jury, "Ladies and gentlemen, we are going to handle it this way. You may have heard testimony by this witness to something that he referred to as A.P.D., anti-social personality disorder. He gave us a definition. [¶] That testimony is stricken from the record as being without foundation in this case. So you are to disregard the references to that syndrome." (RT 49:5685-5686.)

The direct examination of Dr. Osborne resumed, but without reference to appellant suffering from anti-social personality disorder and without reference to the impact of that disorder on appellant's conduct. (RT 49:5686-5704.)

The trial court committed error in striking Dr. Osborne's testimony because that testimony was offered upon adequate foundation and without objection by the prosecution and was not subject to exclusion under the *Kelly/Frye* rule.

B. DR. OSBORNE'S TESTIMONY THAT APPELLANT SUFFERED FROM ANTI-SOCIAL PERSONALITY DISORDER

Dr. Osborne testified on direct examination, without objection, in relevant part, that "Mr. Banks suffers from several severe and chronic mental illnesses. Among those are intermittent explosive disorder and *anti-social personality disorder* and probably substance dependence." (RT 48:5601 [emphasis added].)

Dr. Osborne also testified about the meaning of anti-social personality disorder, stating:

In the broadest sense it means that the person engages in a number of acts that are illegal and outside the normal social and moral boundaries of the society in which they live.

It comes in a number of different forms and it has a number of additional dimensions that can be present but do not necessarily have to be present.

By and large though, it is a life long problem. It usually appears early on in the form of what's called a conduct disorder.

Let me clarify this.

Conduct disorder is the beginning of anti-social personality disorder before the age of 18.

The DSM that I was talking about says to us you can't call it an anti-social personality disorder until the person hits the age of 18.

Before that it is called a conduct disorder, but they are often very similar.

It is, as I said, usually life long. And one of the fortunate aspects of it is that by the time the person reaches their 40's or so, there is a fairly dramatic decrease in the behavior associated with the problems. [RT 48:5603-5604.]

Dr. Osborne further testified that both intermittent explosive disorder and anti-social personality disorder are mental illnesses. (RT 48:5614.) He was aware that Drs. Rudnick and Gold believed that appellant suffered from organic brain damage, i.e., damage to his right temporal lobe. (RT 48:5615.) Dr. Osborne's own tests on appellant independently revealed that appellant was brain damaged. (RT 48:5615.) Dr. Osborne testified that "[t]emporal lobe damage is also consistent with anti-social

personality disorder type behavior that Mr. Banks exhibits. They interact together." (RT 48:5616.) He explained the interaction as follows:

> ... What happens with the kind of physical damage, brain damage, that we are talking about is it affects broadly impulse control.
>
> It affects aggressive impulses and sexual impulses. And these are the kinds of behaviors, sexual behaviors, aggressive behaviors, that also contribute to a diagnosis of anti-social personality disorder.
>
> So you get an added effect one on top of the other. [RT 48:5617.]

Dr. Osborne defined anti-social personality disorder as follows: "The essential feature of anti-social personality disorder is a pervasive pattern of disregard for and violation of the rights of others that begins in childhood or early adolescence and continues into adulthood." (RT 48:5617-5618.) Dr. Osborne also testified about the procedures he used in this case when diagnosing appellant with anti-social personality disorder. (RT 48:5619-5621.)

C. STANDARD OF REVIEW

A trial court's decision concerning the admissibility of evidence is subject to review for abuse of discretion. "This is especially so when, as here, the evidence comprises expert opinion testimony." (*People v. Rowland* (1992) 4 Cal.4th 238, 266.) However, the "conclusion that a certain legal principle, like the *Kelly-Frye* rule, is applicable or not in a certain factual situation is examined independently." (*Ibid.*)

D. DR. OSBORNE'S TESTIMONY WAS ADMISSIBLE EXPERT TESTIMONY NOT SUBJECT TO *KELLY/FRYE*

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under ... section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Cole* (1956) 47 Cal.2d 99, 104 [decisive consideration in admitting expert opinion is whether subject of inquiry is beyond common experience and would assist trier of fact].)

"Assuming the necessary minimum acquaintance with the case in which he is called to testify, 'the extent of an expert's knowledge goes to the weight of his testimony, rather than to its admissibility.'" (*People v. Bassett* (1968) 69 Cal.2d 122, 146, fn. 22, citing *Estate of Schluttig* (1950) 36 Cal.2d 416, 424.)

Expert psychological or psychiatric opinion is not subject to *Kelly/Frye*. (*People v. McDonald* (1984) 37 Cal.3d 351, 372, disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) Although *Kelly* may apply to "scientific processes operating on purely psychological evidence" (*People v. Shirley* (1982) 31 Cal.3d 18, 53), "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to

Kelly/Frye." (*People v. Stoll, supra*, 49 Cal.3d at p. 1157.) "When a witness gives his personal opinion on the stand – even if he qualifies as an expert – the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible." (*People v. McDonald, supra*, 37 Cal.3d at p. 372.)

The trial court held that Dr. Osborne's testimony was inadmissible, stating:

> ... It does not meet *Kelly-Frye*. It is not accepted. It is not proven to this court that the methods of research were such to allow you to come to this unique conclusion and it will confuse mislead and consume the jury's time to an undue degree. [RT 49:5678.]

The trial court erred in excluding Dr. Osborne's testimony under *Kelly/Frye* because his opinion testimony, which neither employed new scientific processes nor contained any special feature which could effectively blindside the jury, was not subject to *Kelly/Frye*. (See *People v. McDonald, supra*, 37 Cal.3d at p. 372; *People v. Stoll, supra*, 49 Cal.3d at p. 1157.)

Moreover, the trial court's order striking the testimony of Dr. Osborne as lacking foundation – after the testimony had been introduced without objection by the prosecution – was an abuse of discretion because the testimony was supported by adequate foundation. Dr. Osborne's expert qualifications, included, among other things, the following: 1) he is a licensed psychologist; 2) he earned a Ph.D. in clinical psychology from the University of Southern California in 1986; 3) he had a post doctoral fellowship at the University of Southern California's Institute for Psychiatry

Law and Behavioral Science; 4) over the years he has taught several courses in psychology at the University of Southern California, including courses in clinical psychology, abnormal psychology, and group therapy; and, 5) for several years he was the Chief Psychologist for Southern California Edison. (RT 48:5591-5594.)

Dr. Osborne testified that he spent approximately 18 hours with appellant. He interviewed appellant's family members. He reviewed extensive records from the Department of Social Services regarding appellant's early childhood. He also performed several tests on appellant, including the Wechsler Adult Intelligence Scale, the Validity Indicator Profile, and the Wechsler Memory Scale. (RT 48:5594-5597.) All of this work led to the diagnosis that appellant suffered from anti-social personality disorder, a mental illness. (RT 48:5616, 48:5601, 5614, 5616, 49:5693-5694, 5697.)

The foundational basis for Dr. Osborne's testimony about appellant's anti-social personality disorder was further supported by the earlier testimony of Dr. Weisberg, a board certified psychiatrist who evaluated appellant in 1988 when appellant was at the California Youth Authority at age fifteen. (RT 48:5391-5394, 5396, 5400.) Dr. Weisberg testified that appellant had an intermittent explosive disorder, which meant appellant could become explosive at any time and in a violent manner; appellant also had explosive personality traits and anti-social personality traits. (RT 48:5399.) Dr. Weisberg testified about anti-social personality disorder. (RT 48:5403-5405, 5411, 5414-5415.) On redirect examination, Dr. Weisberg testified in part:

Q: Dr. Weisberg, *anti-social personality disorder is a form of mental illness*, is it not?

A: *Yes, it is.*

Q: And *that is a recognized form of mental illness for many years in the field of psychology* and psychiatry?

A: *Correct.*

Q: And with all the questions that Mr. McCormick [i.e., the prosecutor] asked you about things that may or may not have happened in the future, that would not change your diagnosis or recommendation to CYA about doing a neurological workup on Mr. Banks, would it?

A: No, it would not.

Q: And that is because you had information from the central file and from Mr. Banks that led you to believe that there could be an organic brain dysfunction?

A: Correct. [RT 48:5415 (emphasis added).]

Accordingly, it was an abuse of discretion for the trial court to strike Dr. Osborne's testimony as lacking foundation.

E. THE ERROR IN STRIKING DR. OSBORNE'S TESTIMONY PREJUDICIALLY DEPRIVED APPELLANT OF A RELIABLE PENALTY DETERMINATION; THERE IS A REASONABLE POSSIBILITY THE ERROR AFFECTED THE VERDICT

Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 94; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Where the error implicates a federal constitutional right, as here, the applicable test is

whether the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) These tests "are the same in substance and effect." (*People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

The trial court's order striking Dr. Osborne's testimony implicated the federal constitutional right enjoyed by every criminal defendant "to present all relevant evidence of significant probative value in his favor ...." (*People v. Marshall* (1996) 13 Cal.4th 799, 836; see also *Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].) This standard of fairness mandates that criminal defendants be "afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636] ["the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"].)

Further, the trial court's order striking Dr. Osborne's testimony that appellant suffered from anti-social personality disorder denied appellant the due process right to a fundamentally fair trial because the ruling undermined the ultimate integrity of the fact-finding process. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 64 [100 S.Ct. 2531, 65 L.Ed.2d 597], overruled on another point by *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297].) Because the error violated appellant's federal

constitutional right to present a complete defense, the death verdict must be reversed unless the error can be shown to be harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*People v. Spencer* (1967) 66 Cal.2d 158, 168.)

Excluding Dr. Osborne's testimony appreciably weakened appellant's case in mitigation. Dr. Osborne was the only defense expert to have diagnosed appellant with anti-social personality disorder. (RT 48:5601, 5614, 5616, 49:5693-5694, 5697.) Not only did Dr. Osborne testify that appellant suffered from anti-social personality disorder, he characterized the disorder in appellant as a "severe and chronic mental illness[]." (RT 48:5601.) Dr. Osborne also testified that appellant's anti-social personality disorder interacted together with appellant's organic /brain damage, i.e., damage to his right temporal lobe. (RT 48:5615-5617.) In combination, "you get an added effect one on top of the other. (RT 48:5617.)

A reasonable possibility exists, therefore, of a different sentence if Dr. Osborne's testimony had not been stricken. The death verdict must be reversed.

/ / /

XIX.

THE TRIAL COURT PREJUDICIALLY ERRED BY ORDERING, OVER DEFENSE OBJECTION, A PSYCHIATRIC EVALUATION BY PROSECUTION PSYCHIATRIST DR. RONALD MARKMAN, AND ALLOWING DR. MARKMAN TO UNDERMINE THE DEFENSE CASE IN MITIGATION BY TESTIFYING AS AN EXPERT WITNESS IN THE PROSECUTION'S REBUTTAL CASE, THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT AS A VIOLATION OF APPELLANT'S RIGHTS TO SILENCE, TO COUNSEL, TO A FAIR TRIAL, TO A RELIABLE PENALTY DETERMINATION, AND TO DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Prior to the first penalty trial, the court order appellant examined by Dr. Ronald Markman, a psychiatrist retained by the prosecution, over objection by, and outside the presence of, defense counsel. (RT 36:3248-3258.) Appellant refused the examination, and Dr. Markman did not testify at the first penalty trial. (RT 35:3030-3186, 36:3187-3191, 39:3797.)

After the mistrial but prior to the penalty retrial, the prosecutor requested that the court order appellant to cooperate with Dr. Markman. Over defense objection, the court ordered the examination. (RT 39:3797-3802.)

The court explained its ruling as follows:

> Except insofar as his refusal to answer any question, which might legitimately be based on the Fifth Amendment right against self-incrimination, he is ordered to cooperate.
>
> He is ordered to answer any questions put to him by Dr. Markman.

Mr. Banks, the problem is this.

If you don't, nobody can make you talk. But the problem is this.

If you do not[,] once we have the trial next time, the People will be urging the court to tell the jury that you refused to cooperate with this psychologist and, therefore, they may look with displeasure on that fact and also give less weight than they might ordinarily to your expert.

In other words, if you only cooperate with one and not the other, they will wonder why. They may see that as a consciousness of guilt or consciousness to hide damaging penalty phase information.

Those are the potential pitfalls of refusing. [RT 39:3801.]

Dr. Markman testified during the penalty retrial as the prosecution's rebuttal witness. (RT 49:5809-5841.)

B. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO SUBMIT TO A PSYCHIATRIC EVALUATION BY THE PROSECUTION'S EXPERT WITNESS

The trial court erred in ordering appellant to submit to a mental examination conducted by Dr. Markman, an expert retained by the prosecution, because such an examination is prohibited by Penal Code section 1054, subdivision (e), and it is not mandated by the federal Constitution. (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116 [neither California's criminal discovery statutes, any other statute, nor the federal Constitution authorize a compelled mental examination of a criminal defendant conducted by an expert retained by the prosecution]; *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.)

C. THE COMPELLED PSYCHIATRIC EVALUATION BY THE PROSECUTION'S EXPERT WITNESS VIOLATED APPELLANT'S RIGHTS TO SILENCE, TO COUNSEL, AND TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION

The trial court's order compelling appellant to submit to a mental examination by Dr. Markman, an expert retained by the prosecution, outside the presence of his attorney, and permitting Dr. Markman to testify for the prosecution, violated appellant's constitutional rights to silence and to counsel under the Fifth, Sixth, and Fourteenth Amendments.[24]

Dr. Markman was acting as an agent for the prosecution when he interviewed appellant for purposes of conducting the mental examination and then testified for the prosecution in its rebuttal case. (See *Estelle v. Smith* (1981) 451 U.S. 454, 467 [101 S.Ct. 1866, 68 L.Ed.2d 359] [when psychiatrist went beyond simply reporting to the court on the issue of competence and testified for the prosecution, his role changed and became essentially like that of an agent of the State].)

Dr. Markman's interview of appellant consisted of testimonial statements. (See *United States v. Wade* (1967) 388 U.S. 218, 222 [87 S.Ct. 1926, 18 L.Ed.2d 1149]

---

[24] In *Verdin v. Superior Court, supra*, 43 Cal.4th 1096, this Court reversed on state statutory grounds the trial court's order compelling the defendant to submit to a mental examination by an expert retained by the prosecution. (*Id.* at p. 1116.) The Court did not consider whether such an order violates a defendant's constitutional rights. (*Ibid.* [conclusion that trial court's discovery order violates state statutory law "renders it unnecessary to decide whether the trial court's order violates petitioner's constitutional rights"].)

[testimonial evidence equates with the disclosure of "knowledge [defendant] might have"]; *Estelle v. Smith, supra*, 451 U.S. at pp. 463-464 [government's claim that mental evaluation was not "testimonial" is belied by observation that it was based on respondent's account of crime]; *Doe v. United States* (1988) 487 U.S. 201, 210 & fn. 9 [108 S.Ct. 2341, 101 L.Ed.2d 184] ["[T]o be testimonial, an accused's communication must be an "expression of the contents of an individual's mind," "reveal, directly or indirectly, his knowledge of facts relating to him to the offense or ... share his thoughts and beliefs with the Government."]; *Hibel v. Nevada* (2004) 542 U.S. 177, 186 [124 S.Ct. 2451, 159 L.Ed.2d 292] [to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information].)

Absent a waiver of constitutional rights, and there was none here,[25] the interview of appellant by a government agent, when the substance of the interview is used against appellant at trial, violates appellant's right to silence under the Fifth and Fourteenth Amendments. (See *Estelle v. Smith, supra*, 451 U.S. at p. 462; *Hoffman v. United States* (1951) 341 U.S. 479, 486 [71 S.Ct. 814, 818, 95 L.Ed. 1118] [privilege against self-incrimination protects an individual from being forced to provide information that

---

[25] Even where the defendant tenders a mental defense, California law does not permit a compelled mental examination of the defendant by an expert retained by the prosecution. (*Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1116.) Accordingly, it cannot be said that appellant waived constitutional rights implicated by such a compelled mental examination by tendering a mental defense.

might establish a direct link in a chain of evidence leading to his conviction]; *Oregon v. Elstad* (1985) 470 U.S. 298, 304-305 [explaining that use of voluntary statements does not violate the Fifth Amendment privilege against self-incrimination].) The interview and its subsequent use against appellant at trial also violates appellant's right to counsel under the Sixth and Fourteenth Amendments. (See *Estelle v. Smith, supra*, 451 U.S. at pp. 469-471 [the defendant's right to counsel extended to an interview with a court-appointed psychiatrist prior to sentencing because the interview played a significant role in sentencing, and thus constituted a "critical stage" of the proceedings for the purpose of the Sixth Amendment analysis].)

Finally, the arbitrary deprivation of appellant's right under California law to a hearing free of inadmissible testimony, as here, gives rise to a violation of the right to due process under the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms, supra*, 459 U.S. at p. 466.)

D. THE ERRONEOUS ADMISSION OF DR. MARKMAN'S REBUTTAL TESTIMONY WAS PREJUDICIAL, BECAUSE THE TESTIMONY WAS AN EVIDENTIARY BOMBSHELL THAT SHATTERED THE DEFENSE AND VIOLATED APPELLANT'S RIGHTS TO A RELIABLE PENALTY DETERMINATION, TO DUE PROCESS, TO SILENCE, AND TO COUNSEL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION

Error in admitting evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Lancaster, supra*, 41

Cal.4th at p. 94; *People v. Brown, supra*, 46 Cal.3d at p. 448.) Where the error implicates a federal constitutional right, as here, the applicable test is whether the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) These tests "are the same in substance and effect." (*People v. Ashmus, supra*, 54 Cal.3d at p. 990.)

Dr. Markman's testimony directly and unequivocally refuted the mitigation case presented by appellant in favor of a life sentence with regard to the mental health issues affecting appellant, and thus presented a strong basis upon which the jury could rely to return a death verdict. As explained below, the defense presented the testimony of three mental health professionals: Dr. Louis Weisberg (*ante*, pp. 36-37), Dr. Michael Gold (*ante*, pp. 37-38), and Dr. Carl Osborne (*ante*, pp. 38-40). In all material respects, their testimony was rebutted by Dr. Markman's testimony. (*Ante*, pp. 49-52.)

Dr. Markman, a medical doctor with a specialty in forensic psychiatry, testified in the prosecution's rebuttal case. (RT 49:5809.) He testified that his credentials as a medical doctor differ from a psychologist[26] in that "a psychologist is not a physician," is "not capable of prescribing medication," and "they don't evaluate individuals in terms of disease." (RT 49:5809-5810.)

---

[26] Defense expert witness Dr. Osborne was a psychologist. (RT 48:5591.)

Dr. Markman testified that he performed a psychological evaluation of appellant, while in "lockup" (RT 49:5811), which consisted of a face-to-face interview on September 2, 1998 and a review of appellant's handwritten notes regarding his past. (RT 49:5811-5812, 5828.)

Dr. Markman testified that he talked to appellant about the murders that appellant had committed of Charles Foster and Charles Coleman (RT 49:5811), and appellant denied participating in the events concerning Charles Foster (RT 49:5812). He found appellant's responses to his questions to be "very thought through and self-serving." (RT 49:5811.)

Dr. Markman reviewed appellant's handwritten notes that purported to describe his past, but found them "[t]otally unconvincing and not consistent with any developmental or behavioral pattern that I am aware of." (RT 49:5812.) Dr. Markman rejected appellant's assertion that at the age of two appellant was concerned that his mother would die from the physical abuse inflicted upon her by his father. (RT 49:5813.)

Dr. Markman also testified that there are a variety of impulse disorders that the American Psychiatric Association has defined as definitive diagnosis. (RT 49:5814.) The prosecutor asked Dr. Markman to consider the following conduct: "secreting urine and feces in a plastic sandwich bag, concealing it for at least an hour or more in his pocket, then standing up and firing the -- or launching the object toward a bench officer

or deputy district attorney ...." (RT 49:5814.) Dr. Markman testified that such "Premeditated planned activity is inconsistent with a claim of impulse disorder[.]" (RT 49:5815-5816.) The prosecutor asked Dr. Markman what his opinion would be "if psychologists [i.e., Dr. Osborne] came in here and testified that" such an act was "indicative of an impulse disorder[.]" (RT 49:5814.) Dr. Markman responded, "I would be in total disagreement with it." (RT 49:5815.)

Dr. Markman's testimony directly rebutted the defense expert testimony of Drs. Osborne and Weisberg. Dr. Osborne testified that appellant suffers from several severe and chronic mental illnesses, including intermittent explosive disorder and probably substance dependence. (RT 48:5601, 5614, 49:5693-5694, 5697.) Dr. Weisberg examined appellant when appellant was fifteen years old, and testified that the information he received implied that appellant had a neurologic problem. (RT 48:5400.) He diagnosed appellant as suffering from intermittent explosive disorder, which meant that appellant could become explosive at any time. (RT 48:5398-5399.)

Dr. Markman also testified that the scenario of the ATM robbery/murder in the instant case – where a person goes up to an ATM with their face concealed, attempts to rob a person standing there, shoots the person, and then after the person falls to the ground shoots the person again in the back of the head, and then flees in a getaway vehicle located in an alley – does not describe a person with an impulse disorder. (RT

49:5816.) Dr. Markman stated emphatically, "It would be absurd to characterize it" as a person with an impulse disorder." (RT 49:5816.) Dr. Markman explained:

> Because of the very nature of it. The approach, the attack, the confrontation, the planning ahead of time to flee to avoid apprehension.
>
> That's not something that is consistent with an impulse disorder.
>
> As I mentioned earlier, an impulse disorder is something done on the spur of the moment.
>
> A person doesn't go into a department store if he is a kleptomaniac to steal. They're in there shopping and then all of a sudden they get the impulse to steal and spontaneously they take something.
>
> They haven't walked into the store to steal something. They've gone in the store to shop. And the impulse interferes with what they were doing and it comes on spontaneously and immediately. [RT 49:5816-5817.]

Dr. Markman testified that one cannot make a diagnosis, nor predict behavior, based on test results of an EEG, MRI, or SPECT imaging. (RT 49:5821.) The fact that appellant had a normal EEG means that the electrical function in appellant's brain is "pretty much normal" and it would be highly unusual to find electrical abnormalities present or some kind of disastrous physical or medical problem. (RT 49:5820.) Dr. Markman also testified that a person with a temporal lobe seizure or temporal lobe disorder might act very unpredictably, but would not show a behavioral pattern that is planned, intentional, and deliberate. (RT 49:5822-5823.) He testified that it is impossible to correlate brain damage with any specific behavior. (RT 49:5841.)

Dr. Markman's testimony directly rebutted the defense expert testimony of Dr. Gold, who performed a neurological examination of appellant, including an EEG (i.e., brain wave test), a MRI brain scan, and a SPECT scan. (RT 48:5531-5537.) Dr. Gold testified that his findings revealed that there was some area of appellant's brain that was abnormal or damaged. (RT 48:5538.) The diagnostic test showed an abnormal SPECT scan, which is a test of how the brain is functioning. (RT 48:5538.) Dr. Gold diagnosed appellant as suffering from malfunction or abnormal function in both temporal lobes, which could affect emotions, behavior, and impulse control. (RT 48:5539, 5545-5546, 5551, 5559, 5584-5585.)

Dr. Markman testified that the scenario of the Charles Coleman murder in the instant case – the act of planning and premeditating the robbery of a person in a wheelchair, wheeling the person up some stairs, wheeling them into a house, waiting for the door to be closed, shooting the person in the back of the head, beginning to look throughout the house for property to steal, taking a 17-year-old girl in the house to a back bedroom and raping her and causing forcible oral copulation on her, taking her to the living room, tying her up, locating items of value and then fleeing the crime scene after attempting to kill the young woman, and then shooting the person that was in the wheelchair a second time – would *not* be caused by a temporal lobe disorder and/or seizure disorder. (RT 49:5824-5825.)

Dr. Markman testified that although Dr. Gold's report regarding SPECT imaging showed some profusion impairment in appellant's temporal lobes, such evidence does not support the conclusion that appellant suffers from brain damage. (RT 49:5832.) Dr. Markman thus effectively rebutted Dr. Osborne's testimony that appellant was brain damaged. (RT 48:5615.) He also effectively rebutted Dr. Weisberg's testimony that appellant could be suffering from organic brain dysfunction. (RT 48:5414.)

The prejudicial nature of the error also is shown in the fact that Dr. Markman did not testify at the first penalty trial, which ended in a mistrial after the jury was unable to return a unanimous verdict of death. (RT 38:3771-3774.)

It is thus reasonably possible that the jury would have returned a penalty verdict of life without parole in this case rather than death if the trial court had not allowed Dr. Markman to testify regarding his mental examination of appellant and his expert opinions relating thereto. (See *People v. Brown, supra*, 46 Cal.3d at p. 448.)

Reversal of the death judgment is required.

/ / /

XX.

THE TRIAL COURT PREJUDICIALLY ERRED BY REFUSING TO PERMIT EVIDENCE AT THE PENALTY RETRIAL ON THE ISSUE WHETHER APPELLANT COMMITTED THE UNDERLYING OFFENSES AND BY INSTRUCTING THE JURY THAT APPELLANT'S GUILT OF THE UNDERLYING OFFENSES WAS CONCLUSIVELY PRESUMED, THEREBY DEPRIVING APPELLANT OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, TO A PENALTY DETERMINATION BASED ON ALL AVAILABLE MITIGATING EVIDENCE, AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 6TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND PROCEDURAL BACKGROUND

During the penalty phase retrial, appellant sought to argue the concept of lingering doubt – i.e., whether the jury might entertain a lingering doubt about his innocence of the underlying offenses notwithstanding his conviction for those offenses. (RT 45:4767-4779.) Because the penalty phase jury had not determined appellant's guilt or innocence of the underlying offenses, trial defense counsel sought to cross-examine the prosecution witnesses on the issue of identity, on the grounds that identity was relevant to both lingering doubt and factor (k); counsel also requested instruction on lingering doubt. (RT 45:4767-4779, 46:5087-5088, 47:5313-5319, 48:5387-5388, 49:5764-5770.)

The trial court denied both requests, ruling that it would not permit examination of the trial witnesses on the issue of identity (or any other matter relevant to the issue whether appellant actually had committed the offenses), and it would not instruct on

lingering doubt. (RT 45:4767-4779, 50:5872.) The court told defense counsel that she could argue the concept of lingering doubt to the jury, but the jury would be instructed to conclusively presume that the underlying offenses had been proven beyond a reasonable doubt. (RT 50:5872-5873.) Thereafter, the trial court rejected the defense request for an instruction on lingering doubt (50:5871-5872) and, instead, it instructed the jury that defendant's guilt of the underlying offenses was conclusively presumed to have been proven beyond a reasonable doubt. (RT 50:5907-5909.)

During closing summation, trial defense counsel argued that for the jury to consider in aggravation prior criminal conduct not charged in this case, the prosecution was required to prove those offenses beyond a reasonable doubt. Counsel conceded, however, that "you have to accept, as the instructions tell you, ... that the murders and the rape and the attempted murder and the special circumstances have been found ...." (RT 50:5977.)

B. LINGERING DOUBT CONCERNING A DEFENDANT'S GUILT IS AN IMPORTANT MITIGATING FACTOR THAT THE JURY IS ENTITLED TO CONSIDER DURING A PENALTY RETRIAL; HERE, THE REFUSAL TO PERMIT EVIDENCE OF LINGERING DOUBT, AND THE INSTRUCTION THAT THE OFFENSES HAD BEEN CONCLUSIVELY PROVEN, WAS PREJUDICIAL, REQUIRING REVERSAL OF THE DEATH VERDICT

Lingering doubt as to the defendant's guilt is appropriate for consideration by the jury as a factor in mitigation, and the defendant has an absolute right to present evidence on the issue and argue its relevance to the jury at the penalty phase. (*People v. Gay* (2008) 42 Cal.4th 1195, 1213 [reversal of death verdict, concluding that the

"trial court's evidentiary rulings {excluding evidence of lingering doubt} violated Penal Code section 190.3 and that the error, exacerbated by the trial court's admonition to the jury that defendant had been 'conclusively proven' to be the shooter and to disregard any statement or evidence to the contrary, was prejudicial"].)

Evidence and argument on the issue of lingering doubt is relevant to either factor (a) or factor (k), or both. (See *People v. Gay*, *supra*, 42 Cal.4th at pp. 1217-1218 [relevant as a circumstances of the offense under factor (a)]; *People v. Farmer* (1989) 47 Cal.3d 888, 921, fn. 5 [defendant has the right to argue his possible innocence to the jury as a factor in mitigation]; *People v. Price* (1991) 1 Cal.4th 324 [subsection [k] of Penal Code section 190.3 encompasses the notion of residual or lingering doubt about a capital defendant's guilt, including the nature of his participation in the capital crime]; *People v. Sanchez* (1995) 12 Cal.4th 1 ["In resolving the issue of penalty, a capital jury may consider residual doubts about a defendant's guilt."]; see *People v. Cox* (1991) 53 Cal.3d. 618, 677; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219 [when the first penalty trial results in a hung jury and the case proceeds to a second penalty trial before a different jury, "it is proper for the jury to consider lingering doubt."].)

In *People v. Terry* (1964) 61 Cal.2d 137, cited with approval in *People v. Gay*, *supra*, 42 Cal.4th at pp. 1218-1221, during jury selection the trial court refused to permit the defendant to examine the jurors on their reaction to his claim of innocence and advised the jury they could not even consider that claim. (*Id.* at pp. 145-147.) On

appeal from the judgment of death, this Court noted that the trial court "properly pointed out that the jury was not to relitigate the issue of the defendant's guilt of first degree murder." (*Id.* at p. 147.) This Court further stated, however, that the jury which determines the penalty "may properly conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty." (*Id.* at pp. 145-146.) The trial court in *Terry* thus erred in preventing the defendant from arguing "lingering doubts" concerning his "possible innocence of the crimes" as "a mitigating factor" to avoid a death verdict. (*Id.* at pp. 145-147.)

In *People v. Gay*, *supra*, 42 Cal.4th 1195, this Court recently reversed the defendant's death judgment, holding that the trial court abused its discretion when it barred defendant from offering evidence at the penalty retrial concerning the circumstances of the murder, which included evidence that another person admitted to firing all of the shots, as well as corroborating testimony from eyewitnesses. (*Id.* at p. 1217.) "The trial court was under the impression that a defendant at a penalty retrial could not present evidence that was inconsistent with the verdict reached in the guilt phase[,]" but that was incorrect: evidence of the circumstances of the offense, including evidence creating a lingering doubt as to guilt, is admissible at a penalty retrial under Penal Code section 190.3. (*Id.* at pp. 1217-1218.) A defendant may rely on such evidence to urge possible innocence as a factor in mitigation. (*Id.* at p. 1221.)

> Our holding that evidence of the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial under Penal Code section 190.3 is in accord with other jurisdictions that, like California, have recognized the legitimacy of a lingering doubt defense at the penalty phase of a capital trial. [*Ibid.*]

The evidentiary error was compounded by the trial court's error in instructing the jury that a prior jury had found defendant guilty of murdering the officer by personal use of a firearm and that defendant's responsibility for the shooting had been conclusively proven. (*Id.* at pp. 1213, 1224.) Moreover, although the aggravating evidence was significant and the jury was instructed on lingering doubt,[27] the jury might have considered a lesser penalty had it been allowed to hear and consider the defense of lingering doubt in full. (*Id.* at pp. 1223-1225, 1227.)

Where a state court's erroneous application of state law renders a trial fundamentally unfair, as here, the error gives rise to a violation of federal due process. (See *Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *Ortiz v. Stewart, supra*, 149 F.3d at p. 934.)

Here, during the penalty retrial, the prosecution presented anew most of the guilt phase evidence as relevant to the circumstances of the crimes. (*Ante*, pp. 31-35.) The

---

[27] In *People v. Gay, supra*, the jury was instructed on lingering doubt as follows: "It is appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt." (*Id.* at p. 1217.)

prosecution itself thus squarely presented to the penalty phase jury the issue whether appellant actually committed the underlying offenses. Appellant sought to counter this evidence by showing that appellant may not have been the one that committed the underlying offenses, notwithstanding his conviction for those offenses. (RT 47:5313, 5316-5317, 48:5388, 49:5764-5769, 50:5871-5872.)

For example, defense counsel sought to question Detective Frank Weber about the photographs shown to prosecution witness Manzanares in connection with the Foster homicide. Defense counsel asked Detective Weber, "When was the first time you showed her any photographs?" (RT 47:5313.) The trial court sua sponte interrupted, "Let me remind both counsel that the identity of the defendant as the perpetrator is not an issue in the case." (RT 47:5313.) When defense counsel sought to introduce evidence concerning the Coleman homicide, the trial court reiterated, "On the issue of who the shooter is, that issue has been determined by the last jury by their finding that the defendant personally used a firearm." (RT 47:5767.)

The trial court refused the defense request for an instruction on lingering doubt. (RT 50:5871-5872.) Moreover, this is not a case where other instructions encompassed the concept of lingering doubt. (See *People v. Hines* (1997) 15 Cal.4th 997, 1068 [finding the concept of lingering doubt to be sufficiently encompassed in other instructions ordinarily given in capital cases]; *People v. Harris* (2005) 37 Cal.4th 310, 359 [same].) The trial court instructed the jury that defendant's guilt of the underlying

offenses was conclusively presumed to have been proven beyond a reasonable doubt (RT 50:5907-5909), thus leaving no room for lingering doubt.

A trial court's error at the penalty phase will require reversal of a penalty verdict if "there is a reasonable (i.e. realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v. Brown, supra*, 46 Cal.3d 432, 448; *People v. Lancaster, supra*, 41 Cal.4th at p. 94 [error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict].) Where the error implicates a federal constitutional right, as here, the applicable test is whether the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The exclusion of the evidence, compounded by the trial court's refusal to instruct on lingering doubt and its instruction that the underlying offenses were deemed to have been proven beyond a reasonable doubt, was prejudicial. Lingering doubt about appellant's guilt would have been an important mitigating factor in his case if the court had permitted evidence and argument thereon. By precluding evidence of lingering doubt, and by instructing the jury that appellant's guilt of the underlying offenses was conclusively proven, the trial court entirely removed the issue of lingering doubt from the case. Residual or lingering doubt about appellant's participation in the underlying offenses reasonably would have caused the sentencing jury to view the mitigating and aggravating circumstances differently, thus presenting a reasonable

possibility the jury would have concluded that appellant did not deserve the death penalty. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1227 ["As other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.'"], citing *Chandler v. United States* (11th Cir. 2000) 218 F.3d 1305, 1320, fn. 28, *Williams v. Woodford* (9th Cir. 2002) 384 F.3d 567, 624, and Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1563.)].)

/ / /

XXI.

THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE INADMISSIBLE TESTIMONY IN AGGRAVATION, INCLUDING TESTIMONY FROM DEPUTY ARTHUR PENATE ABOUT APPELLANT'S CONDUCT IN JAIL AND PURPORTED MENTAL STATE, AND TESTIMONY FROM CAROLE SPARKS ABOUT RUNAWAYS AND THEFTS, THEREBY REQUIRING REVERSAL OF THE DEATH JUDGMENT FOR A VIOLATION OF STATE STATUTORY LAW AND THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 5TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND FACTUAL SUMMARY

At the penalty phase retrial, the prosecution introduced evidence that while incarcerated awaiting his capital trial appellant, from inside his cell, tossed a carton containing feces and urine at Deputy Penate, striking him in the torso. (RT 46:4971-4972.) Thereafter, and over repeated defense objections (RT 46:4975-4976, 4978, 4995), the trial court permitted the prosecutor to elicit testimony from Deputy Penate that went far beyond the incident described above, and included testimony about appellant's behavior in jail and his purported mental state. (RT 46:4973-4996.)

Deputy Penate testified that a few days prior the incident another inmate asked about appellant, to which Deputy Penate responded, "[Appellant] always gets in trouble. He's a troublemaker and that is why everybody is always talking to him." (RT 46:4973.) Deputy Penate then testified that appellant told him, "See. That's what I'm talking about. You're always trying to 'f' me and why you always talking trash

about me and all of this other stuff. Why are you being disrespectful to me?" (RT 46:4973.)

Deputy Penate testified that there are two different types of people housed in the seventh floor, where appellant is located: "mentally ill people and the people that are real violent. They cannot get along with anybody else so they have to be housed by themselves." (RT 46:4974.) He further testified, "So inmate Banks is housed in the violent side." (RT 46:4974.)

Deputy Penate also described an incident where appellant asked about his food, which was late. Deputy Penate told appellant that it was ordered and he needed to be patient, to which appellant responded, "No. No. No. No. No. Let me tell you how it is, he says. You don't know who I am and –" (RT 46:4975.) Deputy Penate testified:

> The reason is his food is not late, but he is always getting himself in trouble. So one day he will be here and next day he will be there and following day he will be somewhere else. So his food has to be chasing him around.
>
> So because he is always constantly moving and getting himself in trouble, his food was late this day. [RT 46:4976-4977.]

Deputy Penate testified that appellant was not satisfied with having to patiently wait for his food, and told Penate, "Let me tell you who I am and what I am capable of doing." (RT 46:4977.) Appellant was trying to intimidate Penate. (RT 46:4979.) Penate further testified, "Exactly. Because usually he manipulates people. If you don't give me that, I'll do that. If I don't get that, I'll do that. He is always doing little

shows." (RT 46:4979.) This type of activity occurs at "least three times a week." (RT 46:4979.)

Deputy Penate also testified to graffiti found inside appellant's cell, including "some gang script" and the phrases "Penate is a bitch" and "fuck off." (RT 46:4984.)

The prosecutor also was permitted to elicit testimony from Deputy Penate about appellant's behavior after the incident. Deputy Penate testified that appellant made comments about the incident every day, "[B]ecause like I say, we do security checks and each one of my partners and myself take turns to do that, so every time I will go through his window or to his door, he will be laughing and telling me: See. See. I told you I was going to get you, and he would be laughing. And he would tell me: you know what I am. You know what I am. This is like an everyday thing." (RT 46:4985.)

Deputy Penate further testified about how appellant manipulates people, as follows:

> Like I said, about seven of us work on the seventh floor.
>
> So there are seven of us here and if I already have a problem with him plus my other four partners, it will leave like only two or one person that can deal with him.
>
> And let's say he needs to go to court or we need to take him out.
>
> So this person needs to deal with him. She is going to do anything she can and give him anything he wants because if she does not do that, he is not going to help us. He is not going to want to get dressed or come to court and stuff like that. [¶]
>
> Every morning we get everybody ready to go to court.

There's five people, say. They all have one blanket to sleep on the seventh floor.

So when they go to the court line, we give them one pants, one shirt. And that is all they get.

But for Mr. Banks we have to get everything special. We have to give him one shirt, one blanket, underwear, socks and the other stuff.

But when he gets back and you don't know that he has been given the socks or other stuff, then you think -- you know what I mean? It can create a problem later on that he can hide the stuff or can do anything with that stuff.

So I don't know.

He does this all the time.

Like I said, why he does that, it is just the way he is. If he does not get it, then he will not come to court. [RT 46:4994-4996.]

Later, again over defense objection (RT 47:5372), the trial court permitted the prosecutor to elicit testimony from appellant's mother, Carole Sparks, about appellant being picked up by police and returned to her for runaways and thefts of bicycles and merchandise. On cross-examination, the prosecutor engaged Sparks in the following colloquy:

Q: Was there an incident back on July 16, 1982, if you recall, where he was arrested for stealing bikes and you went to the police and told them that you needed help because you couldn't control him anymore?

A: No, sir. There was not.

Q: You don't remember anything like that?

A: It did not happen with me. I didn't take him for the bikes.

Q: Okay. Do you remember an incident where he came home with stolen property on August the 26th of '82 and you took him into a police station with the property and said that he had stolen this stuff and that you didn't know what to do with it?

A: No. I made him take it back to where - I made him take it himself and I escorted him. But he told them what he did.

Q: Okay. And then he was -- from May 11th of '87 until August 20th of '87, he had been in the group home and the court allowed him to come back to live with you on a test basis?

A: Yes, sir. If I could say this, please.

Q: Sure.

A: Okay. Now his probation officer, he ran away from one of those homes. Now if I was an unfit parent, they had been watching me anyway, if I was an unfit parent when he ran away, do you think his probation officer would have told him to stay out with me?

Q: There were a number of occasions where Kelvyn left the placements that he was supposed to be -

A: And they let him stay with me.

Q: But my point is that each time he ran away, he came to be with you. Is that correct?

A: Uh-huh.

Q: Is that right?

A: Well, not really. He would go to his aunt and he knew where I was and she would bring him to me or he would come to me.

Q: But there was a point where the court considered whether he should be left in these group homes he was running away from or be placed with you on a trial basis.

A: Yes. [¶]

Q: Okay.

A: You know. I have never taken him back no where. He was released to me from running away from these places.

Q: And what caused him -

A: He got into some trouble is what happened. He got into some trouble with someone and he was arrested.

Q: And that caused him to be out of your home and back into the system?

A: Exactly.

Q: Okay. You said something about when he was paroled this last time and came to live with you, but there was a problem.

A: Yes.

Q: What was that?

A: Well, he had a -- somewhat of a temper tantrum. So I asked him to go -- hey, we will visit your cousin or something because you can't go off on me like that. So he went to visit his cousin and he came back and he was all right. You know? But that was it. The next thing I know, he was in this trouble.

Q: In the time that you were with Kelvyn as an adult, from the time he has been 18 until today, in those times that you have been with him, have you ever seen him in your presence commit any crimes?

A: I've never seen him commit no crime really myself. Like I said, because he had all of this merchandise, you know, I told him to take it back where he got it from. That was it. I didn't see that. I just know that he had the merchandise. [RT 47:5372-5376.]

B. THE TRIAL COURT PREJUDICIALLY ERRED IN PERMITTING THE PROSECUTOR TO ELICIT TESTIMONY FROM DEPUTY PENATE AND CAROLE SPARKS THAT WAS INADMISSIBLE IN AGGRAVATION

The trial court erred in allowing the prosecutor to elicit the testimony from Deputy Penate and Carole Sparks, which is described above, as an aggravating factor under Penal Code section 190.3, factor (b), thereby requiring reversal of the death verdict for a violation of section 190.3 and appellant's state and federal constitutional rights to due process and to a fair and reliable determination of penalty. (Cal. Const., Art. I, §§ 7, 15, 17; U.S. Const., 5th, 8th, and 14th Amends.)

The California statutory scheme allows, in aggravation, consideration of "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence ...." (Pen. Code, § 190.3.) The requisite "criminal activity" must amount to conduct that violates a penal statute. (*People v. Boyd* (1985) 38 Cal.3d 762, 772.) The necessary "force or violence" must be directed toward persons, not merely property. (*Id.* at p. 776; *People v. Gallego* (1990) 52 Cal.3d 115, 196.) Further, the jury may not rely on evidence of such uncharged crimes of violence as an aggravating factor unless the crimes are proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

Aside from Deputy Penate's initial testimony that appellant tossed a carton containing fecal matter at him (RT 46:4971-4972), the remainder of Deputy Penate's

testimony concerning appellant's behavior and attitude in jail, and the purported testimony describing appellant's mental state, was not sufficient to prove that appellant committed a crime involving violence or the threat of violence, and thus the evidence was inadmissible and irrelevant under section 190.3 and this Court's decision in *People v. Boyd, supra*, 38 Cal.3d at p. 774. The testimony that appellant was a "troublemaker" did not prove violent criminal conduct. (RT 46:4973) The testimony that appellant "cannot get along with anybody else" and so must be housed with the "violent people" also does not prove violent criminal conduct. (RT 46:4974; *People v. Boyd, supra*, 38 Cal.3d at pp. 778-779 [defendant's community reputation for violence is irrelevant and inadmissible].) Moreover, Deputy Penate's description of the two types of people housed on the seventh floor – mentally ill people and violent people – and his statement that appellant was housed on the "violent side," strongly implied (based entirely on speculation) that appellant was violent, but not mentally ill. (RT 46:4974.) Further, Deputy Penate's extensive testimony about appellant's mental state – i.e., that he manipulates people and tries to intimidate – does not prove violent criminal conduct. (RT 46:4975-4996.) Nor did Deputy Penate's testimony about finding graffiti in appellant's cell prove violent criminal conduct. (RT 46:4984.) The uncharged conduct that Deputy Penate described was not an aggravating circumstance under factor (b) because the conduct was not shown to have violated a penal statute. (See *People v. Boyd* (1985) 38 Cal.3d 762, 772.)

The prosecutor's cross-examination of Carole Sparks, wherein he elicited from her damaging testimony about appellant's runaways and thefts of bicycles and merchandise, also did not prove violent criminal conduct. (RT 47:5372-5376.) "To be admissible under [factor (b)], a threat to do violent injury must ... be directed against a person or persons, not against property." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013.) Accordingly, appellant's conduct as described by Sparks is not an aggravating circumstance under factor (b).

Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 94; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) This standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

Here, the sheer amount of improper aggravation evidence introduced by the prosecutor created a toxic impression that was severely prejudicial. Appellant presented a substantial case in mitigation for a life sentence, which included 1) evidence of childhood neglect and abandonment and 2) evidence of neurological damage and mental illness, which was identified but never treated by the institutions that were responsible for his mental care. (*Ante*, pp. 36-49.) Deputy Penate's testimony undermined appellant's case in mitigation by advancing the inadmissible and

unsupported opinion that appellant was a calculating manipulator, housed on the violent side of the seventh floor of the jail because he was a violent prisoner, and not a mentally ill prisoner. Sparks' testimony about appellant's runaways and thefts of bicycles and merchandise served to reinforce the idea that appellant knew what he was doing and could control his behavior. Accordingly, there is a reasonable possibility that the improper aggravation evidence affected the verdict, thereby requiring reversal of the death verdict.

///

XXII.

THE TRIAL COURT'S COMMENTS TO THE JURY DURING VOIR DIRE AND ITS INSTRUCTIONS PRECLUDED THE JURY FROM GIVING FULL AND FAIR EFFECT TO APPELLANT'S CASE IN MITIGATION, THEREBY REQUIRING REVERSAL OF THE DEATH VERDICT FOR A VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, JURY TRIAL, TO PRESENT A DEFENSE, TO A PENALTY DETERMINATION BASED ON ALL AVAILABLE MITIGATING EVIDENCE, AND TO A FAIR AND RELIABLE DETERMINATION OF PENALTY (CAL. CONST., ART. I, §§ 7, 15, 17; U.S. CONST., 5TH, 6TH, 8TH, AND 14TH AMENDS.)

A. INTRODUCTION AND SUMMARY OF ARGUMENT

As explained below, the trial court gave biased explanations of case issues to prospective jurors during voir dire, which improperly precluded the jury from giving full and fair effect to the good character evidence presented by appellant in mitigation.

The Eighth Amendment prohibition against cruel and unusual punishment requires the individualized consideration of mitigating circumstances in determining a sentence of death. When it comes to the imposition of the death penalty, the high court has repeatedly held that justice and "the fundamental respect for humanity underlying the Eighth Amendment" require jurors to give full effect to their assessment of the defendant's character, circumstances, and individual worth. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [98 S.Ct. 2954, 57 L.Ed.2d 973].) In *Skipper v. South Carolina* (1986) 476 U.S. 1, the court, quoting *Eddings*, stated that the sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 4.) Thus, the capital sentencer must consider both statutory and nonstatutory mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 317 [109 S.Ct. 2934, 106 L.Ed.2d 256].)

Considered as a whole, the trial court's comments to the jury during voir dire and its instructions precluded the jury from giving full effect to the evidence in mitigation and deprived appellant of a properly guided, individualized sentencing hearing, thereby warranting reversal of the death verdict.

B. THE TRIAL COURT HAS A SUA SPONTE DUTY TO CORRECTLY INSTRUCT THE JURY ON ELEMENTS OF DEATH QUALIFICATION AND THE PROSECUTION'S BURDEN

The trial court has a sua sponte duty to correctly instruct the jury, and its instructions and comments to the jury are properly reviewed on appeal without objection below. (Pen. Code, § 1259;[28] *People v. Brown*, *supra*, 31 Cal.4th at p. 539.)

Appellant recognizes that in *People v. Romero* (2008) 44 Cal.4th 386 this Court held that the trial court's comments to the jury during voir dire were not instructions, but merely explanations. (*Id.* at p. 423.) The Court held that the trial court's comments were proper. (*Ibid.*) Appellant does not argue that the court's comments during voir

---

[28] Section 1259 provides in part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

dire were jury instructions. Rather, the trial court's biased explanations of case issues during voir dire shaped the parameters of aggravating and mitigating evidence that, when considered together with the jury instructions given in this case, improperly precluded the jury from giving full and fair effect to the good character evidence presented by appellant in mitigation.

C. STANDARD OF REVIEW

The standard of review for a claim that a sentencing instruction is ambiguous is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

D. THE TRIAL COURT GAVE BIASED EXPLANATIONS OF CASE ISSUES TO PROSPECTIVE JURORS DURING VOIR DIRE BY PRESENTING MITIGATING FACTORS SOLELY IN TERMS OF MATTERS THAT MIGHT MITIGATE THE SEVERITY OF THE OFFENSE OR THAT MIGHT MITIGATE PUNISHMENT

During voir dire of the first panel of prospective jurors (and in the presence of the entire panel), and prior to completion of the juror questionnaires, the trial court defined aggravating and mitigating factors as follows:

> ... You are to consider all of that evidence in this case and then you are to weigh the good and the bad, the mitigating and the aggravating. That is the word the law uses, mitigation and aggravation, and in that way arrive at a penalty decision. [RT 41:3943.] [¶]

> ... So you will be doing weighing of aggravating factors and mitigating factors, good things shown by the evidence, bad things shown by the evidence. [RT 41:3944.] [¶]

During voir dire of the second panel of prospective jurors (and in the presence of the entire panel), and prior to completion of the juror questionnaires, the trial court defined aggravating and mitigating factors as follows:

> The prosecution and defense will have an opportunity to put on additional evidence about the defendant's background, things like that.
>
> At the end of the presentation of evidence, you will be asked to weigh the good and the bad, that is the mitigation and the aggravation.
>
> You will assign moral weights to those various factors shown by the evidence and in that manner determine what the appropriate penalty would be: the death penalty or life without parole.
>
> So you have discretion, but it is guided by reason and guided by this weighing process that you must undertake. [RT 41:4001-4002.]

The trial court defined mitigating factors in terms of matters that might mitigate the severity of the offenses or that might mitigate the punishment. The trial court misleadingly failed to include a discussion of factor (k) mitigation.

Factor (k) mitigation allows the trier of fact to consider "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (Pen. Code, § 190.3, subd. (k).) Consistent with *Lockett v. Ohio*, *supra*, 438 U.S. 586, this section allows the trier of fact to consider any mitigating evidence of the defendant's character or record which the defendant offers. (*People v. Easley* (1983) 34 Cal.3d 858, 876 [adopting *Lockett*]) The phrase is an open-ended, catch-all

provision, allowing the jury's consideration of any mitigating evidence, limited only by relevance. (*People v. Mickey* (1992) 54 Cal.3d 612, 692-693 [holding that the 8th and 14th Amendments require that sentencer not be precluded from considering as mitigating factor any aspect of defendant's character or record and any of circumstances of offense, as long as it is relevant], cert. denied, 506 U.S. 819 (1992).) To avoid any misunderstandings, the sentencing court must inform the jury that it can consider as a mitigating factor any other circumstance or aspect of the defendant's character or record that the defendant proffers as a basis for sentence less than death. (*People v. Ochoa, supra*, 19 Cal.4th at pp. 455-456.)

Subsequently, during voir dire of Prospective Juror No. 8 from the first panel of prospective jurors, and in the presence of the entire panel, the trial court explained, "An aggravating factor is the opposite of a mitigation factor." (RT 42:4079.)

The court further defined aggravating and mitigating factors to the first panel of prospective jurors as follows:

> You may consider aggravating factors as a bad thing or things about the offender that make him even more blameworthy, such as a past criminal record or other crimes of violence or things like that. Bad things. Things that would lead you toward a death penalty.
>
> Mitigating factors are the opposite. They are things that would not necessarily justify the commission of a crime or be a defense to a crime, but might lessen the culpability or responsibility of a person.
>
> If a person was a follower in a group or criminal enterprise as opposed to being the leader, or a person did not have a criminal

background, or the person was a very tender age, 16 or 17, those would be mitigating factors, perhaps, and the others might be aggravating.

What you will be asked is to characterize things as aggravating or mitigating and not to simply count them but assign weights to them.

There are murders and there are murders. Not all murders are the same.

The state recognizes that by making it only murders with special circumstances that even qualify for this sort of a trial. But among them you must still weigh the facts of the case and the facts about the offender and determine in that way whether Mr. Banks deserves the death penalty or life in prison. [RT 42:4080-4081.]

The court then read portions of CALJIC Nos. 8.85 and 8.88, including factor (k). (RT 42:4090-4094.) However, the court further explained to the first panel of prospective jurors as follows:

You look at the crime and the offender.

The good and the bad.

Then you come up with your decision. [RT 42:4201.]

Subsequently, Prospective Juror No. 8 from the first panel reiterated her understanding that the process was one of weighing the "good against bad." (RT 43:4409.) When asked by the court to explain the concept of how the jury should arrive at its decision, Prospective Juror No. 8 responded, "I have a difficult time saying the word. So I will say good against bad." (RT 43:4409.) The court responded affirmatively, stating, "Aggravating and mitigating circumstances? (RT 43:4409-4410.) Prospective Juror No. 8 responded, "Yes. I will weigh that against each other.

(RT 43:4410.) The court responded, "Roughly stated that is what it boils down to. I will give you the detailed instruction later." (RT 43:4410.)

The court further defined aggravating and mitigating factors to the second panel of prospective jurors as follows:

> I have explained to these folks with us now several times the manner in which that decision is made is outlined in the law and what it says basically, briefly, is that at the end of this case, once you have heard all the facts and the evidence brought by both sides, you are to weigh the good and the bad, the mitigating and aggravating circumstances about the crimes and about the offender. And in that way you are to determine what would be appropriate, the death penalty or life without parole. [RT 44:4532.] [¶]
>
> When I say aggravation and mitigation, I mean the following:
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences above and beyond the crime itself.
>
> A mitigating circumstance is any fact, condition or event which doesn't constitute a justification or defense to the charge or an excuse but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> Okay? ...
>
> So you will weigh aggravation and mitigation and how aggravating is this and how mitigating is this and then determine in that manner with the help of your fellow jurors what penalty would be appropriate for the crime and the offender. [RT 44:4537.]

The trial court defined mitigating factors in terms of 1) "good" things that appellant had done and 2) matters relating to the offense. The court's use of the analogy of "good and bad" to define "mitigating and aggravating factors," and its focus

on mitigating factors relating to the offense, misleadingly omitted a discussion of factor (k) mitigation – i.e. relevant life influences that adversely affected appellant. (See *People v. Ochoa, supra*, 19 Cal.4th at p. 456.)

E. THE DEATH VERDICT MUST BE REVERSED BECAUSE IT IS REASONABLY LIKELY THAT THE JURY APPLIED THE COURT'S COMMENTS DURING VOIR DIRE AND ITS INSTRUCTIONS IN A WAY THAT PREVENTED FULL AND FAIR CONSIDERATION OF CONSTITUTIONALLY RELEVANT MITIGATION EVIDENCE

Although the trial court instructed the jury on factor (k) mitigation (RT 50:5915), the court repeatedly misguided the jury about the proper application of factor (k) mitigation. During voir dire, the trial court educated prospective jurors about 1) the weighing of aggravating and mitigation evidence and 2) the type of mitigation evidence that it could consider. (RT 41:3943-3945, 4079-4081, 4090-4094, 4201, 4409-4410, 4532-4537.) It did so, however, in a manner that was biased in favor of a death verdict by precluding the jury from giving full and fair effect to the actual evidence presented by appellant in mitigation.

In a capital case, the court must clearly and explicitly instruct the jury about mitigating circumstances. "The jury must receive clear instructions which not only do not preclude consideration of mitigating factors, *Lockett*, but which also 'guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.'" (*Spivey v Zant* (5th Cir. 1981) 661

F.2d 464, 471, quoting *Jurek v Texas* (1976) 428 U.S. 262, 274 [96 S.Ct. 2950, 49 L.Ed.2d 929], cert. denied, 458 U.S. 111 (1982).)

Appellant presented substantial evidence in mitigation concerning the life influences that adversely affected him, including 1) being born to, and partially raised by, an abusive and drug-addicted mother, who had sustained serious injuries and ingested large quantities of prescription and street drugs during her pregnancy with him, 2) being abandoned by that same mother, 3) having an abusive father who ultimately discarded appellant too, and 4) suffering from severe mental illness. He also presented persuasive evidence of his good character as shown by the fact that he engendered in his extended family a great love for him. This substantial evidence in mitigation was presented through the testimony of Dr. Louis Weisberg, Dr. Michael Gold, Dr. Carl Osborne, Mary Goldie, Juanita Terry, Linda Allen, and Barbara Mitchell. (*Ante*, pp. 36-49.)

Dr. Weisberg, a board certified psychiatrist, evaluated appellant when appellant was fifteen years old. (RT 48:5391-5394, 5396, 5400.) The information reviewed by Dr. Weisberg implied that appellant had a neurologic problem and thus could be suffering from organic brain dysfunction. (RT 48:5400, 5414.) Dr. Weisberg further testified that appellant's mother had a significant history of alcohol and drug abuse, including drug use during her pregnancy with appellant. (RT 48:5398, 5407.)

Dr. Gold, a neurologist, testified appellant has malfunction or abnormal function in both of his temporal lobes, which could affect emotions, behavior, and impulse control. (RT 48:5539, 5545-5546, 5551, 5559, 5584-5585.) Moreover, appellant presented a history that suggested, but did not prove, that he could be experiencing a type of epilepsy or seizure that arises in the temporal lobe. (RT 48:5540.)

Dr. Osborne, a licensed psychologist, testified that appellant suffered from several severe and chronic mental illnesses, including intermittent explosive disorder and probably substance dependence. (RT 48:5601, 5614, 49:5693-5694, 5697.) Dr. Osborne also testified that he reviewed reports by neuropsychologist Dr. David Rudnick and Dr. Gold, and was aware that Drs. Rudnick and Gold both believed that appellant was organically brain damaged and had right temporal lobe damage. Dr. Osborne's own tests showed that appellant was brain damaged. (RT 48:5615.)

Mary Goldie described how appellant, at three years of age, was brought to the Pasadena Police Department by an unrelated person. She took appellant into protective custody because a family member could not be located. At her direction, appellant was transported to a shelter care home for abused and neglected children. (RT 49:5783-5786.)

Juanita Terry, employed by the Los Angeles County Department of Public Social Services as a protective services worker, testified that appellant was removed from his mother's care because she was an unfit mother, being mentally unstable,

having used excessive corporal punishment on appellant, and having failed to give appellant consistent care and supervision. (RT 49:5788-5789, 5790, 5797.)

Linda Allen, appellant's aunt, testified she loves appellant very much and, despite being aware of his convictions in this case, she wants him to live. (RT 47:5205-5208.) Appellant's mother (Sparks) was a heavy drug user and stripper. (RT 47:5209-5211.) She was three months pregnant with appellant when she was struck by an automobile while exiting a club. (RT 47:5209.) She sustained serious injuries and was in a full body cast for a long time. (RT 47:5210.) While pregnant with appellant, Sparks took prescribed medication, but she also continued to take illegal drugs. (RT 47:5212.) Allen described Sparks as a "monster." (RT 47:5214.)

Allen further testified that when appellant was six or seven years old he was back living with his mother, having previously lived variously with another aunt (Barbara Sparks Mitchell) and in group homes. She saw appellant at a market taking bags to the car for a quarter; he was only six or seven years old. (RT 47:5221-5222.) He was trying to make money to give to his mother. (RT 47:5230.) Allen would feed appellant because he would complain that he was hungry. (RT 47:5229-5230.) She even gave money to a grocery store for food for appellant, but she never gave appellant money because he would give it to his mother. (RT 47:5229-5230.)

Barbara Mitchell testified that appellant lived with his mother and father, Melvyn Banks, for a period of time after appellant was born. Sparks and Melvyn

Banks had a physically violent relationship, which frequently landed Sparks in the hospital. Melvyn Banks beat Sparks, choked her, pushed her down the stairs, slammed car doors on her, and pulled her hair. (RT 47:5326.)

Sparks abandoned appellant when he was two years old. (RT 47:5328.) Mitchell took appellant and obtained legal custody. (RT 47:5328, 5346.) He lived with her for about three years. (RT 47:5328.) She cared for appellant as her own. Appellant was an extremely affectionate child. Mitchell used to hug and kiss appellant, and her sons and appellant hugged her. (RT 47:5328-5331.) Mitchell testified that she loves appellant and does not want him to die. (RT 47:5333.)

The evidence presented by the prosecution in aggravation (*ante*, pp. 25-36, 49-52) was closely balanced with the substantial evidence presented by appellant in mitigation (*ante*, pp. 36-49). Juror comprehension of the sentencing instruction is a federal constitutional guarantee. (See *Boyde v. California, supra*, 494 U.S. at p. 380.) Here, the death verdict should be reversed because there is a reasonable likelihood that the jury applied the instructions in a way that prevented the consideration of constitutionally relevant evidence consisting of 1) mitigation concerning the life influences that caused appellant to act as he did and 2) evidence of his good character as shown by the fact that he engendered in his extended family a great love for him.

///

XXIII.

THE TRIAL COURT'S INSTRUCTIONS TO THE PENALTY-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1 – THE DISAPPROVED "JUROR SNITCH" INSTRUCTION – VIOLATED APPELLANT'S RIGHTS TO JURY TRIAL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

The trial court instructed the jury in the language of CALJIC No. 17.41.1, the disapproved juror snitch instruction requiring jurors to report each other for perceived misconduct during deliberations. (RT 50:5903.) The trial court admonished the jurors as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law, or decide the case based on any improper basis, it is the duty -- strike that -- it is the obligation of the other jurors to immediately advise the court of the situation. [RT 50:5903.]

Appellant raises this identical argument in connection with the guilt-phase trial, and hereby incorporates that argument by reference. (*Ante*, § XII.) The chilling effect that the instruction necessarily had on jury deliberations – stifling free expression during the deliberative process – deprived appellant of his federal constitutional rights to jury trial and due process, thereby warranting reversal of the death judgment.

/ / /

XXIV.

THE COURT COMMITTED PREJUDICIAL MISCONDUCT DURING THE DEFENSE SURREBUTTAL ARGUMENT BY DENIGRATING DEFENSE COUNSEL FOR ENGAGING IN PURPORTED UNETHICAL CONDUCT – THUS UNDERMINING COUNSEL'S CREDIBILITY AS APPELLANT'S ADVOCATE AND BOLSTERING THE PROSECUTION'S ARGUMENT FOR DEATH – AND THEREBY VIOLATING APPELLANT'S RIGHTS TO COUNSEL, DUE PROCESS, IMPARTIAL JURY, MITIGATION, A RELIABLE PENALTY DETERMINATION, AND A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ART. I, §§ 7, 15, 16, AND 17 OF THE CALIFORNIA CONSTITUTION

A. INTRODUCTION AND FACTUAL BACKGROUND

Trial defense counsel began her surrebuttal argument by cautioning the jurors not to return a death verdict as an emotional response to the prosecutor's angry and hostile closing summation. Defense counsel began her surrebuttal argument:

> Mr. McCormick raises his voice and wants you to be angry and he repeats in anger all kind of things over and over and over again.
>
> You can be angry at the deeds. This is the time to look at the person who committed the deeds. [RT 50:5987.]

Counsel then turned her argument to the testimony of Drs. Gold and Osborne. (RT 50:5987.) She implored the jury to consider appellant's mental illness and/or brain damage as a factor in mitigation for a life sentence. Defense counsel argued, in part:

> Now, Mr. McCormick doesn't want you to believe that he is mentally ill or brain damaged because he doesn't want you to show any mercy or compassion or pity. [RT 50:5987.]

Then, trial defense counsel made the following argument, which drew a strong sua sponte rebuke from the trial court:

> You have -- you represent society and our society likes to think of ourselves as civilized, compassionate, merciful, just. We do not sink to the level of horrendous deeds and acts, because we represent the best of what society has, not the worst. We don't kill because somebody else kills, because that lowers us to the level of a horrendous verdict. [RT 50:5987.]
>
> The trial court immediately stopped counsel:
>
> Let me interrupt counsel and admonish the jury as follows:
>
> Arguments are interesting to hear and I allow a lot of leeway to both counsel, but they are getting quite out of hand.
>
> Let me inform you folks of one thing. You are jurors on this case. You are here to fashion an appropriate penalty, whether it be death or life without possibility of parole. You have not demeaned or lowered yourselves to have committed any wrong.
>
> I hope you understand that. Do you?
>
> (The jurors and alternate jurors answered collectively in the affirmative.)
>
> Continue your argument, please, and let's stick to the appropriate path, if you would. [RT 50:5988.]

Trial defense counsel then made the following argument, which drew an even stronger sua sponte rebuke from the trial court:

> I have some concern because Kelvyn has not been in the courtroom with me, and I am -- I am concerned, because he has not been here, you don't see him as a human being and a person also. He is a broken, damaged person, but he is a person just the same. He has done horrendous deeds. You have to make a decision about those deeds.

> Every morning for the rest of your lives you will look in the mirror and you have to be content with who you see and what you have done, and it is much easier to look in that mirror if you give life. [RT 50:5989.]

The trial court immediately stopped counsel and, in the presence of the jury, engaged counsel in the following colloquy:

> The Court: Once again, these arguments, counsel, if you want to sit down and formulate your thoughts to keep them ethical and lawful arguments, I will allow you to.
>
> Ms. Wilensky: I am not dwelling, your honor. I have made this argument before in this court.
>
> The Court: Yeah, probably with the same result.
>
> Ms. Wilensky: No, your honor.
>
> The Court: Let me -- do you want to debate with the court or do you want to be quiet and let the court admonish the jury as to their duties?
>
> I would prefer the latter.
>
> Ladies and gentlemen, again, this is not about your comfort or discomfort or what would be easier on you or harder on you.
>
> This is about a weighing, very straightforward process, weighing aggravation and mitigation and arriving at an appropriate penalty in that way, however it makes you feel, good, bad or indifferent.
>
> Please continue your argument. [RT 50:5989-5990.]

Defense counsel said a few more words to the jury (approximately 200), and then sat down. (RT 50:5990-5991.) The jury returned a death verdict. (RT 51:6001-6002.)

B. THE COURT COMMITTED MISCONDUCT BY DENIGRATING DEFENSE COUNSEL'S CHARACTER AND ADVOCACY IN THE PRESENCE OF THE JURY

It is bad enough when a judge makes statements from which the jury can "infer ... the court['s] ... low opinion ... of defense counsel." (*United States v. Carreon* (9th Cir. 1978) 572 F.2d 683, 686.) In that situation, "counsel can[not] ... remain an effective spokes[person] for his [or her] client" – *United States v. Spears* (7th Cir. 1977) 558 F.2d 1296, 1298 – and "it is not the lawyer who pays the price, but the client." (*People v. Sturm, supra*, 37 Cal.4th at p. 1240, quoting *People v. Fatone* (1984) 165 Cal.App.3d 1164, 1175; accord, *United States v. Coke* (2nd Cir. 1964) 339 F.2d 183, 185 ["Although the judge's caustic and disparaging remarks were, for the most part, directed at defense counsel, they undoubtedly gave the jury the impression that the defendant's case was of little substance and was not worthy of very much attention"]; *People v. Mahoney* (1927) 201 Cal. 618, 627 [reversing because the trial judge persisted in "making disparaging remarks ... discredit{ing} the cause of the defense"].)

The trial court twice interrupted defense counsel's surrebuttal argument, both times sending a clear message to the jury that defense counsel's argument was improper and should not be credited. (RT 50:5988-5990.) The second time the court stopped counsel's argument, however, the court explicitly suggested to the jury that defense counsel was engaging in *unethical* and *illegal* conduct. (RT 50:5989-5990.) The damage from the court's comments went beyond their immediate substantive effect, but

had the effect of discrediting appellant's sole advocate for a life sentence, and thereby bolstering the prosecution's argument for a death verdict.

The trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Clark* (1992) 3 Cal.4th 41, 143.) Here, the trial court's accusation that defense counsel's was engaging in unethical and unlawful conduct directly undermined counsel's credibility with the jury and created the impression that the judge was allying itself with the prosecution. (*People v. Sturm, supra*, 37 Cal.4th at p. 1233.)

The trial court's attacks upon defense counsel thus violated appellant's rights to counsel, due process, impartial jury, mitigation, a reliable penalty determination, and a fundamentally fair trial as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, §§ 7, 15, 16, and 17 of the California Constitution. (*People v. Fatone, supra*, 165 Cal.App.3d at pp. 1167, 1175; *United States v. Coke, supra*, 339 F.2d at p. 185; *United States v. Segines* (6th Cir. 1994) 17 F.3d 847, 852-853; see generally, *Offutt v. United States* (1954) 348 U.S. 11, 14 [75 S.Ct. 11, 99 L.Ed. 11] ["justice must satisfy the appearance of justice"].)

The court's demeaning – and most unwarranted – response to defense counsel's argument to the jury reflected adversely and directly on the counsel's intelligence and

character and thus on the persuasiveness of everything counsel said to the jury. (See *United States v. Tilghman* (D.C. Cir. 1998) 134 F.3d 414, 417, 418-420 [denial of due process where court's comments "may have damaged the appellant's credibility in the eyes of the jury" or "may have given the jury the impression that the judge doubted the defendant's credibility"].)

Like the judge in *Sturm*, here the judge "conveyed to the jury that ... he ... did not take seriously the defense theory in mitigation" – *People v. Sturm, supra*, 37 Cal.4th at p. 1238 – and "intervened in a way that created the impression that ... he ... was allied with the prosecution ...." (*Id.* at p. 1241; accord, *People v. Santana* (2000) 80 Cal.App.4th 1194, 1207.)

When the court makes "comment from which the jury may plainly perceive that the" defense argument "is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary." (*People v. Sturm, supra*, 37 Cal.4th at p. 1233, quoting *People v. Mahoney, supra*, 201 Cal. at p. 627.) That was the case here. "Imputations upon the good faith of counsel made in the presence of the jury ... unjustly injure the cause of a defendant and thereby deprive him of ... [a] fair and impartial trial...." (*People v. Zammora* (1944) 66 Cal.App.2d 166, 209; see *United States v. Tilghman, supra*, 134 F.3d at p. 420 [due process requires reversal where "the jury could

reasonably have interpreted the judge's pointed comments as reflecting his personal disbelief of" the defendant].)

C. THE TRIAL COURT'S MISCONDUCT RESULTED IN PREJUDICIAL ERROR REQUIRING REVERSAL OF THE DEATH VERDICT

"In a death penalty case, [this Court] ... expect[s] the trial court ... to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*People v. Hernandez* (2003) 30 Cal.4th 835, 877.) The proceedings here fell well short of this goal. For the reasons set forth above, the court's rulings and comments violated appellant's rights to counsel, due process, impartial jury, mitigation, a reliable penalty determination, and a fundamentally fair trial as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In a case in which the first jury was hung (RT 38:3774) and the defense presented substantial evidence in mitigation (*ante*, pp. 36-49), as here, the manner and content of the court's intervention

– undermining as it did both defense counsel's character and appellant's principal argument for a life sentence –

may well have adversely affected the vote of one or more jurors, causing the juror or jurors to vote for death without properly weighing that mitigating evidence against the prosecution's evidence in aggravation. (See *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244 [reversing for judicial errors, "We look very closely at the question of prejudice in this instance, where the death penalty was imposed on a penalty phase

retrial after the majority of the prior jury would have voted in favor of a sentence of life in prison without the possibility of parole"]; see also *Chapman v. California, supra*, 386 U.S. at p. 36; *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [108 S.Ct. 1981, 100 L.Ed.2d 575].)

In *People v. Mahoney, supra*, 201 Cal. 618 – reversing for judicial misconduct – this Court castigated the trial court for characterizing counsel's questions and objections as "silly," "idiotic," "trivial," and lacking a "scintilla of sense". (*Id.* at p. 627.) Likewise, this Court should castigate the trial court for characterizing – in the presence of the jury and at one of the most critical stages of the trial – defense counsel's argument as *unethical* and *unlawful*.

Reversal of the death verdict is required.

/ / /

XXV.

THE TRIAL COURT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND A FAIR AND RELIABLE DETERMINATION OF PENALTY, BY ITS REPEATED ERRONEOUS RULINGS AGAINST THE DEFENSE AND REMARKS DISPARAGING DEFENSE COUNSEL

Appellant explained in Argument XIII above, incorporated herein by reference, that throughout this case, beginning well before trial and continuing through the penalty phase retrial, the trial court made repeated one-sided rulings and remarks directed against defense counsel and appellant, disparaging counsel and weakening the defense's ability to present evidence countering the charges against appellant. As explained below, the trial court's actions also weakened the defense's ability to present evidence in mitigation for a life sentence, and thus denied appellant his rights to a fair trial, due process of law, and a fair and reliable determination of penalty.

When trial is by jury, a "fair trial in a fair tribunal" requires the judge to refrain from conduct that can prejudice the jury. (*People v. Sturm, supra*, 37 Cal.4th at p. 1233.) It is not just the appearance of bias expressed in the presence of the jury that is a problem, however. A judge makes many rulings out of the presence of the jury, rulings often deferred to if within the court's discretion. "Due Process clearly requires" that those rulings be made by "a judge with no actual bias against" the defendant (*Bracy v. Gramley, supra*, 520 U.S. at p. 905) – i.e., one who is "impartial and disinterested" (*Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242). (See *Taylor v.*

Hayes, supra, 418 U.S. at p. 501 [reversing where judge became "embroiled in a running controversy with petitioner"].)

In the present case, throughout trial the judge displayed animosity toward appellant. In addition, the judge repeatedly disparaged defense counsel before the jury, selectively overruled defense objections, and made numerous rulings that favored the prosecution over the defense. These rulings include the errors described above (*ante*, §§ XV - XXI, and XXIV) and the several additional erroneous matters identified below, including 1) the court's disparity in questioning of, and rulings on challenges to, death-scrupled jurors and pro-death jurors, 2) limiting defense counsel's cross-examination of witness Sandra Hess and admonishing defense counsel in the presence of the jury, and 3) the court's improper and inappropriate comment to prosecution witness Bridget Robinson, which vouched for her credibility.

A. DISPARITY IN QUESTIONING OF, AND RULINGS ON CHALLENGES TO, DEATH-SCRUPLED JURORS AND PRO-DEATH JURORS

During voir dire of prospective jurors at penalty phase retrial, defense counsel confronted the judge about questioning death-scrupled jurors differently from pro-death jurors. (RT 43:4473-4474.) Defense counsel explained that pro-death penalty jurors who waver in their answers seem to wind up on the jury, despite challenges for cause, while jurors with reservations about the death penalty are dismissed for cause. (RT 43:4473-4474.)

The disparity in treatment can be seen in subsequent voir dire of the alternative prospective jurors. Prospective Alternate Juror No. 4 answered in his questionnaire that he would always choose for life regardless of the evidence. (RT 44:4654.) When questioned by the judge, however, he explained that the written answer was his personal view on the death penalty, but he could follow the law and apply the death penalty in the appropriate case. (RT 44:4655.) The prosecutor's challenge for cause was sustained over defense objection. (RT 44:4658.)

In contrast, the very next prospective alternate juror wrote in his questionnaire that "if you take another life for no just reason, you should pay the price, the death penalty." (RT 44:4668.) The judge commented to the prospective alternate juror, "You seem like from your answers that you are a pretty firm supporter on the idea of a death penalty ...." (RT 44:4667.) After the prospective alternate juror claimed to be able to weigh aggravation and mitigation and follow the law, the judge said that he was entitled to his opinions, and denied defense counsel's challenge for cause. (RT 44:4670-4671.)

Subsequently, the judge engaged Prospective Alternate Juror No. 1 in the following colloquy:

The Court:	Do you know of any reason you would not be a good juror to hear this case?
Prospective Alt. Juror No. 1:	I'm a strong advocate of the death penalty.

The Court:	Do you think you are so strong an advocate that your mind is already made up in our case?
Prospective Alt. Juror No. 1:	I believe an eye for an eye.
The Court:	That is not what I asked.
Prospective Alt. Juror No. 1:	No.
The Court:	I need to know. If you have your mind made up and will be a vote for death no matter if we put on evidence or not, I need to know that. If you think you can keep an open mind, I need to know that.
Prospective Alt. Juror No. 1:	Yes.
The Court:	Which is it?
Prospective Alt. Juror No. 1:	I can keep an open mind. [¶]
The Court:	Do you think you can do that or do you think your views are such that you are really predisposed a particular way?
Prospective Alt. Juror No. 1:	I can keep an open mind, I guess.
The Court:	You guess? I got people that will not give it to me today. I tell you. A lot of hedging. You guess. You think. Maybe. How sure are you?
Prospective Alt. Juror No. 1:	I can keep an open mind.
The Court:	Any doubt about it?
Prospective Alt. Juror No. 1:	No.
The Court:	If you develop some doubts, even in the next 10 seconds, I want you to let me know. [RT 44:4709-4711.]

Trial defense counsel challenged Prospective Alternate Juror No. 1 for cause, stating, in part: "He stood up here and he said an eye for an eye and then the court started questioning him and then, again, I have objected as to the way that these pro death penalty phase people have been questioned in the past." (RT 44:4714.) Defense counsel stated that she was out of peremptory challenges. (RT 44:4715.) She further observed, "We are winding up with a very pro death penalty eye for an eye juror. I will ask the court to excuse him and let's try to get somebody a little more neutral whose mind is not made up before they start." (RT 44:4715.) The judge then denied the challenge, and the alternate stayed on the jury. (RT 44:4716.)

B. LIMITS ON DEFENSE CROSS-EXAMINATION OF PROSECUTION PENALTY-PHASE WITNESS SANDRA HESS AND ADMONISHING COUNSEL IN THE PRESENCE OF THE JURY

During the penalty retrial, the judge sternly admonished trial defense counsel over her cross-examination of prosecution witness Sandra Hess regarding an incident where appellant choked Hess in the classroom. (RT 45:4818-4823.) Defense counsel asked Hess whether, after she refused to permit appellant back inside the classroom, she went to the "school psychiatrist to find out anything more about Kelvyn?" (RT 45:4818.) The judge sua sponte interrupted the questioning and sustained its own relevancy objection, refusing to permit Hess to answer the question. (RT 45:4819.) A few moments later, the judge sua sponte interrupted the questioning when defense counsel asked Hess, "Did you write any notes about his behavior or anything that you

refreshed your memory with?" (RT 45:4820.) The following colloquy then occurred between the court and defense counsel:

The Court: ... Are we conducting discovery, counsel, or is there a specific area?

Ms. Wilensky: Your honor, I am cross-examining at penalty phase.

The Court: I think you are about done cross-examining this witness unless there is something new. If so, come up to the bench and explain what it is. Anything else?

Ms. Wilensky: I have nothing more if the court is not going to allow me to cross-examine.

The Court: I will allow you to cross-examine from here to kingdom come to dooms day if you can elicit relevant information. If you have some, explain it to me. Come on up. [RT 45:4820-4821.]

The judge then admonished counsel in the presence of the jury, as follows:

> Ladies and gentlemen, I take more of an active role than most courts do and my job is to attain relevant information.
>
> And we are going to try to do this cogently, rapidly and clearly.
>
> I want both sides to understand that is the goal here, that we are not going to be here for a year trying the case.
>
> We will do it within the time estimate that the attorneys gave us, so I am going to try to do that.
>
> So if I seem to be pushing, you're right. I am. [RT 45:4823.]

C. JUDGE'S IMPROPER AND INAPPROPRIATE COMMENT TO PROSECUTION WITNESS BRIDGET ROBINSON, WHICH VOUCHED FOR HER CREDIBILITY

During the penalty phase retrial, appellant's former girlfriend, Bridget Robinson, testified that appellant assaulted her by hitting her, choking her, and tying her up with a telephone cord. (RT 46:5113-5124.) As she was being excused from the witness stand following her testimony, the judge stated, in the presence of the jury, "Ma'am, I'm sorry this happened to you and I want to thank you for coming back down. You can step down. Thank you so much." (RT 46:5140.) Following the testimony of the next witness, Frank Weber, the judge instructed the jury to disregard his comment to Robinson, stating that it was "improper and inappropriate." (RT 46:5146.) The fact that the judge made the comment in the first place, however, is evidence of the appearance of bias.

D. REVERSAL OF THE JUDGEMENT OF DEATH IS IS REQUIRED

The above actions by the trial court, along with the other rulings against the defense described in the previous sections of this brief, above, require reversal of the death verdict.

"[S]ome constitutional errors require reversal without regard to the evidence in the particular case." One of those errors is "adjudication by [a] biased judge", which "necessarily render[s] a trial fundamentally unfair. The State, of course, must provide a trial before an impartial judge, [citation], with counsel to help the accused defend against the State's charge, [citation].... Without these basic protections, a criminal trial

cannot reliably serve its function as a vehicle for determination of guilt or innocence, [citation], and no criminal punishment [imposed following such a trial] may be regarded as fundamentally fair. Harmless-error analysis ... presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." (*Rose v. Clark, supra*, 478 U.S. at pp. 577-578.)

As explained above, appellant "did not get to present evidence and argument before an impartial judge" at the penalty phase. The judgment must be reversed in its entirety without the need for harmless-error analysis. (*Ibid.*; accord, *Sims v. Rowland* (9th Cir. 2005) 414 F.3d 1148, 1153 ["trial before a biased judge is an archetypal example of a constitutional error that necessarily renders a trial fundamentally unfair and, for that reason, is not amenable to harmless error analysis"].)

Harmless error analysis would yield the same result. The court's actions and rulings were plainly unconstitutional and an abuse of discretion and require reversal. At the very least, however, the exercise of discretion was subject to the "erroneous or distorted conception of the facts or the law ...." (*Marshall v. Jerrico, Inc., supra*, 446 U.S. at p. 242.) It is very likely that in the absence of the appearance of bias – as shown by the judge's repeated erroneous rulings against the defense and remarks disparaging defense counsel – the errors complained of in this brief would not have occurred. It is likely, for instance, that the trial court:

– would have conducted proper voir dire – one without the disparity in questioning of, and rulings on challenges to, death-scrupled jurors and pro-death jurors;

– would have credited appellant's mental health issues, and not placed unconstitutional limits on the defense case in mitigation;

– would not have placed limits on defense cross-examination of prosecution witness Sandra Hess and would not have admonished defense counsel in the presence of the jury;

– would not have vouched for the credibility of prosecution witness Bridget Robinson when she was leaving the witness stand;

– would not have stricken testimony of defense expert witness Dr. Carl Osborne that appellant suffered from anti-social personality disorder – evidence which was relevant mitigation in support of a life sentence;

– would not have permitting inadmissible testimony in aggravation from Deputy Penate about appellant's conduct in jail and purported mental state, and testimony from Carole Sparks about runaways and thefts;

– would have permitted appellant to present evidence of institutional failure in support of a life sentence;

– would not have elicited expert testimony from Dr. Carl Osborne suggesting future dangerousness, nor allowed the prosecutor to do the same, and then would not

have overruled the defense objection to the prosecutor's argument on future dangerousness;

– would not have refused to permit evidence on the issue whether appellant committed the underlying offenses, and would not have refused to instruct the jury on the issue of lingering doubt;

– would have given full and accurate instructions on the elements of death qualification and the prosecution's burden; and,

– would have permitted appellant to attend his penalty phase trial.

The judge's appearance of bias was conveyed to the jurors directly. By denigrating trial defense counsel, and repeatedly ruling on objections in ways that favored the prosecution, the judge "in the presence of the jury ... conveyed the impression that he favored the prosecution ...." (*People v. Sturm, supra*, 37 Cal.4th at p. 1238.)

The errors deprived appellant of his rights to a fair trial, due process of law, and a fair and reliable determination of penalty. (U.S. Const., Amends. VI , VIII & XIV; Cal. Const. Art. I, sections 7, 15, 16.) "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels, supra*, 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined

effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"].)

Given the substantial evidence in mitigation and the closeness of the penalty evidence, and for the specific reasons set out in the arguments that address the foregoing rulings and omissions, it is reasonably possible and reasonably probable that, without them, or one or more of them, the jury would not have returned a verdict of death. At the very least, it is reasonably probable that the cumulative effect of the judge's conduct adversely affected the penalty verdict. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244; see generally, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15.) The judgement of death must therefore be reversed.

/ / /

XXVI.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the high court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[29] See also, *Pulley v. Harris* (1984) 465

---

[29] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at

U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree

---

p. 2527.)

murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the

"special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[30] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass

---

[30] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The high court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[31] (See Section E. of this Argument, *post*).

---

[31] In a habeas petition to be filed after the completion of appellate briefing, appellant intends to present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant intends to present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[32] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[33] or having had a "hatred of religion,"[34] or threatened witnesses

---

[32] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[33] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[34] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S.Ct. 3040 (1992).

after his arrest,[35] or disposed of the victim's body in a manner that precluded its recovery.[36] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

---

[35] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S.Ct. 498.

[36] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496 U.S. 931 (1990).

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372] [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they

had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 553] [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [542 S.Ct. 296, 159 L.Ed.2d 403] [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 459 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id. at p. 593.) The court acknowledged that in a prior

case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511]) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The high court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the high court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a

judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 [543 S.Ct. 220, 160 L.Ed.2d 621], the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. IN THE WAKE OF *APPRENDI*, *RING*, *BLAKELY*, AND *CUNNINGHAM*, ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

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

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[37] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (RT 50:5915-5916), "an aggravating

---

[37] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[38] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[39]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's

---

[38] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460)

[39] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[40] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether

---

[40] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id. pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). [*Cunningham, supra,* at p. 13.]

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant*

question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[41] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places

---

[41] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The U.S. Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. [*Ring*, 124 S.Ct. at 2431.]

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the

aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88 (7th ed., 2003).) "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*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at p. 2551 [emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. WHETHER AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS IS A FACTUAL QUESTION THAT MUST BE RESOLVED BEYOND A REASONABLE DOUBT

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation.

A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[42])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California, supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].)[43] As the high court stated in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

---

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

[43] In its *Monge* opinion, the high court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

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

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS EXIST AND OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

a. FACTUAL DETERMINATIONS

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural

safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. IMPOSITION OF LIFE OR DEATH

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also

Addington v. Texas (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." [455 U.S. at p. 755.]

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually

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

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the

death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[44] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a

---

[44] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated

not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law

had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See,

e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant, including evidence of an assault on Sandra Hess, an assault on Richard Bee, a robbery of Luz Hernandez, an assault on Sevedeo Sanchez, an assault on Arthur Penate, and an assault on Bridget Robinson. (*Ante*, pp. 25-31.) Moreover, a considerable portion of the prosecution's closing argument was devoted to arguing these alleged offenses. (RT 50:5920-5930, 5936-5937, 5948-5958.)

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*,

supra, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher*

(1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the*

> *relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell*

v. Blodgett (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument, which highlighted the absence in appellant's case of most of these factors. (RT 50:5930-5937.) It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made 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.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be

imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a

compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[45] as in *Snow*,[46] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

---

[45] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[46] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[47]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed

---

[47] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

against persons subject to loss of life; they violate equal protection of the laws.[48] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*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.) The nonuse of the death

---

[48] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "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 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by

mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [122 S.Ct. 2242, 153 L.Ed.2d 335], citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* 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. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death

penalty to only "the most serious crimes."[49] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (See *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335]; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

/ / /

---

[49] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XXVII.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

The death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at the penalty phase of his trial. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; *People v. Hill, supra,* 17 Cal.4th 800, 844-845; *Phillips v. Woodford, supra,* 267 F.3d 966, 985, citing *Mak v. Blodgett, supra,* 970 F.2d 614, 622.)

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels, supra,* 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see also *Montana v. Egelhoff, supra*, 518 U.S. at p. 53[stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"); *Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn.15 ["{T}he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness ...."].)

Here, there is a substantial record of serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284.

Thus, even if the Court were to hold that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermines confidence in the integrity of the penalty proceedings in this case. These numerous constitutional violations compounded one another, and created a pervasive pattern of unfairness that violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights by resulting in a penalty trial that was fundamentally flawed and a death sentence that is unreliable.

As shown above, this was a close case on the issue of penalty as evidenced by, among other things, the strength of the mitigation evidence, which showed that appellant suffered a childhood that deprived him of the opportunity to conform his behavior, he suffered from severe mental illness, and he was loved dearly by his extended family members. (*Ante*, pp. 36-49.)

The also was a close case as evidenced by the fact the first penalty jury could not return a unanimous verdict of death. (RT 38:3771-3774.)

It simply cannot be said that the combined effect of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Appellant's death sentence must be reversed due to the cumulative effect of the numerous errors in this case.

/ / /

CONCLUSION

For the reasons set forth above, appellant Kelvyn Rondell Banks respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

Dated: 10-22-08 By: _____
Stephen M. Lathrop
Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

CERTIFICATE OF COMPLIANCE

I hereby certify under penalty of perjury that the number of words in the brief is 88,957.

Respectfully submitted,

Dated: 10-22-08 By: _____
Stephen M. Lathrop
Attorney for Defendant/Appellant
KELVYN RONDELL BANKS

(PROOF OF SERVICE - 1013a, 2015.5 C.C.P.)

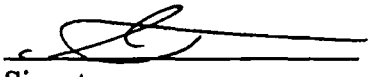
STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430 Rolling Hills Estates, CA 90274. On October 27, 2008, I served the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

Allison H. Chung Deputy Attorney General Attorney General's Office 300 South Spring St., 5th Fl. Los Angeles, CA 90013	Clerk, Los Angeles Sup. Ct. Attn: Hon. Charles E. Horan East District, Dept. EAM Pomona Courthouse South 400 Civic Center Plaza Pomona, California 91766	Linda Robertson Supervising Attorney California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105
Joy L. Wilensky 895 River Dr. Fort Bragg, CA 95437 (Trial Defense Counsel)	Kevin McCormick District Attorney's Office 210 W Temple St #17-1116 Los Angeles, CA 90012	Mr. Kelvyn Banks P.O. Box P-47600 San Quentin, CA 94974

I am readily familiar with the firm's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address above following our office's ordinary business practices. The envelope(s) will be deposited with the United States Postal Service on this date, in the ordinary course of business. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on October 27, 2008, at Rolling Hills Estates, California.

Stephen M. Lathrop
Printed Name


Signature