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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CAPITAL CASE**
Plaintiff and Respondent,	Case No. S081918
v.	Superior Court No. CR40930
KENNETH McKINZIE,	
Defendant and Appellant.	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE VINCENT J. O'NEILL, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On June 22, 1998, appellant Kenneth McKinzie was charged by amended information with first degree murder (Pen. Code, § 187, subd. (a), count one), residential robbery (Pen. Code, § 211, count two), residential burglary (Pen. Code, §§ 459 and 462, subd. (a), count three), carjacking (Pen. Code, § 215, subd. (a), count four), kidnapping for the purpose of robbery (Pen. Code, § 209, subd. (b), count five) and three counts of second-degree commercial burglary (Pen. Code, § 459, counts six through eight). The information alleged as special circumstances that appellant committed the murder charged in count one during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)) and a burglary (Pen. Code, § 190.2, subd. (a)(17)). The information also alleged that the victim in the offenses charged in counts two through six was 65-years-old or older within the meaning of Penal Code section 667.9, subdivision (a). (1 CT 102-107.)

On November 3, 1998, a jury found appellant guilty of first degree murder (Pen. Code, § 187, subd. (a), count one) and made true findings on both special circumstances. The jury also convicted appellant of first degree robbery (Pen. Code, § 211, count two), residential burglary (Pen. Code, § 459, count three), carjacking (Pen. Code, § 215, subd. (a), count four), kidnapping for robbery (Pen. Code, § 209, subd. (b), count five) and two

counts of commercial burglary (Pen. Code, § 459, counts six and eight).[1] The jury found true the allegation that the victim was 65 years of age or older at the time of the offenses charged in counts two, three and four, and that appellant knew or should have known that fact (Pen. Code, § 667.9, subd. (a)). (2 CT 470-472; 18 RT 3347-3352.)

The jury retired to deliberate on the penalty phase at 3:34 p.m. on November 16, 1998. (2 CT 547.) On November 23, 1998, the trial court declared a mistrial after the jury was unable to reach a verdict during the penalty phase after deliberating for approximately five full days. (2 CT 551, 554, 565B-565D, 577-580; 3 CT 591-594; 21 RT 4002-4004.)

A second jury was empanelled and trial on the penalty commenced on May 5, 1999. (3 CT 751A-751F; 30 RT 5951-52.) The cause was submitted to the jury at 4:35 p.m. on May 17, 1999, after roughly seven full days of trial. (3 CT 752-755, 756-760, 764A-764E, 775-777, 783, 793A-793F, 797B, 855-857; 36 RT 7242.) On May 19, 1999, the jury returned a

[1] Count seven (Pen. Code, § 459) was dismissed following the conclusion of the People's case-in-chief upon motion of the defense pursuant to Penal Code section 1118.1. (2 CT 338; 15 RT 2768.)

verdict of death after deliberating for approximately eight or nine hours.[2] (3 CT 871; 37 RT 7259-7261.)

The trial court denied appellant's motion for modification (Pen. Code, § 190.4, subd. (e)) (37 RT 7295-7298) and sentenced appellant to death on count one (Pen. Code, § 187, subd. (a)). (37 RT 7303-7304.) The court imposed a consecutive life term on count five (Pen. Code, § 209, subd. (b)) together with a consecutive one-year term pursuant to Penal Code section 667.9, subdivision (a). The court imposed a consecutive aggravated term of nine years on count four (Pen. Code, § 215, subd. (a)) together with a consecutive one-year term pursuant to Penal Code section 667.9, subdivision (a). The court imposed a 16-month term on count three (Pen. Code, §§ 459 and 462, subd. (a)) but stayed the enhancement pursuant to Penal Code section 667.9, subdivision (a). (37 RT 7303.) The court imposed the aggravated term of six years on count two (Pen. Code, § 211) but stayed sentence on that count pursuant to Penal Code section 654. The court imposed consecutive eight-month terms on counts six and eight (Pen.

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[2] The jury retired to deliberate at 4:35 p.m. on May 17, 1999. (3 CT 857.) The trial court recessed for the day at 4:45 p.m., after being informed by the bailiff that the only thing the jurors had requested was "10 minutes so they can decide when to come back tomorrow." (3 CT 858; 36 RT 7245-7246.) The jury recommenced deliberations at 9:01 a.m. on May 18, 1999, and recessed for the day at 4:35 p.m. (3 CT 863.) The jury resumed deliberations at 9:10 a.m. on May 19, 1999. (4 CT 873.) At 11:18 a.m., the trial court met with counsel in chambers and informed counsel that the jury had reached a verdict. (37 RT 7252.)

Code, § 459). The court ordered appellant to pay $10,000 to the state restitution fund. The court recommended that appellant participate in any drug programs available to him in prison pursuant to Penal Code section 1203.096. The court ordered appellant to provide blood and saliva samples pursuant to Penal Code section 296. (4 CT 913-920; 37 RT 7302-7304.)

Appeal is automatic. (Cal. Const., art. 6, § 11, subd. (a); Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. People's Case-in-Chief

In December of 1995, 73-year-old Ruth Avril owned a three-unit apartment building located at 410 East Dollie in Oxnard. (11 RT 2198.) Avril lived in the upstairs unit and rented out the two downstairs units. (11 RT 2199-2200.) Avril owned a black Ford Taurus. (11 RT 2207.) During the two years prior to her death, Avril left her garage door open every day until roughly 11:00 p.m. (11 RT 2207-2209.)

Appellant Kenneth McKinzie lived with his girlfriend Peggy Garner and her three sons -- Robert T., Donnie B. and Kenneth M. -- in an apartment located at 421 Helena Way, across the alley from Avril's home. (11 RT 2214-2215; 12 RT 2373-2375; 13 RT 2513-2514.) Shortly before Christmas in 1995, Donnie and appellant helped Avril carry her Christmas tree to her apartment. (12 RT 2376-2378-2381.)

Appellant went to Ralph Gladney's during the late evening hours of December 21, 1995 and the early morning hours of December 22nd and asked him whether he needed a camera.[3] (13 RT 2610-2612, 2620-2622.)

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[3] Gladney's preliminary hearing testimony was read to the jury because Gladney died prior to trial. (13 RT 2610.) Gladney's testimony was not specific about the date appellant came to his home, but fixing the date is possible because appellant went to Theresa Johnson's home after leaving Gladney and he and Johnson used Avril's ATM card during the early morning hours of December 22, 1995. (12 RT 2258-2259, 2360-2366.)

Appellant also asked Gladney whether he knew a girl who could help him use an ATM card that belonged to appellant's girlfriend. (13 RT 2612-2614.)

Appellant went to Theresa Johnson's apartment after leaving Gladney's home (12 RT 2258-2259.) His hand was swollen. (12 RT 2313.) Appellant showed Johnson some credit cards, ATM cards and a driver's license for an older white female. (12 RT 2260-2262.) Appellant and Johnson smoked rock cocaine before driving a car similar to Avril's car to a grocery store, where Johnson obtained $240 from an ATM using one of Avril's cards. (12 RT 2322, 2263-2266, 2268, 2361-2363, 2365-2366.) Appellant and Johnson then drove to a convenience store where Johnson obtained $200 from an ATM, again using Avril's card. (12 RT 2269-2270, 2329-2330, 2361, 2365-2366.)

Later that same day, appellant told Johnson he thought he killed someone. (12 RT 2270-2274, 2280-2282, 2330-2336.) Appellant told her that he was referring to "a lady that lived down the street from his apartment building where he used to live." (12 RT 2282.) Appellant knew the woman because she lived down the alley from him. He had seen her earlier that day and had taken her Christmas tree into her house for her. (12 RT 2282.)

Appellant told Johnson that the woman turned off her garage light at a certain time of night and claimed he waited in the garage to rob the woman. (12 RT 2282-2283.) He came up behind the woman and hit the woman with his fist. He kept hitting her but couldn't knock her out. (12 RT 2283-2284.) The woman started screaming and hollering. Appellant wanted her to shut up. (12 RT 2283.) Appellant continued to strike the woman after she turned around and saw him. (12 RT 2284.) He put the woman into the trunk of a car and hit her with the trunk lid. (12 RT 2284.)

Appellant told Johnson that he closed the lid and drove the woman to a back road. (12 RT 2284-2285.) The woman was hollering, screaming and making noise in the trunk. (12 RT 2285-2286.) He took the woman out of the trunk on a back road, hit her again and threw her into a ditch filled with water. (12 RT 2286, 2297.) Appellant told Johnson that the car they had been driving and the ATM card they had been using both belonged to the woman. (12 RT 2286.)

Appellant and Johnson then made one more attempt to use Avril's ATM card, albeit unsuccessfully, before appellant dropped off Johnson at her home and left to get rid of Avril's car. (12 RT 2288, 2293-2295.) Appellant told Johnson that he had dropped off the car somewhere in

midtown but did not say where.[4] (12 RT 2295, 2297.)

Appellant later returned to Johnson's apartment with some wrapped Christmas presents. (12 RT 2297.) Appellant told Johnson that he got the presents from the woman's house. (12 RT 2297-2299.) Appellant and Johnson both opened the presents. Appellant gave a doll to Johnson's daughter but kept the other presents to pass out to other people. (12 RT 2298.) Appellant later sold Avril's stereo to Johnson's brother-in-law. (12 RT 2299-2301; 13 RT 2447-2449, 2451-2454, 2488-2493.)

Gladney went with appellant to a motel room on Hueneme Boulevard the day after appellant and Johnson used Avril's ATM card. (13 RT 2614, 2622.) Appellant told Gladney he thought that he may have beaten and killed an older woman who lived somewhere on Dollie, put her in the trunk of her car and dumped her in a canal somewhere near what he thought was the Point Mugu rock. (13 RT 2615-2617.) Appellant told Gladney that he waited for the woman outside near her garage but attacked her in the garage. (13 RT 2616-2617.) Appellant kept hitting the woman but she would not stop yelling. (13 RT 2617.) Appellant told Gladney that he choked the woman. (13 RT 2617.) He put the woman in the trunk and drove her off "somewhere in Malibu." (13 RT 2617-2618.)

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[4] Avril's car was recovered from an Elk's Lodge parking lot in March of 1996. (13 RT 2535-2536.) A lodge employee testified that the car had been at that location roughly since the end of 1995. (12 RT 2399-2402.)

The Discovery of Avril's Body

On December 22, 1995, at approximately 9:00 a.m., two young men found Avril's body in a water-filled farmland drainage canal near the ocean in Oxnard. (11 RT 2115-2120, 2224-2226, 2228-2229.) Assistant Ventura County Medical Examiner Frank opined that Avril died sometime between the late night hours of December 21st and the early morning hours of December 22nd. (11 RT 2124, 2181-2182.) Frank opined that the cause of death was blunt force trauma to Avril's brain and manual strangulation. (11 RT 2177-2179.)

Avril suffered multiple blunt force injuries to her face and head, including lacerations and abrasions. (11 RT 2133-2135, 2137-2155, 2189.) Avril suffered a subdural hematoma on the left side of her brain and a subarachnoid hemorrhage over the surface of her brain, mainly directly behind the forehead. (11 RT 2178-2179.) Avril also suffered bruising to her legs, chest, neck, right shoulder and on both arms and hands. (11 RT 2156-2167.)

Frank testified that a pale red bruise found just to the right of Avril's voice box was caused by pressure being applied to Avril's neck in an act of manual strangulation. (11 RT 2163-2164, 2172, 2176-2177.) Petechial hemorrhages were found inside Avril's left eyelid. (11 RT 2144-2146.) Frank testified that petechial hemorrhages have a number of causes,

including strangulation. (11 RT 2145-2146.)

Appellant's Gifts to His Daughter

On December 25th or 26th appellant went to Erania McClelland's apartment in order to see his 16-year-old daughter. (13 RT 2457-2459.) Appellant gave his daughter a bathrobe, a small television, a camera and a shirt. The presents were not wrapped. (13 RT 2460, 2462.) District Attorney's Office Investigator Fitzgerald obtained the camera from appellant's daughter during the Spring of 1997 and had the film in the camera developed. (13 RT 2461-2462, 2470-2472.) The film included a photograph of Avril and two photographs of people who lived adjacent to Avril's apartment. (13 RT 2513-2517.) Avril's daughter-in-law identified the robe appellant gave to his daughter as being a gift she sent to Avril as a Christmas present in 1995. (13 RT 2523-2524.)

Discovery of the Burglary

Maria Aragon lived in one of the downstairs apartments in the building owned by Avril. (11 RT 2199.) Aragon last saw Avril alive on December 21, 1995. (11 RT 2210.) On January 1, 1996, Aragon filed a missing person report after the mailman told her that mail was stuck in Avril's door. (11 RT 2210-2211.)

Oxnard Police Officer Funk entered Avril's apartment and found it had been ransacked. (11 RT 2211-2212, 2234; 12 RT 2384-2389.) A

Christmas tree had been set up but no presents were under the tree. (11 RT 2234.) Avril's purse was on the floor next to the television and her checkbook was to the side of the purse. (11 RT 2213.) The stereo cabinet was ajar and the stereo was missing. (11 RT 2212, 2235; 12 RT 2387.)

Physical Evidence

Ventura County Crime Lab Senior Criminalist Jones testified as a blood-spatter expert for the People. (13 RT 2549-2551.) Jones found considerable blood-staining and spattering in the trunk of Avril's car. (13 RT 2553-2554, 2556-2558, 2564-2565, 2575-2577.) Jones also observed several "blood swipes" in the trunk, including one that extended across the trunk lid.[5] (13 RT 2558-2560, 2563.) Based on this evidence, Jones opined that Avril was alive while in the trunk of her car. (13 RT 2560, 2578.) DNA testing established that the blood on the trunk lid was Avril's blood. (13 RT 2580-2581.)

Evidence of a faint pooling of Avril's blood was found just off center of the garage toward the western portion of the garage. There appeared to be blood spatters from that area and deep into the garage and up onto the walls. There was a blood path that led from the pool to the opening of the garage. (11 RT 2539-2540; 13 RT 2593-2594, 2599-2601.) Based on

[5] A "blood swipe" is blood being swiped onto a target. A "blood wipe" is blood being wiped from a target. (13 RT 2553.)

this evidence, Jones concluded that Avril was struck by a minimum of two blows. (13 RT 2594, 2600-2601.)

B. Defense Case

Appellant's defense in this matter was based on his claim that Avril was murdered by Donald Thomas. Appellant called Timothy Akers in order to impeach Gladney's testimony that appellant admitted killing Avril. Appellant called psychopharmacologist Ronald Siegel to explain the effect of prolonged cocaine usage on Theresa Johnson's ability to recall.

Appellant's Guilt Phase Testimony

Appellant denied that he killed Avril, beat Avril, stuck her in the trunk of her car or dumped her body in a ditch. (16 RT 3029.) Appellant testified that he knew Avril. He helped her paint parts of her apartment and had helped her with her groceries from time to time. (16 RT 2987.) Appellant, his son Kenneth and Donald B. helped Avril with her Christmas tree in 1995. (16 RT 2987-2988, 3035-3036.)

Appellant claimed he encountered Donald Thomas sometime around Christmas of 1995 as appellant was walking to Peggy Garner's home. (16 RT 2988-2989, 3045.) Thomas was in a car with some dark-skinned people appellant assumed were Mexican. (16 RT 2989-2990, 3045-3046, 3051-3055.) Thomas had a VCR and some credit cards. He asked appellant if he wanted to "come up on some merchandise." Appellant testified that "come

up on" is street talk for buying. (16 RT 2990.)

Thomas told appellant not to take the VCR to a pawn shop because it had been obtained in a burglary of "the lady's pad by Peggy's." (16 RT 2990, 3008, 3046, 3078.) Thomas gave appellant a key to Avril's car and let appellant take the car. (16 RT 2991-2992, 3003, 3050, 3054, 3057.)

Appellant took the VCR and credit cards and drove to Mona Hall's home. Ralph Gladney was staying with Hall. (16 RT 2990-2991, 3046-3050, 3057-3059.) Appellant sold the VCR to Gladney for $40. (16 RT 2991, 2993, 3063-3064.) Gladney told appellant to take the cards to Theresa Johnson. (16 RT 2994.)

Appellant went back to Thomas' location and gave Thomas $30 and kept $10 for himself. (16 RT 2991, 2994, 3064-3065, 3073-3076, 3097.) Appellant then drove to Theresa Johnson's house in Avril's car. (16 RT 2994-2996, 3039-3040, 3074, 3079.) After smoking some cocaine, appellant and Johnson drove Avril's car to a grocery store and Johnson used Avril's ATM card to obtain $240. (16 RT 2997-3001, 3040-3044, 3084-3085, 3090.) They left the grocery store and drove to a convenience store, where Johnson again used Avril's ATM card to obtain cash. (16 RT 3001, 3003-3004, 3086-3088.)

Appellant and Johnson returned to Johnson's apartment and smoked more cocaine. (16 RT 3004-3005, 3044, 3088-3089.) After smoking the

cocaine, appellant went out to find Thomas to give him some money. (16 RT 3005, 3045, 3089.) After appellant gave Thomas some money, Thomas gave appellant a stereo and five or six other items from Thomas, including a bathrobe, a camera and a stuffed animal. (16 RT 3006-3007, 3011-3012, 3045, 3091-3094, 3097-3099.)

Thomas told appellant that the stuff had come from Avril and that she had been beaten. Thomas and his friends had put her body in the trunk and drove her to Malibu and dumped her body. (16 RT 3007-3008, 3015-3016, 3101, 3105, 3121-3122, 3130.) Thomas told appellant that they were supposed to rob her house but ended up robbing her garage. (16 RT 3122.) Avril was hit with the trunk lid as she tried to get out of the trunk. (16 RT 3122-3123.)

Appellant later told Johnson what he had been told about Avril and expressed his belief that he had involved himself in a murder by having the property. (16 RT 3016-3018, 3102, 3104, 3108.) Appellant told Johnson that Avril had been beaten, robbed, hit with the trunk of her car and taken by force. Her body had been dumped. (16 RT 3016-3017.)

Appellant saw Thomas again later that day as he sat on the steps at Mike Fontenot's home. (16 RT 3021-3022.) Thomas told appellant that Avril had been robbed. They waited for her and things got bad. (16 RT 3022.) Appellant testified he believed that this was when Thomas told him

about the trunk lid. (16 RT 3022.)

Appellant left Avril's stereo at Johnson's apartment when he left to get rid of Avril's car. Johnson sold the stereo to Brewer seven to ten days later and gave appellant $150. (16 RT 3025.) Appellant claimed he had asked Johnson not to sell the stereo because he was afraid to move it. (16 RT 3115.) Appellant acknowledged that he gave Avril's camera and bathrobe to his daughter. (16 RT 3024-3025, 3127-3128.)

Appellant testified that he told Gladney pretty much what Gladney said during his testimony. (16 RT 3023.) Appellant denied telling Gladney that he had killed someone. Appellant did not know why Gladney and Johnson were stretching the truth. (16 RT 3023.) Appellant claimed he never told Gladney or Johnson that he killed Avril or participated in killing Avril. (16 RT 3023.)

Appellant claimed that Johnson and Gladney both lied when they testified that appellant told them he killed Avril. (16 RT 3136.) Nor did he tell Gladney or Johnson that he waited for Avril in the garage and tried to knock her out. (16 RT 3135.) Appellant denied telling Gladney that he stuffed Avril in the trunk of the car. (16 RT 3135.) Appellant never told Johnson or Gladney that Avril's body was dumped in a water-filled canal. (16 RT 3146.) Appellant told Gladney that the body had been dumped in Malibu. (16 RT 3146.)

Appellant was 39-years-old at the time of his testimony. (16 RT 2983.) He quit attending school while in the seventh grade. (16 RT 2987.) He suffered convictions for attempted robbery and car theft in 1983 or 1984. (16 RT 2984.) Appellant was convicted of possession of stolen property in 1977 and attempted burglary in 1978 or 1979. Appellant also was "convicted" of auto theft as a juvenile. (16 RT 3030-3031.)

James Young's Testimony

James Young testified that he had known Donald Thomas for six or seven years. (15 RT 2865-2866.) Toward the end of 1995 or the early part of 1996, Young heard Thomas talking about a burglary while in Thomas' bedroom. (15 RT 2867.) Thomas said that he had a TV and VCR that he had to sell that he got from an apartment across the way from Mike Fontenot's garage.[6] (15 RT 2868, 2876.) Thomas said that he went into the apartment but got scared and left when somebody woke up. (15 RT 2868-2870.) Thomas said that things got bad in the house. (15 RT 2870.)

Donald Thomas' Testimony[7]

Donald Thomas denied involvement in Avril's death and claimed he never took anything from Avril's apartment. (15 RT 2838, 2854-2855.) Thomas also denied taking part in any burglary of Avril's home. (15 RT

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[6] Someone standing outside the Fontenot garage would be able to see Avril's garage. (15 RT 2879.)

[7] Thomas was called by the prosecution during its case-in-chief.

2854.) Thomas claimed that the conversation he purportedly had with Candace Hagen in James Young's presence never occurred. (15 RT 2826.)

Thomas lived two blocks from Avril at the time of her death. (15 RT 2785.) Thomas testified that he had known Avril for 10 to 12 years prior to her death. (15 RT 2781.) Thomas did odd jobs for Avril, including mowing her lawn, helping her with her groceries and washing her car. (15 RT 2781-2783, 2848.) Thomas believed he put some stereo equipment together for Avril at the beginning of 1991. (15 RT 2784, 2791, 2830, 2844-2847.)

Thomas learned that Avril had died a month or so after her death, at about the time he spoke with Officer Palmieri. (15 RT 2818.) Thomas asked Palmieri whether Avril's stereo had been stolen. (15 RT 2849-2850.) No one from law enforcement told him that a stereo was missing but he knew something was missing because Michael Fontenot told him that appellant had a stereo for sale. (15 RT 2819, 2821-2822, 2849-2850.) District Attorney Investigator Fitzgerald told Thomas that his palm print had been found on the stereo cabinet.[8] (15 RT 2837.)

Thomas testified that he told Chris Polk that Avril had been beaten to death after District Attorney Investigator Fitzgerald told him how Avril was killed. (15 RT 2822-2823.) Thomas told Polk that Avril's body had

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[8] Oxnard Police Department crime scene investigator Morgan recovered a latent palm print from the stereo cabinet in Avril's apartment. (15 RT 2885, 2887-2888, 2890-2891, 2893.)

been dumped on Arnold Road after reading that in a newspaper.[9] (15 RT 2824, 2831, 2851.) Thomas denied telling Polk or anyone else that Avril was taken to Arnold Road in the trunk of a car. (15 RT 2840.)

Officer Palmieri's Testimony

Oxnard Police Officer Palmieri testified he first contacted Thomas on January 3, 1996. (15 RT 2909.) Thomas told Palmieri that he believed that any problems in the area in and around Dollie Street were caused by a local street gang called the Black Mafia Gang. He felt that the Avril homicide might be related to that gang. (15 RT 2910.)

Palmieri interviewed Thomas on January 24, 1996. (15 RT 2907, 2911.) Thomas asked Palmieri whether Ruth Avril's stereo had been taken during the burglary. (15 RT 2910.) He told them that he had prior contact with the stereo, that he had hooked it up and could help them identify it. (15 RT 2910-2911, 2915.) Thomas also told Palmieri that he had reconnected the wires to the stereo sometime between Thanksgiving and Christmas of 1995. (15 RT 2916.) Palmieri had not mentioned anything about the stereo before Thomas brought it up. (15 RT 2915.)

Thomas reiterated his concerns about the Black Mafia Gang and he named another person with the first name of Kenny as possibly having been

[9] Thomas also testified that he heard Avril's body had been dumped on Arnold Road from his father, who had read it in the paper. (15 RT 2851.)

involved. (15 RT 2911-2912.) Thomas described Kenny as being a black male with whom he used to play dominos in the garage across from Avril's garage. He indicated that Kenny had served time in prison and was on parole. (15 RT 2912.) Palmieri asked Thomas why he thought Kenny was involved but he never gave a basis for his suspicion. (15 RT 2912-2913.)

Timothy Akers' Testimony

Timothy Akers had known Gladney for at least two years at the time of Akers' testimony. (15 RT 2918.) Akers testified that he and Gladney discussed a killing while on the balcony at Romona Hall's apartment in April of 1997. (15 RT 2919-2921, 2926.) Gladney, who was distraught and very upset, told Akers that he had told on a friend about a murder. (15 RT 2920-2921.) Gladney started crying and told Akers that he had lied on his friend Kenny about a murder and did so because he needed money. (15 RT 2921-2924, 2926.)

Ronald Siegel's Testimony

Psychopharmacologist Ronald Siegel testified for appellant as an expert on drugs and the effect of drugs on memory and perception in order to challenge Theresa Johnson's testimony. (16 RT 2960, 2974.) Siegel testified that the accuracy of a person's memory of an event would be less accurate with the passage of time if that person has used cocaine for 17 or 18 years, smoked cocaine in rock form and used all the cocaine he or she

had. (16 RT 2974-2977.)

Siegel testified that cocaine can cause paranoia and cause hallucinations. (16 RT 2967, 2969.) Ingestion of a lot of cocaine can prevent a user from distinguishing between what is in the users mind and what is real. (16 RT 2967-2968, 2971.) Individuals who continue to use cocaine can reach a psychotic-like state in which they have delusions, false beliefs or hallucinations. (16 RT 2972.)

Siegel testified that cocaine usage does not seem to affect short-term memory but it does hinder the consolidation of short-term memory into long-term memory. (16 RT 2969-2970.) There are a lot of gray areas -- and occasionally black areas -- in people's memories regarding their cocaine days. (16 RT 2970.)

C. People's Rebuttal Case

Jeffrey Robinett testified that he helped Thomas set up Avril's stereo. (16 RT 3148.) According to Robinett, Thomas never told him that he had stolen anything from Avril, participated in a burglary of Avril's home or participated in killing Avril. (16 RT 3149-3150.)

Officer Palmieri testified that a call from a female caller on the Crime Tip line led the police to Theresa Johnson, and she directed them to Ralph Gladney. (16 RT 3160-3165.) On February 14, 1997, Palmieri and his partner Tim Lumas met with Gladney at the Oxnard Police Department.

(16 RT 3165.) They told Gladney that they had been informed that he had information regarding a murder, that someone had talked to him about a murder. (16 RT 3166.)

Gladney indicated that he knew what the officers were talking about. (16 RT 3166.) Gladney told the officers that appellant had confided in him the evening of December 22, 1995, and told him that he had killed an older woman in the area behind appellant's girlfriend's house on Helena Way. (16 RT 3166-3167.)

Gladney told the detectives that appellant came to his house twice. (16 RT 3167.) During the first visit, appellant offered to sell him a camera and told him that he needed money. (16 RT 3167.) Gladney did not purchase the camera. (16 RT 3167.) Appellant also asked him if he knew a female who would be able to assist him with using a bank card. (16 RT 3168.)

Gladney told the officers that he next saw appellant two days later. (16 RT 3169.) Appellant was distraught and cried at times during their conversation, during which appellant confided further and disclosed more details about the killing. (16 RT 3169.) Gladney told Palmieri that appellant said he had killed an old lady, beat her, put her in the trunk of her car and dumped her in a canal somewhere near what he thought was the Point Mugu rock. (16 RT 3170.) Appellant waited near the victim's garage for her

to come home. He knew what time she came and went and intended to take her jewelry. She would not give up her jewelry and he hit her. (16 RT 3170-3171.) Appellant told Gladney that he beat her and beat her with his hands and the victim asked him why he was doing this. (16 RT 3171-3172.) Appellant said he put the victim in the trunk of the victim's car after he beat her with his hands. (16 RT 3172-3173.) Appellant told Gladney that he did not mean to kill the lady. (16 RT 3174.) Appellant had helped the lady on a number of occasions and described her as being a nice lady. (16 RT 3174.)

D. The Prosecution's Penalty Phase Evidence

The prosecution elected to retry appellant on the penalty phase after the first jury was unable to reach a verdict. The prosecution presented the testimony of many of the guilt-phase witnesses during the second penalty phase trial in order to prove the circumstances of the offense.[10] For the sake of brevity, and because the penalty phase evidence was substantially the same as was elicited during the guilt phase, appellant has not digested that

[10] Those witnesses included Theresa Johnson (31 RT 6076-6109), C.J. Brewer (32 RT 6325-6329), Donnie Bullard (32 RT 6302-6315), Edwin Jones (33 RT 6460-6514), Erania McClelland (33 RT 6366-6408), Assistant Medical Examiner Frank (31 RT 5993-6055), Maria Aragon (31 RT 6056-6120; 32 RT 6121-6653), Oxnard Police Officer Palmieri (32 RT 6333-6341; 33 RT 6453-6459), Ralph Gladney (33 RT 6342-6360), Oxnard Police Officer Funk (32 RT 6315-6324), Ventura County Sheriff's Department photo lab supervisor Culbertson (33 RT 6437-6440) and Randolph Loganbill, one of the young men who discovered Avril's body. (31 RT 5985-5993.) The prosecution also had appellant's guilt-phase testimony read to the jury. (32 RT 6131-6300.)

testimony below.

The prosecution also elicited facts about Avril and the impact of Avril's death from some of these witnesses and called other witnesses to establish criminal history and past violent conduct. That evidence is set forth below.

Appellant's In-Custody Admission of Guilt

On April 24, 1999, at approximately 3:30 p.m., Ventura County Sheriff's Deputy Bellissimo removed appellant from his cell in Ventura County Jail in preparation for a visit. (32 RT 6123-6125, 6130.) They were standing in the hallway next to the day room cells when an inmate in one of the day room cells asked appellant how his case was going. (32 RT 6125.) Appellant responded that he was going to meet with a psychologist "right now." (32 RT 6125.)

The inmate in the day room said something else but Bellissimo did not understand what he said. (32 RT 6125.) Appellant responded that the DA didn't know this yet, but he was going to plead guilty, that he had killed a 73-year-old lady and that he needed to take responsibility for his actions. Appellant said that he could live with the jury deciding to give him the death penalty but he needed to take responsibility for his actions because he wanted to go with dignity if that was the case. (32 RT 6125-6126, 6129-6130.)

Appellant's demeanor had changed when he came back from his meeting. He appeared to be a little more concerned. (32 RT 6126-6127.) Appellant said, "I shouldn't have said that stuff in front of you guys. I could really mess up my case." Appellant asked Bellissimo please not to tell anyone. Appellant said that he was responsible for the death but it was an accident. (32 RT 6127-6130.)

Evidence About the Victim

Janet Avril (Janet) had been married to Richard Avril, the victim's son, for almost 21 years as of the date of her testimony. (33 RT 6442.) Avril was 73-years-old at the time of her death. (33 RT 6443.) She retired from GTE at age 67. (33 RT 6443.) Avril lived in Oxnard for at least 22 years. (33 RT 6443.) Avril owned the triplex and lived alone in one of the units. (33 RT 6443-6444.) Avril had one brother, who preceded her in death. (33 RT 6444.)

Avril's son Richard came to see Avril at least once a year, usually at Christmas. He last saw her in Christmas of 1994. (33 RT 6444-6445.) Janet bought Christmas presents for Avril every year. (33 RT 6444-6445.) Janet sent Avril several gifts in 1995, including the bathrobe appellant gave to his daughter. (33 RT 6445-6446.) Richard and Janet cleaned out Avril's apartment after Avril was killed. (33 RT 6446.) There were no gifts under the tree. (33 RT 6447.)

Maria Aragon testified that Avril had been her landlord for 18 years. (31 RT 6057, 6619-6620.) Aragon had regular contact with Avril during the afternoon and evenings. (31 RT 6068.) Aragon described Avril as being very nice, very independent and very kind. She never saw Avril get angry. (32 RT 6629-6630.)

Avril was an intelligent and active person who read a lot. She cut her grass with a push mower and planted expensive plants every spring. (32 RT 6621, 6623.) Avril baked a lot and did crafts such as making covers for the couch and blender. (32 RT 6621.) She sent out Christmas cards every year. (32 RT 6622.) Avril was very patriotic and always put out the flag on holidays. (32 RT 6622-6623.) Avril went to a church in Camarillo and always dressed very nicely for the services. (32 RT 6625-6626.) Avril's friends would come and pick up Avril for lunch. (32 RT 6626.)

Avril was very independent. She lived alone the entire time Aragon knew her. (32 RT 6624.) Avril generally did everything on her own. (32 RT 6625.) Avril really enjoyed the outdoors. She went to the beach every time it was sunny. She wore a one-piece bathing suit and a white robe. She had an ice chest, a chair and an umbrella. (32 RT 6626-6627.)

Avril used to take two or three vacations to San Diego every year, never staying for more than three days. (32 RT 6627.) Avril would tell Aragon when she was leaving so that Aragon could feed Avril's cat. (31 RT

6062; 32 RT 6627-6628.) Aragon did not know what had happened to the cat after Avril's death. (32 RT 6628.)

Avril told Aragon that her son lived up north. (32 RT 6629.) Avril's son usually sent flowers and boxes on holidays such as Avril's birthday, Christmas and Mother's Day and he occasionally came to visit. (32 RT 6629.)

Avril's death was very difficult for Aragon. (32 RT 6644.) Aragon was asked to identify Avril following her death. (32 RT 6632-6633.) Avril's face was badly beaten. (32 RT 6632-6633.) Aragon felt angry, sad and unsafe. (32 RT 6643.) Aragon felt guilty that she had not checked on Avril that Christmas like she always had before. (32 RT 6643.)

Aragon had not realized how brutal the attack on Avril had been until she heard the preliminary hearing testimony of other witnesses. Hearing how Avril had died was very hard for Aragon. (32 RT 6645.) It made her very afraid. She did not want to believe it. (32 RT 6645.) She thought about what Avril went through. (32 RT 6645.) Aragon still thought about Avril every day. (32 RT 6647-6648.)

Aragon testified that some of the expensive plants planted by Avril still are there. They never bloomed during Avril's life. They started to bloom in the summer of 1996 and were in bloom at the time of Aragon's testimony. (32 RT 6648.) When Aragon saw the flowers she told her

husband that Avril still was with them. (32 RT 6648.)

The Robbery of Erania McClelland

Erania McClelland testified that she and appellant had a boyfriend/girlfriend relationship in the 1970's and 1980's. They have a daughter Kenisha who was born in 1981. (33 RT 6368-6369, 6373-6374.) They lived together a total of four years during their relationship, including some time during which they lived with appellant's parents. (33 RT 6376.) Appellant and McClelland never married and stopped seeing one another in 1987. (33 RT 6368-6369.) McClelland had two other children, Annie Ray and McClelland. (33 RT 6370.) Appellant worked with his father in construction while he and McClelland were together. (33 RT 6403.)

McClelland testified that her relationship with appellant was on and off. They had spats and arguments and they had violent confrontations. (33 RT 6374.) McClelland told Fitzgerald that appellant beat her roughly 10 times a year.[11] (33 RT 6434.) Their fights were "pretty much" mutual and McClelland started some of the fights. (33 RT 6387-6388, 6400.) McClelland testified she had a mean streak and it caused disruption in her

[11] McClelland denied that appellant hit her on a regular basis and claimed not to recall telling Fitzgerald that appellant hit her roughly 10 times per year. (33 RT 6374-6375, 6378, 6404.) McClelland instead claimed she told DeFazio that appellant had only gotten physical with her roughly seven times in a three-year period. They would get "into a good one" maybe twice a year. (33 RT 6396.)

home with appellant. (33 RT 6401.) She may have gotten the worst of the fights but that didn't mean she didn't start the fights. (33 RT 6388.) Appellant did not hit her without reason. (33 RT 6388.) McClelland testified that she would hit appellant too. (33 RT 6388.)

McClelland did not know how many times appellant would hit her during their fights. She blacked out a lot. (33 RT 6376.) McClelland suffered some "painstaking injuries" during her fights with appellant but nothing that ever sent her to the hospital. (33 RT 6375.) Appellant would hit her in the face and eyes with his fists. She suffered black eyes, bruises and swelling. (33 RT 6375.) During one incident appellant put a gun in her mouth. He was just pissed off. Nothing came of it. (33 RT 6377-6378, 6389.) McClelland did not remember whether appellant told her that he would kill her during that incident and she did not remember whether she told Fitzgerald that appellant had threatened to kill her. (33 RT 6377-6378.)

On January 26, 1988, at approximately 10:45 p.m., Oxnard Police Officer Nieves responded to a call regarding a battery and robbery. (33 RT 6410.) Erania McClelland told Nieves that appellant had beaten and robbed her. (33 RT 6410-6411.) McClelland told Nieves that she had been out with a friend and had come across appellant. They were en route to a place in Oxnard when appellant asked her how much money she had. She told appellant that she was not going to give him any money. He started to

punch her, slap her and pull her hair. (33 RT 6411-6412.) Appellant told her, "You ain't going nowhere, bitch. Give it to me, and how much you got?" (33 RT 6412.) Nieves documented swelling to the right side of Erania's face, a cut above the lip and abrasions on the right side of her face. (33 RT 6412.)

McClelland acknowledged that she and appellant fought outside a bar in 1988. (33 RT 6379.) They fought about money or drugs. (33 RT 6380.) Appellant wanted money and she was unwilling to give him any. (33 RT 6380.) Appellant asked her how much money she had. (33 RT 6380.) McClelland tried to walk away from appellant. (33 RT 6381.) McClelland testified that appellant punched her and probably slapped her across the face. (33 RT 6381.) McClelland gave him $10 so that he would stop hitting her. (33 RT 6382, 6392, 6405-6406.)

McClelland suffered a severe black eye and had a blood clot in her eye. Her face was swollen. Appellant's handprint stayed on her face for a week. (33 RT 6382-6383.) McClelland did not remember whether appellant grabbed her by her hair but she did remember being on the ground. (33 RT 6381.)

Appellant's Violence Toward Family Members

In January of 1990, appellant became involved in an incident with his younger sister Darlene during which appellant and Darlene struck one

another. (34 RT 6520-6523.) After the police were called to the scene, Darlene told an officer that appellant threw her across the room. Darlene testified she was upset when she said that. (34 RT 6522-6523.) Darlene did not recall appellant grabbing her around the neck. (34 RT 6523.) Darlene admitted she may have told the police that when their mother came into the room appellant turned and hit his mother in the face with a closed fist. (34 RT 6523.) Darlene did not suffer any injuries in the incident and had never been injured by appellant. (34 RT 6536.)

Darlene testified that appellant tried to burn their sister Wylene with an iron after Wylene said something about Peggy Garner that made appellant angry. (34 RT 6523-6524, 6530.) Appellant picked up the iron after Wylene said something and Darlene took it the wrong way. Appellant was playing. He wasn't serious. (34 RT 6533-6534.)

Darlene admitted telling District Attorney Investigator Fitzgerald that she observed appellant hitting and kicking Peggy Garner two years prior to Darlene's testimony. (34 RT 6524-6525.) Darlene also admitted telling Fitzgerald that appellant had been physically violent toward Darlene and Wylene at least 20 times, but claimed she lied and exaggerated to Fitzgerald. (34 RT 6526, 6536.)

Appellant's Assault on Peggy Garner

Peggy Garner and appellant had a boyfriend/girlfriend relationship

for a number of years starting in 1986. (34 RT 6538-6539.) Garner and her sons Ronald, Donald and Kenneth lived in an apartment in a building located at 421 Helena Way. (34 RT 6539, 6556.) Appellant stayed there on occasion but did not live there. (34 RT 6540.) Appellant is Kenneth's father. (34 RT 6539, 6547.)

On May 16, 1995, Garner was awakened by the sound of her kitchen window being broken. (32 RT 6310-6313; 34 RT 6540-6542, 6556-6557.) Garner came out of the bedroom and saw appellant outside the apartment. (34 RT 6542-6543.) He had broken the window by knocking on the window to get Garner to let him into the apartment. (34 RT 6543.) Appellant mistakenly believed another man was in the house. (32 RT 6313; 34 RT 6543, 6557.) Garner let him in and appellant looked around the apartment. (34 RT 6543.)

Garner's son Donnie testified that Garner, who had been sleeping in the living room, came out and swung an ashtray at appellant, hitting him on the head. (32 RT 6311-6314.) Appellant grabbed Garner's arms and tried to protect himself. He did not grab Garner around the neck. (32 RT 6311-6314.) Donnie and Ronald separated appellant and Garner and appellant left the apartment (32 RT 6312-6314.)

Oxnard Police Officer Epps responded to a call regarding the incident. Garner told Epps that she was awakened by appellant banging on

her door. Appellant was on the front porch. Appellant yelled at her to let him in because he knew she had another man in the apartment. Appellant shattered the dining room window as Garner approached the door. Garner opened the door and appellant ran in and went directly to the master bedroom and began checking for the presence of another man. Garner told appellant that there was no one else there and tried to restrain him from looking because the three kids were sleeping. All three kids were awakened. Ronald tried to get appellant off of Garner as appellant grabbed Garner around the neck and pulled on her arm.[12] Appellant turned and struck Ronald under the chin with his fist. Appellant broke away, ran into the master bedroom and locked the door when one of the children called the police. (34 RT 6575-6577.)

On October 3, 1996, Garner wrote a letter to appellant's parole officer in which in which Garner told the parole officer that she did not want appellant around her house out of concern for the safety of their son. (34 RT 6551-6552, 6554, 6569-6570.) On October 25, 1995, Garner,

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[12] Garner contradicted much of the evidence related by Officer Epps, testifying that appellant did not hit her or grab her around the neck. Garner denied making any such statements to police officers. (34 RT 6544.) Appellant struggled with Garner's son Ronald but appellant did not hit anyone. (34 RT 6544, 6558.) Garner was not beaten or kicked. Her hair was not pulled and she was not choked. (34 RT 6545-6546, 6558.) Appellant touched her during the incident but he did not hit her. (34 RT 6545.) Garner threw something -- possibly an ashtray -- after appellant touched her. (34 RT 6546.)

describing herself as appellant's former girlfriend, wrote another letter to an unidentified person indicating that she did not want appellant around her home or her mother's home because appellant hit Ronald. (34 RT 6552-6553, 6569-6570.) Garner testified she was angry with appellant when she wrote that letter. Her kitchen window had been broken while her children were home. (34 RT 6553-6554.)

The Attempted Robbery of Maria Garcia

On June 15, 1983, at approximately 10:30 a.m., Maria Garcia and her sister Pauline went to the First Interstate Bank located at 3rd and B in Oxnard. (34 RT 6593-6594.) They parked in the bank parking lot just a couple of feet away from the bank and both of them went into the bank. (34 RT 6594.)

Garcia noticed appellant and a black woman watching her while she was in the bank. (34 RT 6595, 6599.) Garcia cashed a check for $1,000 and put the money in her purse. (34 RT 6594-6595.) Garcia and her sister left the bank and walked directly to their car. (34 RT 6595.) Garcia got into the passenger side of the car. (34 RT 6596.)

Garcia saw appellant standing next to one of the cars as she was getting into her car. (34 RT 6596.) Appellant ran toward her, got inside the car and hit Garcia in the face a couple of times. (34 RT 6596-6598.) Garcia testified that appellant was trying to take her purse. (34 RT 6597.) Garcia

laid down on the seat and would not release her purse. (34 RT 6598.) Garcia struggled with appellant, striking him and scratching his face. (34 RT 6598-6599.) Garcia pushed appellant to the ground and he ran away. (34 RT 6599.)

The Epperson Robbery

On June 27, 1994, Jon Snyder was distributing commissary[13] to inmates in the Ventura County Jail through a pass-through in a door separating the inmates from the commissary workers. He called out the name Joel Epperson. (34 RT 6605-6606.) Appellant approached and showed Snyder an armband bearing the name "Joel Epperson" so that Snyder could match the armband against a list. (34 RT 6606-6607.)

The armband shown to him was hard to read. The letters were non-standard and faint and the armband did not bear the jail logo. (34 RT 6607.) Appellant showed the band rather quickly so Snyder asked to see it again. (34 RT 6608.) Snyder had appellant sign a commissary slip acknowledging receipt of the goods. (34 RT 6608-6609.) Snyder then told appellant that he would be right back with the commissary and went to notify the quad monitor and the deputy that he had seen a suspicious armband. (34 RT 6609.) Appellant did not receive Epperson's commissary. (34 RT 6610.)

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[13] Commissary essentially is a convenience store in the jail, from which inmates can buy writing materials and candy and chips. (34 RT 6605.)

Joel Epperson was in Ventura County Jail for misdemeanor possession of a controlled substance. (34 RT 6612-6613.) Appellant approached Epperson one day after Epperson received his commissary. (34 RT 6613-6614, 6674.) Appellant was aggressive, angry and threatening. (34 RT 6615.) Appellant demanded half of Epperson's commissary and told him that he would kill him if he didn't comply. (34 RT 6614-6615.) Appellant told Epperson that he had picked up a felony charge the day before while trying to get Epperson's commissary. He felt Epperson owed him something. (34 RT 6614.) Epperson gave him what he asked for. (34 RT 6615.)

Appellant's Criminal History

On May 4, 1978, appellant was convicted of auto theft. On October 15, 1979, appellant was convicted of attempted burglary. On June 12, 1983, appellant was convicted of the attempted robbery of Maria Garcia. On June 24, 1994, appellant was convicted of possession of a controlled substance. (35 RT 6674-6675.)

E. Defense Penalty Phase Evidence

Appellant was 39-years-old at the time of his penalty phase testimony. (35 RT 6830, 6833.) Appellant admitted he was responsible for Avril's death. (35 RT 6825, 6883.) Appellant testified that he felt nasty and filthy for what he had done. He was remorseful. (35 RT 6867.) Appellant knew Avril by her

name and had talked to her from time to time. She was a wonderful person who treated him like a really good friend. She never did anything bad to anyone. (35 RT 6870, 6890.)

Appellant admitted that everything about his guilt-phase testimony, and particularly his testimony implicating Donald Thomas, was a lie. (35 RT 6826-6827, 6869, 6993-6997.) Thomas had nothing to do with the murder or with ransacking Avril's apartment. (35 RT 6994.) Appellant testified he decided to implicate Thomas when he saw, in the discovery, that Thomas' palm print had been found. (35 RT 6992-6993.)

Appellant claimed he was remorseful for killing Avril. (35 RT 6898-6899, 6983.) Appellant did not mean for her to die. What happened to her was awful. (35 RT 6890.) Appellant's conscience had bothered him since the night of Avril's death. (35 RT 6891.) Appellant claimed he knew the difference between right and wrong. He came from a good family. His parents taught him right from wrong. He knew it was wrong to steal. (35 RT 6896-6897.)

Appellant knew that he had to pay for Avril's death. (35 RT 6890.) Appellant was aware that there were only two possible penalties and was afraid of both. (35 RT 6893-6894.) Appellant expected to die in prison and had no hope of ever being released. (35 RT 6859, 6890-6891.) Appellant felt badly that he would never again spend the holidays with his family or

eat at his mother's home. (35 RT 6859-6860, 6865.) His mother and father supported him during the first trial and his mother was sick. (35 RT 6856.)

Appellant testified that he experienced "spiritual warfare" while in jail. (35 RT 6839-6840.) He asked to see the Chaplain and told her what he was feeling. He couldn't' concentrate when he read the Bible. It was like a negative and a positive colliding. It just wasn't clicking. The burden made him want to tell the truth. The only way he could feel the peace was to stand up and take responsibility for what he had done. He was not proud of what he had done. He felt badly about cutting short Avril's life by his mistake. (35 RT 6840.)

Appellant testified that his mother taught him how to pray before sleeping and before eating. Those things were in his heart from just growing up. (35 RT 6839.) Appellant claimed that the church and God have been in his life, but he's turned some wrong corners and made some bad decisions. (35 RT 6839.) Appellant testified that the matter had bothered and hurt him every day for the two years he's been in custody. (35 RT 6828, 6830.) Appellant had been raised in a family and in the church. He asked God for forgiveness and God had forgiven him. (35 RT 6829, 6839, 6885.) The more he read his Bible and talked to the Chaplain, he wasn't satisfied because he was coming clean with God but not with his family. (35 RT 6830.)

Appellant acknowledged making the statements overheard by Deputy Bellissimo. Appellant was being taken to see a psychiatrist. Someone asked how his case was going. Appellant did not think about the deputy who was shackling him. He just spoke from his heart. (35 RT 6856-6857.) Appellant admitted he asked Deputy Bellissimo not to repeat the statements to the District Attorney. (35 RT 6855-6856.) Appellant did that because defense counsel told him not to talk. Appellant did not want to mess up but was feeling good about having come clean with defense counsel. It had taken a big load off of his shoulders. (35 RT 6855.) Telling defense counsel was not enough. Appellant wanted to tell everyone. (35 RT 6856.)

Appellant decided to tell defense counsel that he was responsible after a prospective juror on the second penalty phase panel indicated that he or she would be less likely to vote for death if the killing was unintentional. (35 RT 6825.) Appellant tapped on counsel's leg and asked if he would believe that was somewhat what had happened. (35 RT 6826, 6891.) Appellant asked defense counsel if he should tell the truth. Defense counsel told him that he should. (35 RT 6826.)

Appellant asked defense counsel to arrange a special visit with his parents so that he could tell them face-to-face. (35 RT 6827-6828.) Appellant claimed that one of the reasons he lied was because he believed

his loved ones would hate him for what he did. (35 RT 6866-6867.) When appellant told his mother what he had done she asked him how he could sleep at night. (35 RT 6866.) Appellant told her he had nightmares every night. (35 RT 6866.) Appellant's father told him it was good he was coming clean and standing up for what he did. (35 RT 6866.) Appellant felt partial relief after he told his mother of his involvement in Avril's death. (35 RT 6828-6829.) Appellant was surprised to find that both of his parents still loved him. (35 RT 6866-6867.)

Appellant testified that he thought about what he had done every day and every night. When he read stories in the newspaper about someone getting hurt he thought about Avril and it made him twitch or jump. (35 RT 6883.) Appellant testified that he asked God for forgiveness and believed God had forgiven him. (35 RT 6885.) Appellant's family and children also had forgiven him, though appellant was trying to keep his young son K.K. from understanding appellant's situation. (35 RT 6885, 6898.)

Appellant testified that making the truth known had been a relief but was not enough (35 RT 6857, 6885.) Appellant intended to stand up and take whatever he had coming. (35 RT 6857.) Appellant told defense counsel that in his mind Avril might even rest in peace now that he was coming clean. (35 RT 6857.) Avril lost her life because of what appellant had done. Appellant's elders told him that she could rest in peace with justice done.

(35 RT 6857-6858.) Appellant wanted to apologize to the court, the lead prosecutor and Avril's son and offered to do so through the court. (35 RT 6858.)

Appellant testified he knew Avril for roughly seven years prior to December of 1995. (35 RT 6900.) Appellant and a lot of other people in the neighborhood helped Avril. (35 RT 6900.) Appellant and Donnie B. helped Avril set up her Christmas tree. (35 RT 6870, 6901.) Avril never knew his name. She always called him "young man." (35 RT 6916, 6944.)

Appellant testified that he liked school up to a certain grade but began to have trouble comprehending after that point in time. It was hard for him. He started ditching school and classes. (35 RT 6830-6831.) He was embarrassed that he had been placed in a special class and began to ditch school to hang out and use drugs with other people. (35 RT 6831, 6834.) Looking back at his school experience, appellant blamed himself for not getting the help that he needed. (35 RT 6833.) Appellant testified that he told both of his children to stay in school because it will pay off in the long run. (35 RT 6833.)

Appellant played football and baseball and was good at both sports but was removed from the teams in the middle of the season because he wasn't passing his classes. (35 RT 6833.) Appellant tried and tried to pass his classes but could not do it. (35 RT 6833.) Appellant dropped out of

school after he was dropped from the JV football team for bad grades. (35 RT 6831.)

Appellant testified that he started using marijuana and moved on to PCP. (35 RT 6834.) Appellant sold PCP too, so he used it pretty much every day until he went to prison in 1983. (35 RT 6835-6836.) Appellant also continued to use marijuana. (35 RT 6835.) Appellant indicated that PCP creates a slow motion effect and tears up your brain. (35 RT 6834.) Appellant had gaps in his memory that he attributed to PCP. (35 RT 6834-6835.)

Appellant became involved with cocaine when he got out of prison in 1985. (35 RT 6836.) His sister, who used cocaine, picked him up after he was released from prison and took him to her home. He smoked it a couple of times and liked it. (35 RT 6837.) He used cocaine from that point in time until the day he was arrested. (35 RT 6837.) Appellant smoked as much cocaine as he could get. (35 RT 6838.)

Appellant testified that cocaine made him feel speedy. It made him feel good and want to do good things. (35 RT 6837.) Appellant testified that a run of cocaine means that you use it so much that you don't eat or sleep. The most important thing you do is maintain the feeling. (35 RT 6838.) That is pretty much what appellant had for 10 years. He had an overpowering urge to get that feeling again. (35 RT 6838.)

Appellant continued to smoke cocaine after his release from prison in 1995. (35 RT 6854-6855.) Appellant used as much as he could get as often as he could get it. (35 RT 6855.) Appellant testified he was using cocaine right before Christmas in 1995 but claimed he was not offering his drug abuse as an excuse. (35 RT 6867-6868.) Appellant had been using cocaine constantly for at least three days before the killing, during which he did not eat or sleep. (35 RT 6868-6869.)

Appellant continued to smoke cocaine after his release from prison on December 2, 1995, after serving a term for possession of a controlled substance. (35 RT 6854-6855, 6900.) Appellant was staying both at Peggy Garner's apartment and at his mother's home at the time of the offense. (35 RT 6899.) Garner's apartment was right across the alley from Avril's garage. (35 RT 6869.) Appellant painted, worked on cars and did odd jobs to support himself. (35 RT 6899.)

Appellant had been using cocaine constantly for at least three days before the incident, during which he did not eat or sleep. (35 RT 6868-6869.) Garner and her sons were watching television the evening of the incident. Presents had just been wrapped and put under the tree. Appellant had not gotten gifts for anyone so he was thinking about money. (35 RT 6871.) Appellant went outside to smoke a cigarette and started thinking about how he could get some money to buy presents for Garner and her

sons. (35 RT 6870-6871.) He sat down on a railroad tie to smoke his cigarette and noticed Avril's car in her garage. (35 RT 6871.)

Appellant denied that he planned to kill Avril. (35 RT 6946.) He was smoking a cigarette and thinking about money when he heard Avril's door being opened. (35 RT 6931-6932.) Appellant knew that Avril came down to turn off the light in her garage and close the garage door every night. (35 RT 6871-6872, 6928-6929.) Appellant believed that Avril would be an easy target for a robbery. He had heard that she had not involved the police after having been robbed twice before. (35 RT 6871-6872, 6905, 6929-6931.)

Appellant got up, put his socks on his hands and went into the garage to the left of Avril's garage. (35 RT 6872-6873, 6902, 6904, 6975; 36 RT 7030.) Avril entered the garage and turned off the light. (35 RT 6873, 6902-6903.) Appellant came up behind Avril and grabbed her from behind with his left arm as she was turning off the light. (35 RT 6902-6906, 6928, 6978, 7008.)

Appellant placed his right hand over Avril's mouth when she attempted to make a sound. (35 RT 6874, 6906, 6978.) Avril bit him and appellant reacted by repeatedly hitting Avril on her head and face with his right fist as he took her to the ground. (35 RT 6874, 6907-6910, 6977-6979, 7008.) The blows did not knock out Avril and she continued trying to make a sound. (35 RT 6908.) Appellant grabbed Avril by her hair and struck her

face against the concrete, rendering her unconscious. (35 RT 6874-6875, 6908-6911, 6913, 6923-6924, 6988, 7007-7008, 7016; 36 RT 7031.)

Appellant got up and went to the corner of the garage to see if anyone had seen him. (35 RT 6876-6877, 6911-6912, 6971.) Appellant did not see anyone. (35 RT 6911, 6931.) Appellant claimed he did not know what to do. He did not know whether he was going to go up to her apartment to steal or just leave her. She could have regained consciousness and told someone. (35 RT 6876.)

Appellant opened the trunk of Avril's car using Avril's keys. (35 RT 6911-6912.) Appellant picked up Avril and put her into the trunk. (35 RT 6876, 6913.) Avril "kind of like flopped in the trunk." (35 RT 6914.) Avril started to regain consciousness as appellant was putting her into the trunk. (35 RT 6877, 6913-6914, 6924.) The trunk lid would not close because Avril's head was in the way. Appellant just forced it down. (35 RT 6877, 6914-6915, 6924-6927.)

Avril's blood was on appellant's shirt and pants. (35 RT 6877-6878, 6921.) Appellant backed Avril's car out of the garage and drove to his mother's home in order to change his clothes. (35 RT 6877-6878, 6916-6917, 6927-6928, 6932.) Appellant knocked on the door and his mother let him in. (35 RT 6878, 6932.) Mom asked what was wrong with him. He told her that he had been in a fight and had blood on him. (35 RT 6933.) Blood

had seeped through appellant's clothing to his stomach, waist and legs. Appellant wiped the blood from his body with his shirt and changed into clean clothes. (35 RT 6878, 6933-6934, 6937; 36 RT 7032.)

Appellant left his mother's house after roughly ten minutes and threw his bloody clothing away three or four trash cans down from his mother's home. (35 RT 6878-6879, 6927, 6935.) Appellant testified he still did not know what to do with Avril so he drove away from the lights. (35 RT 6879.) Appellant decided to go out to Arnold Road while in the turning lane on Hueneme Road, intending to leave Avril there before returning to her apartment to steal things from her. (35 RT 6880-6881; 36 RT 7036.) Appellant knew that Arnold Road was an isolated area where Avril would not be able to get any help. (35 RT 6882.) Appellant denied that he intended to kill Avril. (35 RT 6880.) Appellant did not want her to die. (35 RT 6880.)

Appellant drove Avril's car to Arnold Road. (35 RT 6936-6938.) It did not take long to get to Arnold Road and Avril did not make any noise during the drive. (35 RT 6937.) Appellant made a U-turn at the end of Arnold and parked Avril's car next to the drainage canal. (35 RT 6881, 6939-6941.) Appellant did not hear any noise coming from the trunk but the car moved a bit as though Avril had shifted her weight in the trunk. (35 RT 6941.) Appellant walked back to the trunk, opened it and told Avril to get

out. (35 RT 6941-6942.) Avril said, "Okay, get out?" (35 RT 6941-6942, 6944; 36 RT 7040.)

Appellant struck Avril's head with the trunk lid, again trying to knock her unconscious. (35 RT 6942-6943-6944; 36 RT 7040-7041.) Appellant then opened the trunk lid again, grabbed Avril and helped her out of the trunk. (35 RT 6942, 6945-6946.) One of Avril's feet caught the inside of the trunk lid and she lost her balance. Appellant let her go and heard a splashing sound. Appellant testified it sounded like someone tumbling and having the wind knocked out of her. (35 RT 6881-6882, 6942, 6946-6947; 36 RT 7042-7044.) Appellant drove from the scene in Avril's car. (35 RT 6881, 6885, 6946; 36 RT 7044.) All he wanted to do was get away from Avril. He knew she was hurt but not that she was hurt as badly as she was. (35 RT 6885-6886.)

Appellant denied that he strangled Avril. (35 RT 6883, 6980, 6988, 6991, 7003-7004, 7010.) Appellant also denied that he intentionally killed Avril or planned to kill her. (35 RT 6875; 36 RT 7035, 7040.) Appellant intended only to leave her on Arnold Road. (36 RT 7035.) He had not thought about hurting Avril even as he was holding her from behind. (35 RT 6876.) He did not act according to a plan. He just acted stupidly. (35 RT 6874, 6876.) Appellant and Avril were just in the wrong place at the wrong time. (35 RT 6875.) Appellant believed Avril was alive when she fell into

the ditch. (36 RT 7043.)

Appellant drove back to Avril's home from Arnold Road. Appellant used Avril's keys to open Avril's door. (35 RT 6951-6952.) Appellant again wore socks on his hands because he did not want to leave any prints. (35 RT 6958.) Once inside Avril's home appellant found and donned a pair of gloves. (35 RT 6958-6959.)

Appellant found Avril's purse in her bedroom and took her driver's license, credit cards and $800 in cash. He then took those items and Avril's VCR to Ralph Gladney's house, intending to sell the VCR to Gladney and to buy drugs from Gladney. (35 RT 6886-6887, 6950-6951, 6953-6954.) Gladney previously had told appellant that he needed a VCR if appellant ever came across one. (35 RT 6886.) Appellant locked Avril's door when he left. (35 RT 6954.)

Gladney, Mona and a man named Reggie Webber were present when appellant arrived at Gladney's home. (35 RT 6954.) Gladney asked Mona whether she still wanted a VCR, then bought the VCR from appellant for $20 and a $40 piece of cocaine. (35 RT 6955.) Appellant, who did not know how to use Avril's cards, asked Gladney whether he knew anyone who could work the cards. (35 RT 6887-6888, 6955-6956, 6984.) Gladney told him Theresa Johnson could help him. (35 RT 6888, 6956.)

Appellant went to Johnson's apartment after leaving Gladney's home. (35 RT 6887.) Appellant and Johnson smoked cocaine but appellant did not talk to Johnson about the cards right away. (35 RT 6888, 6964-6965.) Appellant eventually told her that he had some credit cards[14] and asked if she knew how to use them. (35 RT 6888.) Johnson asked him if he knew Avril's PIN number.[15] (35 RT 6889.) Appellant found the PIN number on a strip of tape on a card with numbers. (35 RT 6889, 6967.)

Appellant and Johnson left to go to a grocery store to get some money. (35 RT 6889, 6965-6966) Appellant told Johnson to put socks on her hands before they left Johnson's apartment because he did not want any fingerprints left in the car. (35 RT 6966.) Appellant also put socks on his hands. (35 RT 6966.)

Appellant and Johnson both went into the grocery store. (35 RT 6966.) Johnson first used the card to get $40 in quick cash. (35 RT 6968.) Appellant walked away to buy some cigarettes after Johnson told appellant that she was going to try again. Johnson gave appellant either $200 or $240 when he came back. (35 RT 6968-6969.)

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[14] Appellant had Avril's driver's license and 7-10 of Avril's cards. (35 RT 6967.)

[15] Appellant did not understand about PIN numbers. He would have used the cards by himself if he had. (35 RT 6888.)

Johnson then told appellant to take her to a convenience store. (35 RT 6969-6970.) Appellant stayed toward the front of the convenience store while Johnson used Avril's card to obtain $200 from an ATM inside the store. (35 RT 6970-6971.) Appellant had been to the store before and knew there was a camera up by the cashier. (35 RT 6970.)

Appellant took Johnson home and dropped her off before returning to Avril's apartment to take Avril's stereo, silverware and the Christmas presents under Avril's tree. (35 RT 6956-6958, 6960, 6971.) Appellant then returned to Johnson's apartment. Appellant and Johnson carried Avril's property into the apartment and opened the presents. (35 RT 6972.) Appellant sold the stereo to C.J. Brewer for $150. (35 RT 6982.) Appellant stole Avril's camera when he entered her apartment a third time. (35 RT 6952, 6961-6962, 6975.) Appellant gave the camera to his daughter. (35 RT 6975.)

Appellant left the presents at Johnson's apartment and went out to obtain drugs. (35 RT 6973.) When he returned to Johnson's apartment Appellant saw a television broadcast showing the ditch and Johnson told him that the woman had died. (35 RT 6892.) Appellant's conscience began to bother him and he needed to tell someone what he had done. (35 RT 6889-6890, 6896.)

Appellant told Johnson he might have killed someone. (35 RT 6889, 6973, 6976, 6981, 7046.) Appellant told Johnson that the victim was a woman he knew who lived down the alley from Garner, that he knew the woman for a long time, that he had helped carry the woman's Christmas tree into her apartment, that the garage door was open. (35 RT 6976-6977.) Appellant told Johnson that the woman went out and turned off the light at the same time every night, that he hid in the garage and waited for the woman. (35 RT 6977.) Appellant told Johnson that he intended to rob her but was not able to knock out the woman.[16] (35 RT 6977.)

Appellant and Johnson then went to a bank and again tried to use Avril's ATM card. Appellant wore a wig and glasses during the effort but the card did not work. (35 RT 6981.) Appellant took Avril's car to the Elks Lodge after this attempt and then took a taxi back to his mother's home. (35 RT 6892.)

Appellant spoke with Gladney at Johnson's apartment a day or two after he sold him the VCR. Appellant told Gladney about the incident while they were driving to a motel from Johnson's apartment in order to buy drugs. (35 RT 6984-6985.) Appellant, who was crying, told Gladney that he

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[16] Appellant disputed some of Johnson's testimony. He claimed that Johnson lied when she testified that he told her that Avril was hollering. (35 RT 6979-6980.) Nor did appellant say anything to Johnson about a ditch. (35 RT 6980.) Appellant also denied telling Johnson that he "couldn't knock the bitch out." (35 RT 6979.)

thought he might have killed a nice lady he knew who lived on Dollie. Appellant told Gladney that he waited for the woman and attacked her in her garage. (35 RT 6985-6987.)

Appellant did not know how much money he netted from the incident but indicated that $1,400 sounded about right. (36 RT 7047.) Appellant spent the money "all kind of ways." (36 RT 7047.) Appellant gave his daughter things that he bought in addition to the camera and robe. (36 RT 7047-7048.) Appellant also bought his son some presents, but did not remember whether it came from the proceeds of his thefts. (36 RT 7048.)

Appellant admitted that he previously had committed crimes and been sent to prison. (35 RT 6841.) Appellant was convicted of car theft in 1978. (35 RT 6841.) In 1979 he tried to break into a house and was convicted for that. (35 RT 6841.) Appellant tried to steal Garcia's purse in 1983. (35 RT 6841.) He also went to prison for possession of cocaine. (35 RT 6841-6842.)

Appellant denied that he tried to burn his sister Wylene with an iron but admitted that he pushed his sister Darlene up against a wall. (35 RT 6842, 6844.) The altercation with Darlene occurred after appellant went to his mother's house to pick up a stereo. Appellant was downstairs talking to his mother when she told Darlene to do something. Darlene got smart with

their mother. Appellant went upstairs and said something to Darlene. She got smart with him. He grabbed her and shoved her up against the wall. She was mad and got in a couple of licks against appellant. (35 RT 6843.) Appellant did not know whether he grabbed her by the neck. (35 RT 6843.)

Appellant testified that he loved Darlene and felt badly when he saw her on the stand. He felt she had been misled into saying what she said. (35 RT 6842-6843.) Darlene was roughly nine years younger than appellant. He taught her how to walk. (35 RT 6842.) He always was on his sisters as they were growing up. He was their big brother. He would say something about it if they got sassy when their mother or father told them to do something. (35 RT 6843-6844.)

With regard to the incident at Garner's apartment during which a window was broken, appellant testified he did not intend to hurt either Garner or Ronald. (35 RT 6846.) Appellant had a lot of positive, loving, affectionate feelings for Garner over the years. (35 RT 6849.) Appellant claimed he treated Ronald with the utmost respect and was proud of him, even when he saw him in court. (35 RT 6850.) Appellant participated in Ronald's upbringing. He talked Ronald into going to college and Ronald still was attending as of the date of appellant's testimony. (35 RT 6850.) That Ronald was attending college was important to appellant because he's seen the other side of what it leads to. (35 RT 6850.)

Appellant also believed he treated Donald well. (35 RT 6850.) Appellant considered Ronald and Donald to be his children to a certain extent. (35 RT 6851.) The fact that appellant was not the father of either young man was not a problem. Appellant treated them like they were his own blood, as did appellant's mother and father. (35 RT 6851.)

Appellant acknowledged that he and McClelland had some fights. (35 RT 6851.) McClelland was outspoken and had an attitude. She would be wrong about things and not want to hear about it. They would end up getting into fights. (35 RT 6851.) McClelland used a lot of drugs and was strung out on heroin at one time. (35 RT 6851-6852.) McClelland's behavior and drug use did not stop appellant from loving her. (35 RT 6852.) McClelland had overcome her heroin problem, changed her life and gone to college. Appellant was proud of her. (35 RT 6852.)

Appellant admitted he tried to steal Garcia's purse. He pleaded guilty to committing the offense and served three years in prison. (35 RT 6852-6854.) Appellant testified he was in the bank with McClelland, who was there to cash her welfare check. They were standing behind Garcia as the teller counted out a lot of money. After seeing Garcia put the money in her purse, appellant told McClelland, "You know what? Take my car. Meet me at my mom's house." (35 RT 6853.)

McClelland seemed to know what was on appellant's mind. She said, "No, Ken. No, no, no." (35 RT 6853.) Appellant went outside and stood by the corner of the building. (35 RT 6853.) Garcia and another woman walked to a car and unlocked the door. The woman on the passenger side said something in Spanish. The woman turned around and saw appellant coming. Appellant grabbed the purse as she opened the door and tried to pull it away. Appellant ran away because the theft was taking too much time. (35 RT 6853-6854.)

Appellant's mother, Betty McKinzie (Betty), testified that appellant always was a smart boy as he was growing up. (35 RT 6814.) He was good about helping clean the house. He liked having a clean house. (35 RT 6814.) Betty and appellant went to church together and he participated in the services quite a bit. (35 RT 6820.) Appellant played drums, and possibly other instruments. (35 RT 6820.)

Betty believed she had a special bond with appellant because he was her first child. (35 RT 6815, 6821-6822.) Appellant was affectionate toward her and always was concerned about how Betty felt. (35 RT 6820-6821.) Betty testified that appellant hit her on one occasion. He apologized afterward and asked for forgiveness. She forgave him. (35 RT 6815-6817.)

Betty, who also has two daughters, prayed for a son before appellant was born. She wanted a boy because she had so many sisters. (35 RT 6814-

6815.) Appellant took care of his sisters. He was their big brother. (35 RT 6820.) Betty also testified that appellant's son missed his father. (35 RT 6821.)

Appellant told Betty that he killed the victim a couple of weeks prior to her testimony. (35 RT 6819, 6822.) Appellant was crying and appeared to be emotional. (35 RT 6819, 6824.) Appellant told her that he was sorry he did it. He said, "Mama, I just needed to talk to somebody cause it's driving me crazy." (35 RT 6819.)

Kenneth McKinzie, Sr. (McKinzie), testified that appellant was his only son by his wife Betty. He also had another son by his first wife. (35 RT 6808-6809.) McKinzie testified that he loved and missed appellant. (35 RT 6809-6810.) McKinzie continued to support appellant after his arrest because he loved appellant. (35 RT 6810.)

McKinzie testified that appellant was a good little boy until he grew up a little bit. Then he started getting into things. (35 RT 6809.) Appellant went to school and helped around the house. (35 RT 6810-6811.) They went fishing together and McKinzie taught appellant to work with concrete. (35 RT 6808-6810.) Appellant never was disrespectful to his father. (35 RT 6811.)

ARGUMENT AND AUTHORITY

I.

LEAD PROSECUTOR GLYNN'S LEAK OF A STORY TO A NEWSPAPER REPORTER DURING *HOVEY* QUALIFICATION WAS REPREHENSIBLE PROSECUTORIAL MISCONDUCT THAT DENIED APPELLANT HIS RIGHTS TO DUE PROCESS, JURY TRIAL AND A RELIABLE DETERMINATION OF PENALTY UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Introduction

Deputy District Attorney Donald Glynn, the lead prosecutor in this matter, repeatedly engaged in reprehensible attempts to influence the juries by trying the case in the media during jury selection. After the first jury was unable to reach a penalty verdict, a second jury was empanelled to decide whether appellant would be sentenced to death or to life without the possibility of parole. While *Hovey* qualification was in progress with that second jury, Glynn leaked a story to a newspaper reporter regarding his desire to offer evidence that appellant had threatened to harm Glynn.

The story written by that reporter appeared in the Ventura Star Press during the last full day of *Hovey* qualification of the second panel. The headlines for the story included both the purported threat and the fact that Glynn wanted to use the threat as evidence. The body of the story repeated the threat and indicated that Glynn wanted to use it in order to bolster the

prosecution's case that the defendant is a violent person who should be put to death.

Voir dire was completed and the jury was seated the next court day after the article appeared in the newspaper. Several of the prospective jurors admitted during final *voir dire* that they had read all or part of the article. Those who had read most or all of the article admitted that the article influenced their thinking. A number of the prospective jurors also indicated that they had read or had an awareness of the articles published during *voir dire* of the first panel. The second jury returned a verdict of death.

Appellant contends that his sentence must be reversed because Glynn committed egregious and reprehensible misconduct by attempting to influence the jurors by leaking this story to the press. That misconduct resulted in the violation of appellant's rights to due process, jury trial and a reliable verdict both under the United States and California Constitutions.

B. Deputy District Attorney Glynn's Attempts to Try the Case in the Media During the First Trial Even As the Prosecution Was Attempting to Prevent Defense Counsel from Providing Information to the Media

On August 7, 1998, defense counsel Willard Wiksell informed the court he had just learned that the prosecution had known for 15 months that District Attorney investigators had uncovered evidence of potential third-party culpability. (2 RT 320-321, 326-339.) Lead prosecutor Donald Glynn

acknowledged his failure to release the reports written about this information. (2 RT 327.)

On September 28, 1998, Wiksell filed a motion for leave to introduce evidence of third party culpability. (1 CT 211.) During hardship qualification of the first jury that same day, defense counsel informed the court that the press wanted access to his motion for leave to admit evidence of third party culpability and asked the court to rule on that request. (3 RT 541.)

Glynn objected, arguing that defense counsel had admissibility problems. (3 RT 541.) Glynn informed the court, "I really hate to see it in the press and have the jurors read about it ahead of time." (3 RT 541.) Glynn agreed with the trial court's suggestion that the motion be sealed. (3 RT 541.)

Defense counsel Wiksell objected to sealing the motion. Wiksell noted that Glynn had given an interview to the press that very morning[17] in

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[17] Wiksell commented on this newspaper article again three days later while explaining why he stipulated to the release of one of the jurors:

> "There was -- the record may be a little cloudy, but there was a lengthy article in the L.A. Times on Monday which outlined pretty much the entire case from the People's perspective, including some opinions of the prosecutor as to the guilt of Mr. McKinzie. I felt that he -- that this juror was so tainted by that publicity, plus the spillover from the O.J. Simpson case, that he really could not be fair at a guilt phase because of the publicity." Glynn declined the trial court's invitation to comment following Wiksell's statement. (5 RT 1026.)

which he was quoted as saying that it took the police more than a year to solve the crime and that appellant was "guilty of murder and special circumstances." (3 RT 541-542, 596.)

The trial court and parties revisited the issue later that same afternoon. Deputy District Attorney Morgan again asked the court to seal the record, arguing that the court needed to decide the admissibility of the evidence before the press "gets ahold of this and before it gives what may be erroneous information to the public." (3 RT 595.) Defense counsel responded that reportage of the motion "would give, if anything, a balance that we're just -- that we're entitled to." (3 RT 597.)

The court ruled that it would seal the defense motion until after the prosecution had filed a written opposition. (3 RT 600.) The court indicated that it believed releasing "a selective offer of proof...could create mischief during jury selection." (3 RT 600.)

On October 13, 1998, after granting the People's motion to preclude the admission of third party culpability evidence, the court also granted the People's motion to keep appellant's motion regarding James Young's anticipated testimony[18] sealed in order to keep it from the press pending the conclusion of trial. (10 RT 1914.)

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[18] James Young ultimately testified that Donald Thomas made statements in Young's presence indicating Thomas' involvement in Avril's killing. (15 RT 2865-2870.)

On October 26, 1998, the trial court informed counsel that it believed the "time was ripe" to unseal the motions regarding third-party culpability. (15 RT 2934.) Deputy District Attorney Morgan suggested to the court that the motions should remain sealed because some of the representations in the motions had been litigated and were proved to be without foundation. Morgan argued that those representations were "prejudicial in the sense that they portray the defense evidence as far stronger that it really was." (15 RT 2935.)

Glynn also argued that the motions should remain sealed. Glynn noted that some or most of "those statements never came before the jury, and many of them had a lot more meat to them than the actual testimony that we heard today." Glynn expressed his concern that the statements could be "published in the press." (15 RT 2935.)

On November 10, 1998, KEYT television filed a request for permission to videotape portions of the first penalty phase. (2 CT 494-495; 19 RT 3437-3438.) Noting that the Star Free Press had used the name of appellant's daughter in an article, lead prosecutor Donald Glynn objected "to any type of coverage," arguing that the press was irresponsible. (19 RT 3438-3439.) Glynn agreed with defense counsel's claim that the press was not interested in gathering the truth. (19 RT 3439.) Glynn believed that granting the request for media coverage would turn the trial into a circus.

(19 RT 3439-3440.)

C. The Incident Underlying Glynn's Second Leak to the Press

After the jury was unable to reach a verdict during the first penalty phase, the People elected to retry the penalty phase to a second jury. (21 RT 4002-4003, 4011.) Hardship qualification of the second panel began on April 5, 1999. (22 RT 4054.)

On April 21, 1999, defense counsel informed the trial court that appellant was becoming upset because he believed Glynn was demeaning him by referring to him as "that man" during *Hovey* examination of the second panel. The court asked Glynn to refer to appellant in another manner, such as "Mr. McKinzie" or "the defendant." Glynn responded that he did not believe he was being insulting and indicated that appellant was not deserving of "that type of consideration" because he had killed "a 70-year-old." The trial court again told Glynn that it "would like [Glynn] to change the phrasing that [Glynn had] been using most of the time." (25 RT 4884-4887.)

Hovey qualification of juror number four began immediately after that exchange. (25 RT 4888.) During examination of this juror, Deputy District Attorney Morgan pointed out that the juror would be sitting in the same room as "this man" and asked whether the juror actually could vote for death. (25 RT 4895-4896.) After juror number four was excused, the

parties briefly examined another prospective juror and that juror was excused for cause. (25 RT 4897-4899.) After that juror left the court room, appellant twice stated, "I'll tear his head off." (25 RT 4899.)

The parties then examined another prospective juror before resuming their discussion -- in chambers and outside appellant's presence -- of the prosecutors' demeaning references to appellant. (25 RT 4899-4904.) The court informed the parties that its bailiffs had recommended that appellant be placed in ankle chains because appellant was "so angry" about "the recent events in the courtroom as to how he's being referred to by the prosecutors." The court wanted to know whether they could "come to an agreement as to how [appellant was] going to be referred to that will satisfy everybody." (25 RT 4904.)

Counsel for appellant argued against using ankle chains, pointing out that -- other than a comment made by appellant during Theresa Johnson's testimony -- appellant had behaved well throughout the trial. (25 RT 4905-4906.) Counsel argued that appellant simply was angry and had not made any threats. Counsel suggested that appellant overheard comments between the prosecutors that that made him even angrier. (25 RT 4906.) The trial court then made the record as to what appellant said:

> As one juror was on the -- was leaving and we were waiting for the next one to come in, Mr. McKinzie, in a voice audible to me at the bench, at counsel table there was used some kind of phrase about socking Mr. Glynn, and "I have got nothing to

> lose." And then there were some very aggressive comments apparently made in the lockup area and during the break. (25 RT 4907.)

The court then asked Glynn why he shouldn't be ordered to refer to appellant either as Mr. McKinzie or as the defendant. (25 RT 4908.) Glynn responded that the court should "strike a balance" because appellant had been convicted of "horrendous crimes." Glynn did not believe he had been insulting to appellant and indicated that the court would be going too far if it ordered him "to show respect to this murderer." (25 RT 4908-4909.) Deputy District Attorney Morgan then claimed that the prosecutors actually were trying to humanize appellant by their manner of reference. (25 RT 4911.)

The court noted that appellant had twice been offended by the prosecutors' comments and ordered the prosecutors not to use the words "that man or person." Glynn objected to the ruling. (25 RT 4911.) The court told Glynn that it was just trying to find a practical solution that would permit the court and parties to complete *Hovey* examination. Glynn responded, "It depends how much respect are you going to give this man." (25 RT 4912.) The court held that Glynn was not being disrespectful to appellant, but also noted that Glynn had referred to appellant as a convicted murderer in a tone indicating that appellant was not due any respect. (25 RT 4913.) Glynn again protested that he had done nothing wrong:

> Okay. Well, my -- my objection is that I -- I have done nothing that the court finds offensive. This man who has killed a 73-

> year-old lady is getting undue deference because it is upsetting him, even though you find there is nothing wrong with it and you are ordering me to use different language. I find that -- I find that very upsetting, that you would take that position. (25 RT 4914.)

On April 22, 1999, Glynn informed the court that he was concerned for his personal safety and asked the court to have appellant placed in restraints. The court denied Glynn's request. (26 RT 4945-4947.)

D. Glynn's Second Attempt to Influence the Outcome of This Case Through the Media

On April 26, 1999, Glynn filed a Third Amended Notice of Proposed Evidence in Aggravation. This document varied from the Second Amended Notice in that it included as item number 13, "Evidence of a threat of force or violence against Donald C. Glynn on 4-22-99." (3 CT 715-716; 28 RT 5606.)

After *Hovey* examination of the prospective jurors concluded for the day, defense counsel Wiksell asked the court for a tentative ruling on this new item of proposed evidence in aggravation. (28 RT 5607.) Wiksell argued that Glynn would have to testify should the evidence be permitted. (28 RT 5607.) Wiksell further argued both that the evidence posed "a tremendous 352 problem" and that appellant's words were neither a threat nor heard by Glynn. (28 RT 5607.)

Glynn responded that he believed he was entitled to a hearing on whether the statements overheard by the deputies were admissible. The trial

court informed Glynn that its tentative ruling was to exclude the incident but set the matter for hearing on the following Friday.[19] (28 RT 5608.)

On April 27, 1999, The Ventura Star-Press published an article written by Ventura Star-Press staff reporter Amy Bentley entitled, "Prosecutor To Use Courtroom Threat Against Murderer." (2 Clerk's Transcript of Court's Exhibits 500.) The sub-heading on the article indicated: "NEW SENTENCING TRIAL: Jury will know Kenneth McKinzie said he'd like to rip lawyer's head off." (2 Clerk's Transcript of Court's Exhibits 500.) The first two sentences of that article read as follows:

> A convicted killer's threat to rip off a prosecutor's head will be used against him when a jury decides whether the Oxnard man should get the death penalty for beating and strangling a 73-year-old neighbor. Kenneth McKinzie's threat in court last week led prosecutor Donald Glynn to file court papers Monday saying he will use it to bolster the prosecution's case that the defendant is a violent person who should be put to death. (2 Clerk's Transcript of Court's Exhibits 500.)

Bentley's article then repeated appellant's threat to "rip off" Glynn's head and added that appellant also had threatened to punch Glynn and said that he had nothing to lose. (2 Clerk's Transcript of Court's Exhibits 500.) Citing "court transcripts" as her source, Bentley traced the history of the issue and quoted Glynn as saying, "If the court orders me to show respect to this murderer, I think you have gone too far." (2 Clerk's Transcript of

[19] The following Friday was April 30, 1999.

Court's Exhibits 500.)

Defense counsel Wiksell brought Bentley's article to the attention of the trial court when proceedings commenced that same day. (29 RT 5610.) Wiksell noted that Glynn previously had asked the court to seal appellant's motion regarding third-party culpability evidence the same morning Glynn had given an interview to the press about the case. (29 RT 5610-5611.) Wiksell argued that Glynn's conduct was outrageous. Wiksell contended that Glynn knew that he would never be able to get the evidence of appellant's statements before the jury because of "the rules of recusal" so Glynn filed a "frivolous motion so that he could get before the jury what he knew could never have been before the jury." (29 RT 5611.)

Wiksell argued that it was not a coincidence that Bentley was in the courtroom "asking to see that transcript." (29 RT 5612.) When asked by the trial court for the basis of that claim, Wiksell informed the court that appellant's investigator observed Bentley come into the courtroom and talk to a bailiff on April 26, 1999. The bailiff then spoke to Glynn. Glynn bent over and picked up a transcript and gave it to the bailiff, who in turn gave the transcript to Bentley. Wiksell contended that this sequence of events demonstrated that "there must have been some communication." (29 RT 5613.)

The issue was revisited later that same day during a break in *voir dire*. (29 RT 5637-5655.) When asked for comment, Glynn told the court that he "did not know that this was a closed courtroom." Glynn informed the court that reporter "Amy Bentley asked if anything's going on in the trial" and he "directed her to the appropriate day of the transcript." Glynn also admitted that he loaned his copy of the transcript to Bentley. (29 RT 5640.)

The court's bailiff[20] informed the court that Bentley had approached the bailiff and told the bailiff that Glynn had some papers for her. Glynn handed something to the bailiff -- the trial court characterized the object as appearing to be a couple volumes of transcripts -- and the bailiff handed the items to Ms. Bentley. (29 RT 5640.)

Defense counsel James Farley[21] told the court he believed Glynn had acted intentionally, knowing full well that he was not going to be able to introduce the evidence. (29 RT 5641.) Wiksell described Glynn's explanation of how Bentley came to be in possession of the transcripts -- Bentley calling Glynn and asking whether anything was going on -- as being "sugar-coated" and again suggested that Glynn deliberately

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[20] Defense counsel James Farley later identified the deputy as Deputy Smith. (29 RT 5650.)

[21] Mr. Farley did not participate in the guilt phase. He was employed by Mr. Wiksell as second chair for the retrial of the penalty phase.

communicated with Bentley because Glynn was "mindful of negative publicity." (29 RT 5643.)

Glynn responded by again claiming that Bentley had called him, informing the court that "a reporter called me up" and asked whether anything was going on in the case. Glynn told the court he "directed her to read a transcript of an open court proceeding for a particular day" and told her that he "was going to file an amended notice of factors in aggravation."

Glynn denied that he had done anything wrong or unethical. Glynn noted that it was an open court to which Bentley had "complete access." Glynn claimed that Bentley "took a shortcut and asked me if anything interesting was happening." Glynn asserted that he directed Bentley's attention to the issue because "we all know how boring *Hovey* is, but I directed her to something that was happening that had a certain interest to it." (29 RT 5644-5645.)

The trial court told Glynn that it thought Glynn had "showed very poor judgment" by calling Bentley's attention to the incident. (29 RT 5649.) Glynn again claimed that Bentley had called Glynn and asked what was going on in the trial: "She calls me up and asked me what is going on." (29 RT 5649.) Glynn noted that no motion had been made to seal the transcripts. (29 RT 5649.)

The court acknowledged that there had been no motion to seal but observed both that "this is clearly an issue that you knew was up in the air" and that the incident was presented to Bentley as though the admissibility of the evidence was "a done deal." The court noted that Glynn apparently did not even bother to tell Bentley that the issue of admissibility was unresolved. (29 RT 5649.)

Glynn responded that Bentley had not asked him about the admissibility of the evidence. (29 RT 5650.) The court explained that its concern rested in the fact that Glynn called Bentley's attention to the issue. (29 RT 5650.) The court issued an order sealing the transcripts of the proceedings on this issue together with Glynn's third amended notice pending resolution of the issue of the admissibility of the evidence. The court also directed all parties to refrain from discussing the issue with any reporters. (29 RT 5653-5654.)

Later that same day, Glynn changed his story about how Bentley came to know about the incident. Glynn told the court he wanted "to clarify" his earlier claim that he had been contacted by Bentley. Glynn informed the court that he initiated the contact by calling Bentley and leaving her a message. Glynn directed Bentley's attention to the transcripts after she returned his call. (29 RT 5656.) The court asked Glynn, "So in other words, you felt the need to have this matter appear in the newspaper,

is that it?" (29 RT 5656.) Glynn responded,

> I -- I communicate with Miss Bentley frequently and I brought it to her attention, yes. This is an open court. I directed her to the transcript, but I did not talk to her about it. (29 RT 5656.)

Shortly before the proceedings concluded for the day, defense counsel Wiksell informed the trial court that he continued to be bothered by Glynn's deliberate leak to the press. (29 RT 5802.) Wiksell argued that the prejudice from the article was so great that a juror who was "on the fence" could be "put over the edge." (29 RT 5802.) Wiksell argued that Glynn's leak constituted misconduct and "a violation of professional responsibility." Wiksell indicated his belief the trial court "should do something." (29 RT 5802-5803.) Wiksell asked the court to state for the record that Glynn had engaged in misconduct. (29 RT 5803.)

The trial court did not do so, noting instead that it was greatly troubled that Glynn "went out of the way, your way to bring in completely unnecessary issues in the case" but did not find that Glynn had committed "technical misconduct." (29 RT 5804.) The court declined to give its "personal comments," but indicated its belief that Glynn needed to discuss with his supervisors "the fact of my view." (29 RT 5805.) The court stated that:

> The key problem here to me is that you engineered this article, knowing that there would be a major dispute as to the admissibility of this evidence. And the result is that this article is telling people that as if it is gospel, gospel. It happened and

> it's gospel that it is admissible. And that is clearly wrong to be bantering about, even indirectly, questionable or inadmissible evidence in the public eye. And it would be -- if it was intended to prejudice the jury, you would be subject to significant discipline. (29 RT 5807-5808.)

On April 29, 1999, the trial court excluded the evidence of appellant's purported threats for several reasons. The court did not believe appellant's statements were sufficient to prove a violation of Penal Code section 422. The court also took into consideration the circumstances in which the purported threats arose and found that appellant was simply blowing off steam. The court also excluded the evidence under Evidence Code section 352, finding that the evidence presented a danger of confusing the jury and would cause an undue consumption of time. (30 RT 5807-5808.) The court also noted that it "would probably keep it out as a sanction for the People's action in orchestrating the newspaper article." (30 RT 5808.)

Glynn asked the trial court whether it believed he had acted improperly. The court responded in the affirmative. The court noted that Glynn should have known that the admissibility of the evidence was "highly questionable and would be strongly contested." The court observed that it was clearly improper for an attorney to make a public statement about such evidence and held that Glynn did indirectly what he was not allowed to do directly. (30 RT 5809.)

Glynn responded that he believed Bentley had "every right to read the transcript, and I think that I had every right to direct her to the transcript." Glynn informed the court that he believed "the public needs to know the type of rulings that you're making with respect to shackling a dangerous, convicted murderer, and I thought that this was of interest to the public, and that's why I alerted Miss Bentley to that particular passage in the transcript." (30 RT 5810.)

The trial court noted that it had indicated earlier that it did not have a problem with either side letting the public "know what I'm doing in here," and indicated it had not realized until that moment that Glynn had leaked the story for that purpose. (30 RT 5810.) The court nonetheless held that the outcome was the same: highly questionable evidence had been injected "into the media at a rather tender moment in terms of the jury selection." (30 RT 5810.)

Glynn again argued that the court should have sealed the record had it not wanted the information in the press. (30 RT 5811.) The court responded that its concern was with the fact that Glynn had the opportunity to avoid publicizing potentially inadmissible evidence and did not take that opportunity. (30 RT 5811.) The court believed Glynn may have been "skating by the ethical line here because of the fact that it's all public record." (30 RT 5811.) The court thought that Glynn exercised "horrible

judgment, really, in not anticipating the fact that this evidence was going to be contested and it could have an impact on the jurors." (30 RT 5812.)

E. Glynn's Leak to Bentley Constituted Misconduct

Glynn's belief that he had done nothing wrong plainly was incorrect. This court held -- more than 37 years before Glynn leaked his story to Bentley -- that prosecutorial release of statements by a defendant before those statements have been admitted into evidence is improper. (*People v. Brommel* (1961) 56 Cal.2d 629, 636, reversed on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478.) The court stated:

> Prosecuting officers owe a public duty of fairness to the accused as well as to the People and they should avoid the danger of prejudicing jurors and prospective jurors by giving material to news-disseminating agencies which may be inflammatory or improperly prejudicial to defendant's rights. (*Id.* at p. 636.)

Deputy District Attorney Glynn's conduct in this matter was so egregious that it infected the trial with unfairness to a degree that violated appellant's rights to due process and jury trial under the United States and California Constitutions and undermined the reliability of the jury's penalty verdict. (U.S. Const., amends. V, VI, VIII and XIV; *People v. Mendoza* (2007) 42 Cal.4th 686, 700; *People v. Farnam* (2002) 28 Cal.4th 107, 167; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94

S.Ct. 1868, 40 L.Ed.2d 431].) Glynn's conduct also constituted prosecutorial misconduct under the California Constitution because it involved the use of a reprehensible method to attempt to persuade the jury. (Cal. Const., art. I, § 15; *People v. Hill* (1998) 17 Cal.4th 800, 819)

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]; *People v. Seaton* (2001) 26 Cal.4th 598, 649-650, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 439 [115 S.Ct. 1555, 131 L.Ed.2d 490].) The prosecutor may not become the "architect of a proceeding that does not comport with the standards of justice." (*Brady v. Maryland* (1963) 373 U.S. 83, 88 [83 S.Ct. 1194, 10 L.Ed.2d 215].)

Appellant does not need to demonstrate that Glynn acted in bad faith or with an appreciation of the wrongfulness of his conduct, as a prosecutor's conduct is judged by an objective standard. (See *Smith v.*

Phillips (1982) 455 U.S. 209, 219 [102 S.Ct. 940, 71 L.Ed.2d 78]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Appellant nonetheless submits that there is little reason for this court to excuse Glynn's conduct because trying this case in the media was reprehensible both when judged by an objective standard and when judged in light of the substantial evidence that Glynn knowingly engaged in wrongful conduct for the express purpose of prejudicing the jury by evidence he knew or should have known could not be introduced for a number of reasons.

Demonstrating that Glynn's conduct was wrong under an objective standard is relatively straightforward. In addition to the court's decision in *Brommel*, the Rules of Professional Conduct in effect at the time of appellant's trial made it very clear that Glynn's actions were unethical. The rules made no direct mention of an attempt, such as Glynn's, to use the media to prejudice a jury. Rule 7-106 instead provided a broader rule that necessarily included an attempt to try a case in the media. Rule 7-106 provided as follows:

> Rule 7-106. Communication With or Investigation of Jurors
>
> (A) Before the trial of a case, a member of the State Bar connected therewith shall not communicate directly or indirectly with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case. ¶ (B) During the trial of a case: (1) A member of the State Bar connected therewith shall not communicate directly or

> indirectly with any member of the jury. (Rules of Professional Conduct, rule 7-106, in pertinent part.)

The Rules of Professional Conduct have been modified twice subsequent to the start of appellant's trial. The first such modification took effect on May 27, 1989, roughly one month after Glynn leaked the story to Bentley. The proscription against direct or indirect communication with jurors or prospective jurors was renumbered as rule 5-320 but the substance of the rule was essentially unchanged:

> Rule 5-320. Contact With Jurors
>
> (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case. ¶ (B) During trial a member connected with the case shall not communicate directly or indirectly with any member of the jury. (Rules of Professional Conduct, rule 5-320, in pertinent part.)

There really can be very little question but that the purpose of Glynn's leak to a newspaper reporter, when judged by an objective standard, constituted an attempt to communicate indirectly with the prospective jurors. That conclusion is only cemented by consideration of Glynn's subjective state of mind as shown by Glynn's evolving explanation of how reporter Amy Bentley came to be aware of the story. When first asked for comment, Glynn informed the court that he "did not know that this was a closed courtroom." Glynn first informed the trial court that

Bentley asked him whether anything was going on in the trial and he "directed her to the appropriate day of the transcript." (29 RT 5640.) Glynn subsequently repeated his claim that he had been contacted by Bentley and denied he had done anything wrong. (29 RT 5644-5645.) Later that day, Glynn "clarified" his earlier statements to the trial court by admitting that he had initiated the contact with Bentley and directed her attention to the issue. (29 RT 5656.)

Glynn's shifting position as to who initiated the contact between Glynn and Bentley can fairly be characterized as demonstrating Glynn's consciousness that he had done something wrong by contacting Bentley. The same also can be said for Glynn's explanation for *why* he imparted the information to Bentley. Glynn initially told the court that he merely was responding to an inquiry from Bentley as to whether anything was going on in the case. (29 RT 5640.) Glynn repeated that claim (29 RT 5644-5645) after appellant's attorneys accused Glynn of deliberately leaking the story -- knowing that the evidence was not admissible -- because Glynn was mindful of negative publicity. (29 RT 5641-5643.) Glynn then repeated his claim that Bentley had asked Glynn "if anything interesting was happening." Glynn asserted that he directed Bentley's attention to the issue because "we all know how boring *Hovey* is, but I directed her to something that was happening that had a certain interest to it." (29 RT 5644-5645.)

Glynn had a different explanation for what he had done when the trial court and parties reconvened the following day, claiming for the first time that he believed:

> [t]he public needs to know the type of rulings that you're making with respect to shackling a dangerous, convicted murder, and I thought that this was of interest to the public, and that's why I alerted Miss Bentley to that particular passage in the transcript. (30 RT 5810.)

Setting aside the question whether leaking a story to the media during a trial in order to criticize a judge's rulings is ethical, it should be clear to this court that Glynn's final justification for the leak was a significant departure from Glynn's previous claim that he merely was trying to provide something of interest to a reporter during the "boring" *Hovey* process. It also should not escape this court's notice that Glynn actually leaked the story *before* the trial court issued its ruling on the admissibility of the threat. (30 RT 5807-5808.) Bentley picked up the transcripts from Glynn on April 26th, which was the same day that Glynn actually filed the Third Amended Notice. (3 CT 715-716; 28 RT 5606, 29 RT 5640.) The only ruling the trial court had made prior to April 26th was that appellant need not be shackled (26 RT 4945-4947), and that was not the primary subject of the story. The admissibility of appellant's purported threats did not become an issue until April 26th, when Glynn actually filed the Third Amended Notice, and the court only tentatively ruled on the admissibility of

that evidence at the end of the court day. (28 RT 5608.) Glynn's final justification was in fact little more than a transparent and blatant attempt by Glynn to shift his excuse to a justification suggested by the trial court the previous day.[22] (29 RT 5804.)

The record in this matter leaves this court with little choice but to conclude that Glynn purposely leaked the story to Bentley for precisely the reasons claimed by defense counsel: he wanted to avail himself of the benefit of negative publicity by placing facts before the jury when he knew, or reasonably should have known, that he faced difficulties in obtaining leave to admit the evidence. Glynn would not have had to conceal the fact that he -- and not Bentley -- initiated the contact had Glynn not understood that what he was doing was wrong. Nor would he have needed to shift from his initial justification for the contact to the rationalization suggested by the trial court. Glynn's repeated references to the fact that the trial court had not sealed the proceedings also demonstrates that Glynn knew what he was doing by leaking the story to Bentley.

Glynn's subjective state of mind further is shown rather clearly by the repeated references -- found throughout the record -- to the matter of

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[22] Glynn did not adopt this justification when it first was suggested by the trial court. (29 RT 5803-5806.)

People v. Holland[23] (Ventura County Superior Court case number CR39530). *Holland* was a capital case Glynn and defense counsel Wiksell tried before Judge O'Neill not long before this matter.[24] Holland was tried on an indictment handed up on August 1996, charging Holland with murder and alleging special circumstances based on robbery and carjacking. The jury in *Holland* returned a verdict of life without parole on February 6, 1998. (Request for Judicial Notice of Ventura County Superior Court case number CR39530.)

Glynn's "defeat" in *Holland* clearly was on his mind as he went into this trial, as shown by the motion to limit Wiksell's penalty phase argument filed by Glynn on November 6, 1998. (2 CT 473-484.) This motion contained a laundry list of "wrongs" committed by Wiksell during *Holland* and one other matter (2 CT 479-480), a list Judge O'Neill characterized as being "very interesting reading." (18 RT 3414.) It does not take much of a leap to understand that Glynn's leak to Bentley was prompted in part by Glynn's desire -- no doubt piqued by his failure to obtain a death verdict from the first jury in this matter -- to avoid a second straight "defeat" at the hands of Wiksell. From Glynn's perspective, appellant's trial probably was

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[23] Appellant has filed a Request for Judicial Notice of the Superior Court file in *Holland* under separate cover.

[24] Wiksell and Glynn already were counsel of record in this matter when *Holland* was tried. (1 CT 17; 1 RT 3-4.)

very much a grudge match, one in which he was willing to bend the rules in order to win.

F. Necessity for Reversal

Appellant acknowledges that of the jurors ultimately seated, only Alternate Juror Number Two admitted reading "partway into" the article before realizing that it was about this case.[25] (30 RT 5912.) Juror Number Eleven's husband and a friend both told her about the article but all they said to her was that there was an article about the McKinzie case. She did not read the article. (30 RT 5887-5888.)

This court should nonetheless hesitate to conclude that Glynn's misconduct was harmless, however, because the taint that flowed from Glynn's misconduct deprived appellant of a fair opportunity to evaluate jurors who may have been qualified to serve but for their exposure to coverage in the media. *Hovey* qualification was concluded and the jury was actually selected on April 29, 1999, the very first court day following the publication of the article. (3 CT 729-734; 30 RT 5807-5928.) Four of the prospective jurors interviewed following the conclusion of *Hovey* admitted

[25] The record actually makes it clear that Alternate Juror Number Two remained on the panel only because defense counsel Wiksell passed for cause on the juror in the mistaken belief he still had a peremptory challenge to use on the juror. (30 RT 5913.)

reading all or part of the article.[26] (30 RT 5846-5847, 5888, 5902-5904.) Two of those three jurors confirmed the prejudicial impact of the article. Prospective juror Horan told the court that the article crystallized in his mind the belief that if appellant committed a premeditated murder he should get the death penalty. (30 RT 5865.) Horan admitted the article influenced his outlook on the case and was not sure he would be able to "set it aside completely." (30 RT 5846-5847.)

Prospective juror Barbara Smith also read the entire article and believed it had changed her outlook on the case in a manner she could not set aside. (30 RT 5904.) She told the court the article was pushing her toward the death penalty. (30 RT 5905.) She thought she could set it aside, but commented that she would really have to discipline herself. (30 RT 5905-5906.)

A considerable number of the other prospective jurors also had been exposed to earlier media coverage of the trial. Juror Number Twelve informed the court that he had read about the case "a while back in the paper." (29 RT 5716.) Juror Number Eleven told the court she may have read a headline about the case but did not remember anything about the

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[26] Three other prospective jurors saw the headline on the article but did not read the article. (30 RT 5847-5848, 5862-5863, 5911.) The wife of one other prospective juror mentioned the article to the prospective juror. (30 RT 5895.)

article. (23 RT 4583.) Juror Number Two -- who was a member of the neighborhood patrol in the victim's neighborhood -- informed the court he had seen "a few newspaper articles" and had been briefed on the crime by the head of the neighborhood patrol. Juror Number Two told the court that the neighborhood was a "troubled area." (23 RT 4403-4404.)[27]

G. The Trial Court's Admonition to the Jury Did Not Cure the Prejudice That Flowed from the Prosecution's Pervasive Efforts to Influence the Outcome of the Case Through the Media

The trial court addressed the article prior to the commencement of final selection:

> There's one issue that I need to address. On Tuesday of this week in the Ventura County Star, there was an article about this case. Undoubtedly, some of you are aware of this article and some of you may have read it, and as you're reading it, it dawns on you and kicks in what I told you earlier not to read

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[27] Roughly 28 of the other prospective jurors indicated they had either read or heard about the case in the media but did not indicate precisely when they were exposed to the media or which form of the media was involved. (22 RT 4171-4172, 4215; 23 RT 4362-4363, 4429, 4470, 4488-4489, 4505; 24 RT 4622-4623, 4687, 4700-4701, 4714, 4717; 25 RT 4779, 4780, 4817-4818, 4836-4837; 26 RT 5013-5014, 5023, 5084, 5100, 5124, 5158-5159; 27 RT 5191, 5208-5209, 5216-5217, 5248-5250, 5270-5271, 5320, 5363; 28 RT 5416-5417, 5564; 29 RT 5622.) Of these prospective jurors, eight knew that the case involved the murder of an older woman (24 RT 4622-4623, 4714, 4717; 26 RT 5084; 27 RT 5248-5250, 5270-5271; 28 RT 5416-5417; 29 RT 5622), four knew that the victim's body had been found in a ditch (24 RT 4687; 27 RT 5248-5250, 5363; 28 RT 5564), one knew that the victim's body had been found on Arnold Road (26 RT 5084) and one believed the victim's body had been found out near where he worked in Point Mugu. (27 RT 5216-5217.) Several of the jurors knew what property had been taken from the victim (24 RT 4714, 4717; 25 RT 4836-4837; 26 RT 5013-5014; 27 RT 5270-5271, 5363) and a couple of them knew that appellant had given the victim's camera to his daughter as a gift (24 RT 4714, 4717; 27 RT 5363).

> anything about his case. I'm not trying to put any of you on the hot seat if you may have read it or heard about it or glanced at it, but to make a very strong point here, as sometimes happens in the course of matters making their way from the actual event to the newspaper, there is a major inaccuracy in the article about this case about what -- what evidence is likely to be in the penalty phase of this case. So this inaccuracy bears directly on what you're going to be hearing as jurors, and it's crucial that it be disregarded if you know what was printed there. (30 RT 5845-5846.)

Appellant anticipates that respondent will claim that this admonition cured any potential prejudice arising from Glynn's misconduct. The court should reject any such argument because the trial court's subsequent statements to the first juror who admitted having read the article -- prospective juror Horan -- completely undercut the court's first statement. The exchange took place at the outset of final voir dire, while all of the prospective jurors were in the courtroom. Horan informed the court that he had in fact read the article and believed it would influence his outlook on the case "somewhat." Horan wanted to know what inaccuracies were in the article. The court informed him that the article was inaccurate insofar as it indicated what evidence would be presented. The events in the article "did not happen as stated in the article *to some extent*." (30 RT 5846-5847, emphasis added.)

By phrasing its comments in this manner, the trial court necessarily told the remaining jurors that the events in the article actually did occur as

represented in the article -- to some extent -- but failed to inform the jurors how the events that actually occurred varied from the version contained in the article. Because of this, the court's instruction actually did precisely what Glynn initially intended. It conveyed to the jurors that the newspaper story being discussed was -- to some extent -- true.

H. Conclusion

This case very much was a grudge match from Deputy District Attorney Glynn's perspective, so much so that he was willing to engage in reprehensible methods to ensure that appellant's second penalty-phase trial did not end in a verdict of life without parole as it had in Glynn's previous case with defense counsel Wiksell. A death sentence should not be -- or even appear to be -- the product or result of a grudge match between the attorneys.

Glynn's conduct constituted prosecutorial misconduct under the United States and California Constitutions. Reversal of the penalty phase verdict is required by the United States Constitution because Glynn's misconduct directly and adversely impacted appellant's rights to jury trial and confrontation under the United States Constitution. (See *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182 [reversal is required when prosecutorial misconduct so infects the trial with unfairness as to make the resulting conviction a denial of due process].) Reversal also is required

under the California Constitution because Glynn's misconduct involved the use of a reprehensible method to attempt to persuade the jury. (Cal. Const., art. I, § 15; *People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Appellant's death sentence must be reversed.

II.

APPELLANT'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE THE PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE TO EXCUSE PROSPECTIVE JUROR KELVIN SMITH DENIED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND A JURY SELECTED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

On October 15, 1998, prior to commencing the final selection of the first jury, defense counsel Wiksell asked the trial court to require the People to justify the exercise of any peremptories directed toward African-Americans on the panel. Counsel noted that there were "very, very few black jurors on this panel." (10 RT 1923.) Counsel suggested that there were "three, possibly four that are in the 72 [*Hovey* qualified jurors]." (10 RT 1923-1924.) Counsel expressed his concern that -- because there were so few African-Americans on the panel -- there would not be any African-Americans left on the panel "if we wait until there's a systematic exclusion." (10 RT 1923.)

Deputy District Attorney Glynn correctly observed that appellant was required to make a *prima facie* case before the People can be required to provide a justification for a strike. (10 RT 1924.) Wiksell agreed that Glynn's statement of the law was correct, but argued that the trial court nonetheless had discretion to require the prosecution to provide justification

prior to striking any of the African-American individuals on the panel. (10 RT 1925.) Wiksell again indicated his belief that:

> The problem is when you only have one, two or three potential black jurors, once you get down to where there's a pattern of exclusion, we're shut out. (10 RT 1925.)

The trial court denied appellant's request but did not dispute Wiksell's assertion that there were only two or three African-American jurors in the panel.[28] The court instead noted that the racial composition of this jury was "entirely normal in this county, the way the population is made up, to have so few African-American jurors in a group of 72." (10 RT 1925.) Glynn then suggested that they could go to sidebar whenever the People intended to challenge an African-American juror. The court and parties agreed to the procedure. (10 RT 1926-1927.)

Glynn subsequently informed the trial court at sidebar that he intended to use his next challenge against prospective juror Kelvin Smith, who was African-American. (10 RT 1982.) Wiksell objected under *Wheeler* and asked the court to direct Glynn to justify the strike. (10 RT 1983-1984.) When asked to argue in support of a prima facie case, counsel again expressed his belief that he could not make a showing of systematic

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[28] During the record correction and settlement proceedings conducted in this appeal, the trial court indicated that two African-American jurors actually made it into the box. One of those jurors was challenged by each side. (1 RT August 21, 2006 35.)

exclusion because Smith would be the first African-American juror challenged by the People. (10 RT 1984.)

The trial court correctly suggested to Wiksell that a challenge to a single juror could suffice for a prima facie case. Wiksell noted that Smith stated that he could be fair. Smith's questionnaire indicated he had applied to be a police officer. Smith had circled "8 on the chart for capital punishment." (10 RT 1984.)

After reviewing Smith's questionnaire, the trial court indicated that it did not find a prima facie case but nonetheless asked Glynn to justify the strike: "Okay. I find no prima facie case. I do see an issue with Mr. Smith based on the questionnaire and what I recall of his statements earlier. But in an abundance of caution, I'd like the People to state their reasons for the record." (10 RT 1985.) Glynn provided the following justification:

> Okay. As starters, Mr. Smith was convicted in 1997 of domestic violence. He's been married for three years but is currently separated from his wife and has been separated for about one month. The evidence that we will offer in the penalty phase of this case involves the defendant in battering a number of women, including his mother, his sisters and the woman who mothered one of his children -- or -- yeah, one of his children. So the same issues are involved there. Mr. Smith, as I say, was convicted of domestic violence. (10 RT 1985-1986.)

Glynn indicated that he knew Smith's defense counsel in the domestic violence case and expressed his belief that Smith had fought the

charges. Glynn also indicated that Smith's "lifestyle does not particularly thrill me." Glynn noted that Smith "put down" that Smith spent his spare time dancing and playing basketball and darts, inclining Glynn to believe that Smith did not "seem to have a whole lot of depth in areas that I would deem to be important." (10 RT 1986.)

Glynn also noted that Smith had "checked in the questionnaire that he had a bad experience regarding a traffic stop." Glynn believed Smith had "kind of swaggered into the court." Glynn believed that Smith had a "disrespectful attitude toward the whole process and the seriousness of this trial" because Smith rested his chin on his hand -- with his elbow on the arm of his chair -- while answering questions during voir dire. (10 RT 1985-1986.)

The trial court indicated that had it found a prima facie case it also would have found those justifications adequate and highlighted by Smith's own brush with the law. (10 RT 1986.) Glynn then used the People's sixth peremptory challenge to remove Smith from the panel. (10 RT 1988A.)

Appellant's conviction must be reversed because the prosecutor's use of a peremptory challenge to excuse Smith denied appellant his right to equal protection and a jury selected from a representative cross-section of the community. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution forbids challenges to potential jurors

solely on the basis of their race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 86 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *Taylor v. Louisiana* (1975) 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690].) The Sixth Amendment of the United States Constitution guarantees that a jury will be selected from a pool of names representing a cross-section of the community. (U.S. Const., amend. VI.)

Article I, section 16 art. I, § 16 of the California Constitution equally and independently guarantees the right to trial by jury drawn from a representative cross-section of the community. (*People v. Wheeler*, *supra*, 22 Cal.3d at p., 272.) The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under the California Constitution. (*Id.* at pp. 276-277.) Group bias is "a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713.) Contrary to defense counsel's repeatedly expressed belief, "[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

The United States Supreme Court restated the three-step *Batson* procedure in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]. First, the defendant must raise the point in a timely fashion and make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Id.* at p. 168.) "[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." (*Id.* at p. 170.)

Once a prima facie showing is made, "the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (*Johnson v. California*, *supra*, 545 U.S. at p. 168, quoting *Batson v. Kentucky*, *supra*, 476 U.S. at p. 94.) If a race-neutral justification is provided by the prosecutor, the trial court must evaluate the "persuasiveness of the justification" and "determine whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Johnson v. California*, *supra*, 545 U.S. at p. 171.)

The United States Supreme Court has held that a trial court has a duty to assess the plausibility of a prosecutor's justification for peremptory challenges "in light of all evidence with a bearing on those challenges. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 251-252 [125 S.Ct. 2317, 162 L.Ed.2d 196], citing *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) This

court follows a similar rule, under which the trial court has a duty to evaluate the "subjective genuineness" of the race-neutral reasons given for the peremptory challenge. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924.) To discharge that duty the trial court must make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily[.]" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

This court has held that the prosecutor's rationale must not be contradicted by the record and may not be inherently implausible, but also stated that "all that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924.) The United States Supreme Court has taken a different view. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.[29] Some stated reasons are false, and although some false reasons are shown up within the four corners

[29] *Swain v. Alabama* (1965) 380 U.S. 202 [85 S.Ct. 824, 13 L.Ed.2d 759], held that the legitimacy of a prosecutor's challenge was presumed except in the face of a longstanding pattern of discrimination. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 238.)

of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 240.) The credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Id.* at p. 247, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931].)

That Glynn's justifications for the strike were a pretext is particularly seen to be true in light of the fact that Glynn asked Smith only a very few questions. Glynn's very first question -- after noting that Smith was a "pretty big guy" -- was whether Smith played basketball while at Indiana State. (7 RT 1375.) Glynn did not ask Smith anything about dancing or playing darts or any of the other aspects of Smith's "lifestyle" that "did not thrill" Glynn and which convinced Glynn that Smith did not "seem to have a whole lot of depth in areas that [Glynn] would deem important." (10 RT 1986.)

That this justification was a pretext also is easily seen by the responses given by the jurors who actually were seated. For example, several jurors listed hobbies similar to the leisure activities enjoyed by Smith that "did not thrill" Glynn and which convinced Glynn that Smith did not "seem to have a whole lot of depth in areas that [Glynn] would deem important." (10 RT 1986.) Juror Number One was an athletic woman whose

hobbies included triathlons, running, biking, swimming, reading and going to movies. (7 CT 1678; 8 RT 1497, 1502.) Like Smith, she indicated strong support for the death penalty by circling the number eight on question 43 on the questionnaire.[30] (6 CT 1680.)

Juror Number Two was a woman whose hobbies included shopping, traveling, reading and attending sports events. (6 CT 1693.) She liked to read mysteries, romance and adventure novels. (6 CT 1693.) Juror Number Three was a woman with a 7th grade education whose hobbies were sewing, crafts and cleaning. (6 CT 1708.) Glynn did not challenge either of these jurors based on their lifestyles. He did not even ask either of the jurors any questions about their lifestyles.

Juror Number Seven, a man, listed sports, family and church as his hobbies. (7 CT 1764, 1767.) Juror Number Seven indicated that one of his three favorite television programs was basketball. (7 CT 1769.) He circled five on question 43 on the questionnaire, indicating less support for the death penalty than Smith. (7 CT 1770.)

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[30] Question 43 on the questionnaire completed by the first panel asked the prospective jurors to rate themselves on a scale of one to ten with regard to their support for the death penalty, with ten being strongly in favor of the death penalty and one indicating that the prospective juror was strongly against the death penalty. (See e.g. Vol. 7 CT 1875.) Although the Superior Court lost Mr. Smith's questionnaire, appellant's attorney indicated in open court that Smith circled eight on the questionnaire. (10 RT 1984.)

Juror Number Eight was a man who, like Smith, attended college. (7 CT 1779, 1782; Vol. 8 RT 1461.) He listed his hobbies as running, basketball and cycling. (7 CT 1783.) He circled eight on question 43 on the questionnaire, the same as Smith. (7 CT 1785.)

Juror Number Nine, a woman, listed soccer as her hobby. (7 CT 1794, 1798.) Juror Number Eleven listed his or her hobbies as softball, basketball, golf, fishing and bingo. His or her favorite section of the newspaper was the Sports section. (7 CT 1828.) He or she circled five on question 43 on the questionnaire, indicating less support for the death penalty than Smith. (7 CT 1830.)

Alternate Juror Number One listed golf and fishing as his hobbies. He watched sporting events and visited family in his spare time. (7 CT 1854, 1858; Vol. 7 RT 1279.) He circled six on question 43 on the questionnaire, indicating less support for the death penalty that Smith. (7 CT 1860.) Alternate Juror Number Two listed his hobbies as working and gambling. (7 CT 1869, 1873.) He twice indicated on the questionnaire that he was not a big reader. (7 CT 1873.)

While it is true that none of these individuals listed dancing or playing darts as hobbies, it also is true that there is little or no basis for differentiating between the hobbies listed by these jurors and Smith's sports and game-oriented hobbies that caused Glynn to strike Smith based on

Glynn's claim that Smith's hobbies did not indicate that Smith had "a whole lot of depth in areas that [Glynn] would deem important." (10 RT 1986.) It is especially telling that Glynn did not ask Smith or any of these individuals any questions that could conceivably illuminate either what Glynn meant by "lifestyle" or by "depth in areas" that Glynn would deem important.

The similarities between Smith and these jurors support two conclusions. First, because Glynn did not ever ask Smith or any of these jurors about their activities or "lifestyles," it should be very evident to this court that Glynn's claim that he was not "thrilled" by Smith's lifestyle was a pretext. Second, Glynn's differentiation between the "lifestyles" enjoyed by Smith and these jurors could only be based on Smith's appearance. A significant feature of Smith's appearance, of course, was the fact that Smith was African-American.

It also should not be lost on this court that Glynn did not ask Smith anything about Smith's attitude toward the proceedings. Glynn instead claimed to discern that Smith was disrespectful by the way appellant "swaggered" into the courtroom and the way Smith answered questions while resting his chin in his hand. (10 RT 1985-1986.) Because Smith was not asked anything to illuminate Smith's attitude toward the proceedings, this court is again left with the inevitable conclusion that Glynn's belief that Smith was disrespectful was based solely on Smith's appearance.

Glynn did ask Smith whether he had gone to trial in his domestic violence case. Smith responded, "We went -- me and my wife before the court. She spoke, and they decided. We didn't really go to trial, I guess." (7 RT 1375.) When asked whether he felt he had been treated fairly by the criminal justice system, Smith responded that he was not sure. (7 RT 1375.) Smith emphasized that he had not had much contact with the District Attorney's office. (7 RT 1375-1376.) Smith believed that the "counseling and everything was fine" but questioned whether the financial burden occasioned by "paying the fines that [he] did helped [his] family situation." (7 RT 1376.)

Significantly, Glynn did not ask any questions about the specific nature of the domestic violence that resulted in charges being brought against Smith. The record on appeal contains no indication whatsoever of the facts underlying the domestic violence charges against Smith.[31] Other than Glynn's claim that Smith had been "convicted of domestic violence," the record does not even reveal whether Smith was in fact convicted or whether the charge brought against Smith was felony or a misdemeanor.[32]

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[31] This is particularly true because the Superior Court has lost the juror questionnaire completed by Smith. (1 Supp. CT 66, 85-86; 1 August 21, 2006 RT 27-28.)

[32] It should be noted, however, that Glynn need not have wasted a peremptory challenge on Smith had Smith been convicted of a felony as that would have disqualified Smith from serving. (Code Civ. Proc., § 203, subd. (a)(5); Pen. Code, § 1046.).)

(10 RT 1986.)

Nor did Glynn ask Smith anything about the specifics of the contact Smith had with a police officer that troubled Glynn. In referring to this contact, Glynn made the following statement:

> He also had a bad experience with the police that he told us about. Unfortunately, I didn't write it down, but he checked in the questionnaire that he had a bad experience regarding a traffic stop. (10 RT 1986.)

The reason Glynn had not "written anything down" about what "Smith told us about" his contact with a police officer probably is because the only actual questioning of Smith regarding this incident came from one question asked by Glynn. Neither the trial court nor defense counsel asked any questions about Smith's "bad experience" with a police officer. Glynn prefaced his question by noting that Smith "also wrote down that [he] had -- an officer was impolite during a traffic stop." (7 RT 1376.) Glynn then asked the only question asked of Smith regarding his contact with an impolite police officer, namely whether it would affect his evaluation of testimony by a police officer. (7 RT 1376.) After Smith responded, "No, not at all," Glynn responded, "Okay," and moved on to a different topic. (7 RT 1376.)

Smith was not the only prospective juror who had a negative contact with law enforcement. Juror Number Five had been the victim of several

burglaries. (8 RT 1472.) Juror Number Five indicated that the police came out and took reports but no arrests ever were made. (8 RT 1472-1473.) Juror Number Five circled the number seven on question 43 of the questionnaire, indicating slightly less support for the death penalty than Smith. (6 CT 1740.)

Juror Number Eight's son had been arrested for and convicted on a robbery charge and served three years. (7 CT 1786-1787.) Glynn did not ask Juror Number Eight anything about his son's arrest for robbery, much less whether Juror Number Eight harbored any ill will toward the police officers who arrested his son. (8 RT 1462-1465; 10 RT 1968-1970.)

The retention of jurors whose responses were substantially similar to the responses by Smith that purportedly motivated Glynn to challenge Smith greatly undercuts Glynn's claimed justifications for challenging Smith. The prosecution's failure to conduct any meaningful inquiry on the issues the prosecutor claims prompted a challenge "is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246, quoting *Ex parte Travis* (Ala. 2000) 776 So.2d 874, 881.)

There is absolutely no reason for this court to accept the trial court's findings and ruling on appellant's *Batson/Wheeler* motion. The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is

an error of constitutional magnitude requiring reversal. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 95; *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Reynoso*, *supra*, 31 Cal.4th at p. 927, fn. 8.) The prosecutor's challenge to Smith was racially motivated. Appellant's convictions must be reversed.

III.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED BY GRANTING CAUSE CHALLENGES BY THE PROSECUTION AND DENYING APPELLANT'S CAUSE CHALLENGE TO A JUROR, DENYING APPELLANT HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY

In *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (*Id.* at p. 522, fn. 21.)

That standard was amplified in *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*), where the court, adopting the standard previously enunciated in *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581], held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (*Id.* at p. 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath.'" (*Id.* at p. 424.) The *Witt* standard applies to both prosecution and defense challenges. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728-729 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *People v. DePriest* (2007) 42 Cal.4th 1, 20.)

The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.) *Witt* requires a trial court to determine "whether the juror's views would prevent or substantially impair performance of his duties as a juror in accordance with his instructions and his oath." (*Witt, supra*, 469 U.S. at p. 424.) To qualify as a juror in a capital case, a prospective juror must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case. (*People v. Stewart* (2004) 33 Cal.4th 425, 446-447; *People v. Heard* (2003) 31 Cal.4th 946, 958.) Exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error. (*People v. Heard, supra*, 31 Cal.4th. at p. 966; *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622].) This court's duty is to:

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . . was fairly supported by the record. (*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright, supra*, 477 U.S. at p. 176.)

A. Life-Prone Jurors Were Wrongly Excused

The trial court in this matter dismissed nine life-prone jurors for "cause" when none existed. Exclusion for cause of a prospective juror from serving on a capital jury when that juror is in fact qualified to serve is per se reversible error. (*Gray v. Mississippi*, *supra*, 481 U.S. 648.)

Prospective Juror Frances Texeira

On her juror questionnaire, prospective juror Frances Texeira wrote that death was appropriate for premeditated murder and murders involving torture or the excessive infliction of pain on the victim. Texeira indicated she was not sure of her general feelings about the death penalty and that it depended on the circumstances in each case. She believed there were cases where she "thought it right." (13 CT 3661.)

Texeira indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (13 CT 3662.) Texeira indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (13 CT 3663.)

During *voir dire*, Texeira informed the court she could vote for death under the right circumstances and would not automatically vote for life without parole. (28 RT 5534, 5542.) Texeira believed there are times when the death penalty is the only just punishment. (28 RT 5532.) She

nonetheless could not say whether she would be fair. She would not be comfortable making a decision. (28 RT 5530, 5532-5533.) She believed that someone had to do it, she just didn't want the responsibility. (28 RT 5533, 5535.) Texeira thought that given the two choices of penalty she was more likely not going to be able to do the job than able to do the job. (28 RT 5541.) Texeira indicated that if they needed a yes or no answer right then she would choose no. (28 RT 5541.)

The trial court granted the People's challenge for cause over defense objection. (28 RT 5541-5543.) The court felt Texeira could not "assure us in any way that she could ever vote for it and that she said similar things in the questionnaire as well." (28 RT 5543.)

Prospective Juror Edwin Todd

On his juror questionnaire, prospective juror Edwin Todd indicated he did not believe in the death penalty except for serial killers. (13 CT 3709.) His views on the death penalty changed "when a death penalty man is found to be innocent." (13 CT 3709.) Todd felt that the death penalty was imposed "about right." (13 CT 3709.) Todd circled the number "eight" on question number 52.[33] (13 CT 3711.)

[33] Question number 52 on the questionnaire completed by the second panel presented prospective jurors with a sliding scale of one to ten, with the number one indicating strong opposition to the death penalty and number ten indicating strong support for the death penalty.

Todd wrote that he did not have any feelings that were so strong that he would always vote for or against the death penalty. (13 CT 3710.) Todd indicated that he would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (13 CT 3711.) Todd did not belong to any groups that advocated either the increased use or abolition of the death penalty and did not have any religious beliefs that would make it difficult for him to sit in judgment of another person or on a jury considering the death penalty. (13 CT 3711-3712.)

During *voir dire* Todd indicated that he "firmly believe[d] in the death penalty" and confirmed that he could impose it in an "extreme" case. Todd gave murder, child molestation and "serial" as examples. (28 RT 5580-5581, 5585.) Whether a particular individual deserved the death penalty depended upon "what plays out in court." (28 RT 5583.) Todd acknowledged it would be hard for him to vote death for a single murder. (28 RT 5586.) The trial court granted the People's challenge for cause. (28 RT 5586-5587.)

Prospective Juror Frances Rios

On her juror questionnaire, prospective juror Frances Rios wrote that she had "no feelings one way or the other" about the death penalty, depending on the type of crime and the circumstances. (12 CT 3389.) She

believed the purpose of the death penalty was to put a person to death. (13 CT 3389.) She was not sure what sort of crimes deserved the death penalty and -- in response to the question asking whether the death penalty was imposed too much, not enough or about right -- indicated that she did not keep up with who is being put to death. (12 CT 3389.)

Rios wrote that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (12 CT 3390.) Rios circled the number "five" on question number 52. (12 CT 3391.) Rios did not belong to any groups that advocated either the increased use or abolition of the death penalty and did not have any religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty. (12 CT 3391-3392.) Rios indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (12 CT 3391.)

During *voir dire*, Rios indicated she was not 100% opposed to the death penalty. She was wide open to either penalty. (29 RT 5663.) She could impose the death penalty in an appropriate case but would want to know more about the facts before she decided on the penalty. (29 RT 5663-5664.) She would have an open mind and listen to all of the evidence. (29 RT 5665.) She would vote either for life without parole or for death depending on what was appropriate. (29 RT 5665-5666.)

Rios believed the death penalty would be appropriate for serial killers like Jeffrey Dahmer. (29 RT 5668.) She did not know whether a person who killed only one person should get death but would consider voting for death in such a situation if the case involved awful facts. (29 RT 5668.) Rios did not know whether she would be strong enough to vote for death until she heard the evidence. (29 RT 5669, 5677.) She believed she was strong enough to vote for death, but would not want to be put into the position of voting for death for appellant and probably could not do it because she did not know enough about it. (29 RT 5669-5671.) She would not want the responsibility. (29 RT 5671.) Under examination by the prosecution, Rios indicated it was fair to say that she would vote for life without parole because of her feelings. (29 RT 5671.)

The prosecution challenged Rios for cause, arguing that she was equivocal and teary-eyed throughout the examination. (29 RT 5671, 5679-5680.) The trial court granted the challenge. The court did not see Rios as being open. The court was impressed by her body language. (29 RT 5683-5684.)

Prospective Juror Richard Howie

On his juror questionnaire, prospective juror Richard Howie wrote that the death penalty is wrong. He did not feel we have a right to put someone to death. (11 CT 2957.) Howie felt the death penalty made a

strong statement to the media but made Americans look like animals to the rest of the world. (11 CT 3957.) He believed the death penalty should be imposed only for presidential assassinations. (11 CT 2957.) He did not think he had ever wanted to see someone put to death for a crime and believed the death penalty was imposed too often. (11 CT 2957.)

Howie wrote that he did not have any feelings that were so strong that he would always vote for or against the death penalty. (11 CT 2958.) Howie also indicated that none of his convictions were very strong. It would be hard but not impossible for him to vote for death if 11 other jurors felt that death was the only fair punishment. (11 CT 2958.) He would have to think long and hard before he could vote for death. (11 CT 2958.) He believed he was open to both sides. (11 CT 2958.)

Howie did not belong to any groups that advocated either the increased use or abolition of the death penalty and did not have any religious beliefs that would make it difficult for him to sit in judgment of another person or on a jury considering the death penalty. (11 CT 2959-2960.) Howie wrote that he would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (11 CT 2959.) Howie circled the number "two" on question number 52. (11 CT 3103.)

During *voir dire*, Howie told the court he could vote for death if he thought it was appropriate. (29 RT 5770.) Howie indicated he was not strongly for or against the death penalty. (29 RT 5764.) He would not have a problem voting for death as a juror even though he was against the death penalty in principle. (29 RT 5762-5763, 5766.) He believed he could weigh both options. His decision would depend on how the case was going. (29 RT 5764.) Howie acknowledged that, generally speaking, he would vote death only in very limited cases. (29 RT 5768.) Howie was against the death penalty in principle but would vote to retain the death penalty if it was on the ballot. Howie believed it definitely was needed in some cases such as presidential assassination. (29 RT 5762.)

The trial court granted the People's challenge for cause. (29 RT 5769.) The court believed that Howie's answers indicated that the categories for which Howie would impose the death penalty were so narrow that in this case he never could vote death. (29 RT 5771.)

Prospective Juror Rose Charles

On her juror questionnaire, prospective juror Rose Charles indicated that she was for the death penalty before she was called as a juror for this case, but had come to feel that the "fate of someone's life might be different in this matter." Charles wrote that it depended on the evidence. Charles thought the death penalty was appropriate for brutal murders. In response to

the question asking whether she felt the death penalty was imposed too often, not often enough or about right, Charles checked "about right." (9 CT 2365.)

Charles indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (9 CT 2366.) Charles indicated that her views on the death penalty had changed over time. She always thought everyone was good when she was growing up. As she had grown older life had shown her that there are many cruel things. (9 CT 2365.) Charles circled the number "eight" on question number 52. (9 CT 2367.)

Charles did not belong to any groups that advocated either the increased use or abolition of the death penalty. (9 CT 2367.) Charles did have religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty, but she believed she could be open-minded. (9 CT 2367-2368.) Charles indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (9 CT 2367.)

During *voir dire* Charles admitted she had mixed feelings about the death penalty. (27 RT 5250.) She wrote that she was for the death penalty before she was involved but admitted it might be a difficult for her to do it personally. (27 RT 5256.) Charles believed she probably would vote for

death if the crime was brutal and there was no remorse. (27 RT 5250.) Charles claimed she had not made up her mind and was not leaning one way or the other. (27 RT 5253-5255.) Charles believed she could apply the law but, when asked by the trial court, also indicated that she did not feel like she could vote for death. (27 RT 5255, 5258.)

The prosecution challenged Charles for cause, but did not specify the basis for that challenge. (27 RT 5259.) The trial court sustained the challenge but did not state its reasoning for this ruling. (27 RT 5259.)

Prospective Juror Dolores Keim

On her juror questionnaire, prospective juror Dolores Keim indicated that she had feelings that were so strong that she would always vote against the death penalty. (11 CT 3022.) She wrote that she opposed the death penalty and preferred "jail without parole," which she believed was harsher punishment than death. (11 CT 3021-3022.) Keim also wrote that it is wrong to take another person's life. Keim did not believe death should be imposed for any crimes. Keim believed the death penalty was imposed too often. (11 CT 3021.) Keim circled the number "two" on question 52. (11 CT 3023.)

During *voir dire*, however, Keim denied she was absolutely against the death penalty. (26 RT 4962.) Keim told the court she might be able to vote for death, but it would have to be a tremendous, heinously demented

crime for her to vote death. She would have to feel that there is no hope of salvation or rehabilitation. (26 RT 4952-4953.) Keim told the prosecution that it was obvious that she would vote for death, "but it would have to be extreme circumstances." (26 RT 4958, 4961.)

Keim indicated she had given her position a lot of thought since hardship and would follow the law -- and return a death verdict -- even if she disagreed with it. (24 RT 4960-4962.) She had lived her life as a good citizen and did not want to be in a position to vote either for life without parole or the death penalty, but also recognized that it was her responsibility as a citizen. (26 RT 4956.) Keim assured the court she would try to be open-minded even though she was leaning toward life without parole. (26 RT 4952.)

The prosecution challenged Keim for cause under *Witt* based on Keim's responses on the written questionnaire. (26 RT 4960.) The court granted the challenge over defense objection. The court believed that Keim was not someone who was reasonably likely to apply the correct test. The court gave great weight to what Keim wrote on her questionnaire. (24 RT 4967-4968.) The court believed Keim's comments in court were very strong, but it was not persuaded that she would be open-minded. (24 RT 4968.)

Prospective Juror Ilse Lopez

On her juror questionnaire, prospective juror Ilse Lopez indicated that she had mixed feelings about the death penalty, depending on the type of crime and the circumstances. She believed the only purpose of the death penalty was to ensure that the offender would not reoffend. (11 CT 3101.) Lopez circled the number "five" on question 52. (11 CT 3103.) Lopez did not belong to any groups that advocated either the increased use or abolition of the death penalty and did not have any religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty. (11 CT 3103-3104.)

Lopez believed that death was a worse punishment than life without parole but also wrote that a person serving life in prison was "equally dead." Lopez wrote that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (11 CT 3102.) Lopez indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (11 CT 3103.) Lopez indicated both that she could vote for the penalty she believed was proper even if the other jurors disagreed and that she could change her vote if her initial inclination changed during deliberations. (11 CT 3104.)

During *voir dire* Lopez informed the court she had mixed feelings about the death penalty but would not automatically vote either for or against the death penalty. (24 RT 4717, 4728.) She did not have a preconceived punishment for appellant. (24 RT 4717.) The death penalty was not part of the law in her country of origin. (24 RT 4717.) Lopez indicated it would be hard for her to vote death but she could do it. (24 RT 4717-4718, 4728.) Lopez believed that voting for the death penalty would make her unhappy and thought that probably would prevent her from voting for the death penalty. (24 RT 4725-4726.) Lopez had made many decisions in life that did not make her happy. (24 RT 4728-4729.)

The prosecution challenged Lopez under the *Witt* standard. (24 RT 4727.) Defense counsel opposed the challenge, arguing that Lopez was "right in the middle" and had indicated she could vote death penalty if it was the right verdict. (24 RT 4731.) The trial court granted the prosecution's challenge over appellant's objection. (24 RT 4732.)

Prospective Juror Roscoe Barger

On his juror questionnaire, prospective juror Barger indicated both that he felt the death penalty did not serve any purpose and that it was imposed too often. (7 CT 2014.) Barger nonetheless also indicated that he did not have any feelings that were so strong that he would always vote for or against the death penalty. (7 CT 2015.) Barger indicated that he would

listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (7 CT 2016.) Barger did not belong to any groups that advocated either the increased use or abolition of the death penalty and he did not have any religious beliefs that would make it difficult for him to sit in judgment of another person or on a jury considering the death penalty. (7 CT 2016-2017.) Barger circled the number "two" on question 52. (7 CT 2016.) Barger indicated both that he could vote for the penalty he believed was proper even if the other jurors disagreed and that he could change his vote if his initial inclination changed during deliberations. (7 CT 2017.)

During *voir dire* Barger informed the court that he "maybe" could vote for the death penalty if the circumstances were right, but it would be very difficult. He did not really believe in the death penalty except in certain circumstances. (23 RT 4487-4488, 4490, 4495-4496.) Barger did not think imposing the death penalty should be easy but indicated he could do it if he felt it was his responsibility to do so. (23 RT 4490, 4495.)

Barger told the court he did not really believe in the death penalty but understood that it was the law. (23 RT 4487, 4491.) He would not have the death penalty if he got to make the law. (23 RT 4487.) He would try to be fair but did not believe that it was right for the state to kill someone for violating a law against killing. (23 RT 4488.) Barger claimed he might be

able to vote for the death penalty for mass murderer. (23 RT 4488.) Barger could vote for the death penalty in appellant's case if it was really necessary. (23 RT 4488.) Barger committed to listening to the evidence and discussing the case with his fellow jurors. (23 RT 4490-4491.) Barger also expressed distrust of the legal system and the prosecutor's office based on his son's experience in the criminal justice system. (23 RT 4491-4494.)

The prosecution challenged Barger for cause, but did not state any specific reasons for the challenge. (23 RT 4502.) The trial court granted the challenge over appellant's objection, finding that the incident involving Barger's son was relatively recent and he had no problem telling Deputy District Attorney Morgan that he did not trust her. The court also believed that Barger appeared to be stretching when he indicated that he could vote for the death penalty. (23 RT 4503.)

Prospective Juror Linda Galvan

On her juror questionnaire, prospective juror Linda Galvan indicated that she had had not thought much about the death penalty. Galvan wrote that it would be a tough decision, but felt that the death penalty "needs to be handed down depending on evidence." She believed the death penalty sends out a strong message and that it was appropriate for murder. (10 CT 2717.) Galvan circled the number "seven" on question 52. (10 CT 2719.)

Galvan indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (10 CT 2718.) Nor did she belong to any groups that advocated either the increased use or abolition of the death penalty. Galvan indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (10 CT 2719.) Galvan did have religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty. Galvan believed such a decision should be difficult but also expressed her awareness that it was a decision that needed to be made. (10 CT 2720.)

During *voir dire* Galvan indicated that she probably could vote for death and would vote to retain the death penalty if the issue was on a ballot. (27 RT 5367-5368.) Galvan also indicated she did not think she could vote for death. (27 RT 5372.) She knew the death penalty had to be handed down sometimes and acknowledged it would be hard for her to vote for death. Galvan indicated she probably would vote for life without parole in most cases. (27 RT 5363-5366, 5370.)

Galvan informed the court that she thought she could be fair but also told the court it would be very hard for her to sit on the jury. (27 RT 5363-5364.) She had done a lot of praying on whether she would be open. She would do her best. (27 RT 5364.) She was very uncomfortable with voting

for death. (27 RT 5368.) The trial court granted the People's challenge for cause. (27 RT 5372.)

B. Death-Prone Jurors Were Wrongly Retained in the Jury Pool

The trial court's excusal of the above jurors stands in stark contrast to its denial of appellant's cause challenge to Juror Number Three, who wrote that his general feelings regarding the death penalty were, "For it." (15 CT 3915.) Juror Number Three believed that the death penalty should be applied to persons convicted of "1st degree murder."[34] (15 CT 3915.) Juror Number Three thought the purpose of the death penalty was to possibly save someone else's life and to save taxpayers money. (15 CT 3915.) Juror Number Three wrote that even before he had heard any evidence he would be open-minded about penalty "only if innocent." (15 CT 3916.) Juror Number Three circled "10" on the sliding scale, indicating that he most strongly favored the death penalty. (15 CT 3917.)

Juror Number Three confirmed those beliefs during *voir dire*. Juror Number Three indicated he believed that people who are convicted of first degree murder should be executed, "unless my mind could really be changed." (28 RT 5430-5431.) Juror Number Three admitted a predisposition coming into the case that "it's death unless the defense can

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[34] Juror Number Three believed that first degree murder is a murder by preconceived plan. (28 RT 5439-5440.)

prove otherwise."[35] (28 RT 5437.) Juror Number Three explained this view by relating that he or she had been the victim of an attempted stabbing by a person who had "the choice to go in the opposite direction" but chose instead to try to stab the juror. (28 RT 5437.) Juror Number Three was concerned about safety and believed people had to be safe walking down the street. (28 RT 5437.) Juror Number Three's position, as he or she was sitting there, was that appellant should be executed. (28 RT 5438.)

Appellant challenged Juror Number Three. (28 RT 5431.) The court denied that challenge. The court was impressed that the juror was naive about the law and was basing his answers on his assumptions about the law. The court's "gut feeling" was that the juror was a fair person who was open to being persuaded either way and would become more open as the trial progressed because of being subjected to the process. (28 RT 5449.)

C. Defense Counsel's Failure to Exhaust Appellant's Peremptory Challenges Does Not Negate the Requirement That Appellant's Sentence Be Reversed

The trial court's erroneous ruling on cause challenges to the second jury requires the reversal of appellant's death sentence. The fact that defense counsel did not exhaust appellant's peremptory challenges (30 RT 5899) does not mitigate the trial court's error in any way. In *Gray v.*

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[35] The quoted language was counsel's characterization of the Juror Number Three's position. Juror Number Three agreed with the characterization.

Mississippi, *supra*, 481 U.S. 648, the United States Supreme Court refused to uphold a conviction by engaging in speculation as to how unused peremptory challenges might have been exercised had the trial court not erred during jury selection. In *Gray*, the trial court erroneously granted the prosecutor's challenge to prospective juror Bounds based on her opposition to capital punishment. The state argued on appeal that the error was harmless because the prosecutor had additional peremptories that could have been used on the prospective juror if the challenge for cause had not been erroneously granted. Thus, the state argued that the prospective juror would have been removed from the panel regardless of the error.

The United States Supreme Court rejected this argument:

> The unexercised peremptory argument assumes that the crucial question in the harmless-error analysis is whether a particular prospective juror is excluded from the jury due to the trial court's erroneous ruling. Rather, the relevant inquiry is "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error" (emphasis in original). *Moore v. Estelle*, 670 F. 2d 56, 58 (CA 5) (specially concurring opinion), *cert. denied* 458 U.S. 111, 73 L.Ed.2d 1375, 102 S.Ct. 3495 (1982). Due to the nature of trial counsel's on-the-spot decision making during jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges. A prosecutor with fewer peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories. (*Gray v. Mississippi*, *supra*, 481 U.S. at 664-665.)

The Court in *Gray* also cited with approval the specially concurring opinion on motion for reconsideration in *Blankenship v. State* (Ga. 1981) 280 S.E. 2d 623, 624, "demonstrating that the unexercised peremptory harmless-error approach is inappropriate because in the jury selection process there are too many variables which may give rise to the non-use of a peremptory challenge.'" (*Gray v. Mississippi*, *supra*, 481 U.S. at 664, fn. 15.)

This very dynamic of jury selection was discussed by the court in *People v. Johnson* (1989) 47 Cal.3d 1194 in language particularly applicable to appellant's case. In *Johnson* the court considered the continued viability of the practice of comparing the stated reasons for *Wheeler*-challenged excusals with similar characteristics of non-members of the group who were not challenged by the prosecutor. The court concluded that the use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges fails to take into account the variety of factors that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. (*Id.* at p. 1220) The process of selecting a jury is complex and, as this court has recognized, the process grows more complex as the number of peremptory challenges declines:

> It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different

> weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. *Near the end of the voir dire process a lawyer will naturally be more cautious about "spending" his increasingly precious peremptory challenges.* Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, *a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated.* If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel. (*Id.* at pp.1220-1221, emphasis added.)

Clearly, had the remaining venire not been contaminated with pro-death jurors who should have been excused for cause, counsel might have felt free to continue to exercise peremptory challenges until he arrived at a jury truly to his satisfaction. That he was not in a position to do so because of the trial court's error, should not in fairness now be used to sanitize that error of prejudice and infer that he was satisfied with the seated jury.

D. Necessity for Reversal

A careful review of the responses digested above demonstrates that all or most of the jurors excused for cause on motion of the People were excused because they expressed an awareness of the monumental nature of the issue they would be asked to decide: whether appellant should die. For

example, prospective juror Texeira plainly stated that she could vote death in an appropriate circumstance (28 RT 5534, 5542) but also indicated that she did not want the responsibility (28 RT 5533, 5535). Texeira believed the propriety of the death penalty depended on the circumstances in each case (13 CT 3661) and assured the trial court that she would not automatically vote for life without parole. (28 RT 5534, 5542.)

Texeira did not have any feelings that were so strong that she would always vote for or against the death penalty. (13 CT 3662.) Texeira indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (13 CT 3663.) Nothing about Texeira's responses conveyed a "definite impression" that the juror's views "would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424, 426.)

Prospective juror Rios similarly wanted to know more about the facts of the case before deciding whether death was the appropriate penalty. (29 RT 5663-5664, 5668-5669, 5677.) Rios assured the trial court that she was not 100% against the death penalty and was "wide open" to either penalty. (29 RT 5663.) There can be no question that Rios was emotional while on the stand (29 RT 5671, 5679-5680, 5683-5684), but that again reflected

Rios' appropriate understanding of the enormity of the decision she would be asked to make if selected to sit as a juror. It did not indicate that she held views "would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424, 426.)

The responses given by prospective juror Rose Charles were distinguishable from the responses given by Texeira and Rios only in that Charles indicated she was a much stronger supporter of the death penalty by circling the number eight on the sliding scale question. (9 CT 2367.) Charles believed she probably would vote for death if the crime was brutal and there was no remorse. (27 RT 5250.) Charles claimed she had not made up her mind and was not leaning one way or the other. (27 RT 5253-5255.) Charles indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (9 CT 2366.) Charles indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (9 CT 2367.)

Prospective juror Dolores Keim gave a great deal of thought to the burden of sitting on a death case jury (24 RT 4960-4962) and decided -- notwithstanding the strong feelings she acknowledged on the juror questionnaire (11 CT 3021-3023) -- that she would follow the law and

return a death verdict if appropriate even though she disagreed with the death penalty. (24 RT 4960-4962.) Keim was eminently qualified to sit on this jury.

Prospective juror Richard Howie perhaps presented a closer case than the other prospective jurors excused for cause on motion of the People, as he indicated a strong opposition to the death penalty on his questionnaire. (11 CT 2957.) Howie nonetheless clarified, during *voir dire*, that his feelings on the matter were not as strong as his responses on the questionnaire seemed to indicate. (29 RT 5764.) Howie told the court that he could impose a death sentence if he thought it was appropriate even though he disagreed with the death penalty in principle. (29 RT 5762-5763.) Howie told the court he would weigh both options and base his decision on how the case was going. (29 RT 5764.)

Prospective juror Edwin Todd gave similar responses, indicating on his questionnaire that he did not believe in the death penalty except for serial killers. (13 CT 3709.) Todd nonetheless informed the court during *voir dire* that he "firmly believe[d] in the death penalty" and confirmed that he could impose it in an "extreme" case. (28 RT 5580-5581, 5585.) Todd acknowledged it would be hard for him to vote death for a single murder (28 RT 5586) but also indicated that his decision whether an individual deserved the death penalty depended upon "what plays out in court." (28

RT 5583.)

All of these individuals expressed an appropriate degree of respect for the decision they would have to make as a juror in this case, and all of them expressed their willingness to make that decision notwithstanding their reservations. These are precisely the sort of jurors necessary for a just, well-reasoned result in a death case. As noted by the United States Supreme Court in *Witherspoon v. Illinois, supra*, "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its inflection. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522.)

By erroneously granting the prosecution's cause challenges to these jurors, and by retaining Juror Number Three, the trial court artificially created a death prone jury, which violated appellant's due process rights and undermined the reliability of the verdict. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7, 15.) Appellant's death sentence must be reversed.

IV.

APPELLANT'S SENTENCE MUST BE REVERSED BECAUSE THE PRESUMPTION OF PREJUDICE RAISED BY THE RECEIPT OF EXTRANEOUS INFORMATION BY MEMBERS OF THE JURY WAS NOT REBUTTED

On April 21, 1999, appellant became agitated during *Hovey* qualification of the second jury because he believed lead prosecutor Donald Glynn was demeaning him. Because of this, appellant uttered intemperate words that Glynn took as threats. (25 RT 4884-4887, 4904-4914.)

Alternate Juror Number Three and three of the other jurors ultimately selected to hear the second penalty phase trial were among the jurors who participated in *Hovey* qualification on April 21, 1999.[36] Alternate juror number three was examined early in the proceedings on that date. (25 RT 4823.) Juror Number Seven was the last juror subjected to *Hovey* qualification before defense counsel first brought appellant's dissatisfaction with the prosecutor's demeaning comments to the attention of the trial court. (25 RT 4873-4884.)

Defense counsel informed the trial court that appellant believed the manner in which prosecutor Glynn was referring him was demeaning after

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[36] During the correction and settlement proceedings in this matter, the trial court reviewed its records and determined that at least one juror who was selected to sit on the second jury could have been in the courtroom at the time of the incident. The court held that it was impossible to reconstruct the timing of each *Hovey* session. (1 RT August 21, 2006 49.)

Juror number seven left the courtroom. The trial court asked Glynn "to change the phrasing that you have been using most of the time." (25 RT 4887.)

Juror Number Four was the next juror to be questioned after defense counsel brought appellant's dissatisfaction with the prosecutor's demeaning comments to the attention of the trial court. (25 RT 4887.)

The trial court and parties met in chambers after two more prospective jurors were examined. During this conference the court informed the parties that "the bailiffs" had recommended that appellant be shackled for the rest of the day because appellant was "so angry." (25 RT 4904.) The court also indicated that appellant made a comment -- as one of the prospective jurors was leaving the room -- indicating that he had nothing to lose and said something about "socking" the prosecutor. (25 RT 4907.) Juror Number Five was the next prospective juror to be examined after this chambers conference. (25 RT 4917.)

Jail incident reports regarding the incident were completed by two Sheriff's Deputies. One of those reports, prepared by Deputy Sheriff Robert Ortiz, indicates that Ortiz heard appellant mutter, "I ain't got nothing to lose." Appellant's comment also apparently was heard by an investigator employed by the Ventura County District Attorney's Office. Ortiz' report indicates that Ortiz brought the matter to the attention of Deputy Sheriff

Mary Smith. Smith then requested a court recess "after an interview of a potential juror." (2 Clerk's Transcript of Court's Exhibits, 486-487.) Deputy Smith's report provides additional details about the incident but does not contain any reference to an interview of a potential juror. (2 Clerk's Transcript of Court's Exhibits, 488-492.)

A. General Legal Principles

Appellant's conviction must be reversed because the receipt of extraneous information by the jury, both during *Hovey* qualification and by the press at one or more points in time during the second penalty phase, constituted juror misconduct. The trial court's failure to conduct any meaningful inquiry into these contacts makes it impossible for this court to determine what was conveyed to these jurors. That, in turn, makes it impossible for this court to find that the presumption of prejudice raised by the receipt of extraneous information by the jurors rebutted in light of the entire record.

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear." (*Mattox v. United States* (1892) 146 U.S. 140, 150.) Private communications are presumptively prejudicial. That presumption "is not conclusive, but the burden rests heavily upon the Government to

establish . . . that such contact with the juror was harmless to the defendant." (*Remmer v. United States* (1954) 347 U.S. 227, 229 [74 S.Ct. 450, 98 L.Ed. 654] hereafter *Remmer I.*)

The *Remmer* decision should be very instructive to this court. Remmer was convicted by a jury on several counts of tax evasion. (*Remmer v. United States*, *supra*, 347 U.S. at p. 228.) During Remmer's trial, an individual named Satterly[37] told the juror who ultimately became the foreperson that the juror could profit by bringing in a verdict favorable to Remmer. (*Id.* at p. 228.) The juror informed the trial court and the trial court informed the prosecution. The Federal Bureau of Investigation conducted an investigation and prepared a report. That report was disclosed to the trial court and the prosecution but not to defense counsel. (*Id.* at p. 228.)

Remmer and his attorneys learned of the incident in the newspapers after a verdict had been returned. (*Remmer v. United States*, *supra*, 347 U.S. at p. 228.) Remmer filed a motion for new trial asserting the denial of Remmer's right to a fair trial. Remmer also asked for a hearing to determine the circumstances surrounding the incident and its effect on the jury. (*Id.* at p. 228.) Remmer's attorneys averred that Remmer would have moved for

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[37] This individual was not identified by name in *Remmer I.* He subsequently was identified by name when the case returned to the United States Supreme Court following the remand ordered in *Remmer I.* (*Remmer v. United States* (1956) 350 U.S. 377, 378 [76 S.Ct. 425, 100 L.Ed. 435], hereafter *Remmer II.*).)

mistrial had the defense known of the contact during trial and requested that the juror be replaced with an alternate. (*Id.* at pp. 228-229.)

The District Court denied the motion for new trial without first conducting the requested hearing. The Court of Appeals affirmed, finding no abuse of discretion because Remmer had failed to establish prejudice. (*Remmer v. United States*, *supra*, 347 U.S. at p. 229.)

The United States Supreme Court vacated the judgment of the Court of Appeals, noting that "any private communication, contact, or tampering directly or indirectly" raised a presumption of prejudice which, though not conclusive, placed upon the prosecution a heavy burden "to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." (*Id.* at p. 229.) Because neither the court nor Remmer knew what actually transpired or whether it was in fact prejudicial, the court remanded the matter to the trial court with directions to conduct a hearing to determine whether the incident was harmful to Remmer. (*Id.* at pp. 228-229.)

The District Court treated the remand for hearing ordered in *Remmer I* as being limited to the effect of the FBI investigation -- rather than to the effect of the FBI investigation and the effect of Satterly's contact with the juror -- and found that the FBI agent's contact with the juror was harmless. (*Remmer v. United States*, *supra*, 350 U.S. at pp. 378-379.) The Supreme

Court, after acknowledging that its ruling in *Remmer I* could have been more explicit, pointed out that its remand actually required the District Court to explore the "entire picture." (*Remmer II* at p. 379.) The court noted that the remand was necessary in the first place because the "paucity of information relating to the entire situation, *coupled with the presumption which attaches to the kind of facts alleged by petitioner*." (*Remmer II* at pp. 379-380, emphasis added.)

The Supreme Court vacated the judgment against Remmer and directed that he be granted a new trial. (*Remmer II* at p. 382.) The court noted that the facts adduced during the hearing conducted by the District Court made any further remand unnecessary and held that the "total picture" revealed "such a state of facts that neither [the juror] nor anyone else could say that [the juror] was not affected in his freedom of action as a juror." (*Remmer II* at p. 381.) The court stated:

> Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the FBI agent's interview with [the juror], whatever the Government may have understood its purpose to be, dispersed the cloud created by Satterly's communication. (*Remmer II* at p. 381.)

Appellant submits that the parallels between *Remmer* and this matter are obvious. The Jail Incident report prepared by Deputy Ortiz indicates that Ortiz -- after becoming aware of the incident -- related appellant's statement

to Deputy Smith. Ortiz's report indicates that:

> After an interview of a potential juror, Smith requested a court recess to evaluate the situation and inform Judge O'Neill of McKenzie's statement. Refer to Smith's jail incident report for further details. (2 Clerk's Transcript of Court's Exhibits 487.)

Looking to Smith's report for further details would be a fruitless effort, as Smith's report says absolutely nothing about "an interview of a potential juror." (2 Clerk's Transcript of Court's Exhibits 488-492.) Nor does Smith's report assist much in identifying which of the prospective jurors may have been interviewed. Smith's report instead indicates that Ortiz approached Smith at approximately 2:30 p.m. -- as Smith was escorting prospective jurors into and out of the courtroom -- and informed Smith about appellant's outburst. (2 Clerk's Transcript of Court's Exhibits 488.) The report does not indicate which juror or jurors were being escorted when Ortiz related the incident to Smith. Nor does it indicate that Ortiz related the incident to Smith away from the presence of any jurors being escorted by Smith. (2 Clerk's Transcript of Court's Exhibits 488-492.)

The only clue as to when the interview actually took place rests in the fact that the clerk's transcript indicates that *Hovey* qualification of the jurors commenced at 1:42 p.m. and continued until the court declared a recess at 2:46 p.m. (3 CT 701-702.) Smith's report indicates that she received the information at 1430 hours, roughly 15 minutes before the trial

court declared a recess. (2 Clerk's Transcript of Court's Exhibits 488.)

As noted above, Juror Number Seven was examined immediately before defense counsel informed the trial court that appellant objected to Glynn's references to appellant as "that man." (25 RT 4873-4883.) Juror Number Four was examined immediately after counsel so informed the court. (25 RT 4873-4883) The court examined two prospective jurors between the examination of Juror Number Four and the declaration of a recess to discuss Smith's request for the use of shackles. (25 RT 4897-4904.)

From this, it should be abundantly clear to this court that there is no way to determine which jurors were exposed to contact by the bailiffs, when that contact was made and what was said during that contact. Because of these uncertainties, this court cannot find that the presumption of prejudice was overcome. The court can instead only speculate -- something the *Remmer* court was unwilling to do -- as to whether the presumption of prejudice was rebutted.

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472 [85 S.Ct. 546, 13 L.Ed.2d 424].) Due process under the United States Constitution is offended when a criminal

defendant is denied a fair trial by a panel of impartial, indifferent jurors. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, §16; *Turner v. Louisiana*, *supra*, 379 U.S. at pp. 472-473, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484, 1490-1492; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; *People v. Nesler* (1997) 16 Cal.4th 561, 578; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

California law is similar. Under California law, a defendant is entitled to be tried by twelve impartial and unprejudiced jurors. A conviction cannot be allowed to stand if even a single juror has been improperly influenced. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112.) "It is misconduct for a juror to consider material [citation] extraneous to the record. [Citations.] Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred." (*People v. Williams* (2006) 40 Cal.4th 287, 333; *People v. Mendoza* (2000) 24 Cal.4th 130, 195.) A juror's inadvertent exposure to extraneous information constitutes misconduct. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579.) Reversal is required when "there appears a substantial likelihood of juror bias." (*People v. Danks* (2004) 32 Cal.4th 269, 303, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 653.) That determination is made by a reviewing court as a predominantly

legal mixed question of law and fact. (*People v. Ault* (2004) 33 Cal.4th 1250, 1255.)

Prejudice may be shown in one of two ways. First, reversal is required when "the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*People v. Danks*, *supra*, 32 Cal.4th at p. 303.) Second, when the extraneous information does not satisfy the first test, a reviewing court must consider "the nature of the misconduct and the 'totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.'" (*Id.* at p. 303, quoting *In re Carpenter*, *supra*, 9 Cal.4th at pp. 653-654.)

As a practical matter, this has little effect on appellant's claim in this appeal as the record on appeal does not contain any indication of the nature of the communication between the court's bailiffs and prospective jurors. Because of this, there is no way for this court to determine whether the *ex parte* communications contained information that, if admitted, would have required reversal. Nor can this court determine whether the *ex parte* communications conveyed material that was substantially likely to prejudice appellant when viewed in light of the entire record. The court simply cannot weigh the prejudice arising from the *ex parte* communications without first

knowing the content of those communications.

The incident reports prepared by Ortiz and Smith were marked as Court's Exhibit Number Five on April 22, 1999. (2 Clerk's Transcript of Court's Exhibits 485; 26 RT 5072.) The trial court and prosecution knew the contents of those reports but neither the court nor the prosecutor made any effort to ascertain the nature and contents of the *ex parte* communications between the court's bailiffs and prospective jurors. Because of this, there is no way for this court to find that the presumption of prejudice has been rebutted, either by the prosecutor or by reference to the entire record. Appellant's death sentence must be reversed.

V.

SHOULD THIS COURT REJECT THE CONTENTIONS RAISED BY APPELLANT IN ARGUMENTS TWO AND FOUR ABOVE, APPELLANT'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE APPELLANT HAS BEEN DENIED HIS DUE PROCESS RIGHT TO AN ADEQUATE RECORD ON APPEAL

On November 3, 2004, appellant's appointed counsel on appeal filed a motion to correct, complete and settle the record in this matter. (1 Supp. CT 66.) Appellant's motion noted, among other things, that roughly 55 juror questionnaires from the first jury -- including the juror questionnaire completed by prospective juror Kelvin Smith -- had been omitted from the record on appeal. (1 Supp. CT 85-86.) A search of the trial court's records did not locate the missing questionnaires. (1 August 21, 2006 RT 27-28.) Appellant also asked leave of the court to settle the record as to the "hounding" of potential jurors during the second penalty phase trial.[38] (1 Supp. CT 101; 2 Supp. CT 307-311.)

Settlement proceedings in this matter took place over a period of roughly three years. During those proceedings the trial court denied

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[38] On May 19, 1999, the court and counsel met in chambers prior to the penalty phase verdict. During this meeting, the court informed the parties that the jurors would exit the building after the verdict through "a certain rarely used way out of this building" because there had "been some problems reported of the press hounding the jurors on the way out, guarding the exit and that sort of thing." (37 RT 7255.) The court did not explain this comment.

appellant's request for leave to settle the record as to the "hounding" of the jurors. The court held that no such actual or reported "hounding" even occurred in this case. The court further held that the reference to hounding in the record "was an inartful reference to post verdict contact between media representatives and jurors in other cases tried in the same courthouse." (2 Supp. CT 314.)

On August 21, 2006, counsel for appellant asked the trial court to inquire directly of the jurors whose questionnaires had been lost before making a finding that the questionnaires could not be constructed. (2 Second Supp. CT 93; 1 August 21, 2006 RT 21-27.)

Counsel for respondent opposed appellant's request for settlement of the contents of the missing juror questionnaires, arguing that there was a "ridiculously low likelihood that anybody would remember anything of substance." (2 Second Supp. CT 93; 1 August 21, 2006 RT 28.) Counsel for respondent argued that the court had "no obligation to further inconvenience" the prospective jurors who had completed the missing questionnaires. (2 Second Supp. CT 93; 1 August 21, 2006 RT 29.)

The trial court granted appellant's request for leave to settle the record with regard to the missing juror questionnaires once it became clear that neither the court nor the parties had copies of the juror questionnaires. (2 Supp. CT 319; 2 Second Supp. CT 64, 66; 1 August 21, 2006 RT 27.)

The trial court nonetheless limited appellant to inquiring of the court and parties. The court refused to involve the prospective jurors, finding that there was little chance the jurors would provide accurate information. The court also noted its concern about intruding on the lives of these prospective jurors. (1 Second Supp. CT 96; 1 August 21, 2006 RT 37.)

Counsel for appellant also asked the trial court for leave to settle the record as to the identity of the prospective juror identified in Deputy Ortiz's report regarding appellant's outburst during *Hovey* qualification of the second panel. Appellant also asked to settle the record both as to what was said during the interview referenced in Ortiz's report as well as whether that particular prospective juror ultimately was seated on the jury. (2 Second Supp. CT 94; 1 August 21, 2006 RT 39-40.) Counsel for appellant asked the court to inquire directly of the deputies. (1 August 21, 2006 RT 41.)

The trial court noted that Deputy Smith had retired. (1 August 21, 2006 RT 42.) After reading the reports prepared by both deputies, the court questioned whether Ortiz's report was accurate because Smith's report did not mention anything about interviewing a juror. (1 August 21, 2006 RT 42.) The court agreed with respondent's suggestion that -- because the court and parties all had copies of the reports -- settlement was not appropriate because counsel for appellant had the ability to make the record at the time of the incident and did not do so. (1 August 21, 2006 RT 48.) The court

denied appellant's request to settle the record on this issue. (1 August 21, 2006 RT 48.)

On October 19, 2006, appellant filed a petition for writ of mandate in this court asking the court both to direct the trial court to inquire directly of the jurors whose questionnaires have been lost and to settle the record as to any and all communications between any and all prospective jurors and Sheriff's Deputies Robert Ortiz and Mary Smith on April 21, 1999, and to inquire of Sheriff's Deputies Robert Ortiz and Mary Smith prior to issuing any order settling the record as to the contents of the communication between the bailiffs.[39] On July 11, 2007, this court denied appellant's petition for a writ of mandate. (2 Second Supp. CT 99.)

Rule 8.610(a)(1)(P) of the California Rules of Court, requires the clerk's transcript on appeal to include all juror questionnaires. As part of the preparation of the record in a criminal appeal, appellant may apply to the trial court for settlement of a statement of any part of the "oral proceedings" of which a transcript "cannot be obtained for any reason." (Cal. Rules of Court, rule 8.346; *People v. Gzikowski* (1982) 32 Cal.3d 580.) An "oral proceeding" subject to settlement is an "unreported matter, the contents of which may be useful on appeal" (*Id.* at p. 585, fn. 2), and includes missing

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[39] Appellant has filed a request for judicial notice of appellant's writ petition and this court's file and records in case number S147509 under separate cover.

documents and other matters. (See *People v. Osband* (1996) 13 Cal.4th 622, 661-662 [missing trial exhibits]; *St. George v. Superior Court* (1949) 93 Cal.App.2d 815 [map used by witness in connection with his testimony but not marked or introduced into evidence].)

A criminal defendant is entitled under the Eighth and Fourteenth Amendments to an appellate record that is adequate to permit meaningful review. (*Griffin v. Illinois* (1956) 351 U.S. 12, 16-20 [76 S.Ct. 585, 100 L.Ed. 891]; *Draper v. Washington* (1963) 372 U.S. 487, 495-496 [83 S.Ct. 774, 9 L.Ed. 2d 899]; *People v. Young* (2005) 34 Cal.4th 1149, 1170, citing *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8, and *People v. Howard* (1992) 1 Cal.4th 1132, 1166; *People v. Blair* (2005) 36 Cal.4th 686, 756.) A complete and accurate appellate record is necessary to ensure appellant's rights to due process under the Fifth and Fourteenth Amendments, effective assistance of counsel under Sixth and Fourteenth Amendments, meaningful appellate review as mandated by the Eighth Amendment, as well as the corollary state constitutional rights (Cal. Const., art. I, §§ 7, 15 and 17), and the right to have the record on appeal prepared in conformity with state statutory requirements and rules of court as set forth above. (See *Marks v. Superior Court (People)* (2002) 27 Cal.4th 176; *People v. Welch* (1999) 20 Cal.4th 701; *Chessman v. Teets* (1957) 354 U.S. 156 [77 S.Ct. 1127, 1 L.Ed.2d 1253]; *Evitts v. Lucey* (1985) 469 U.S. 387 [105 S.Ct. 830, 83

L.Ed.2d 821]; *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 198 [96 S.Ct. 2909, 49 L.Ed.2d 859] (joint opinion of Stewart, Powell and Stevens, JJ.) [complete transcript and record is important "safeguard against arbitrariness and caprice"]; *Douglas v. California* (1963) 372 U.S. 353, 358 [83 S.Ct. 814, 9 L.Ed.2d 811] [noting the benefit of "counsel's examination into the record, research of the law, and marshaling of arguments on [client's] behalf"].) Access to "the entire [trial] transcript" is essential for effective appellate advocacy. (*Hardy v. United States* (1964) 375 U.S. 277, 282 [84 S.Ct. 424, 11 L.Ed.2d 331]; see *Id.* at p. 288 (Goldberg, J., concurring) ["an appointed lawyer ... needs a complete trial transcript to discharge his full responsibility ...."]; *People v. Barton* (1978) 21 Cal.3d 513, 518-519.)

Should this court find that appellant has failed to meet his burden of proving either jury misconduct or that the prosecutor's challenge to prospective juror Kelvin Smith was racially motivated, appellant's conviction must then be reversed because the trial court's rulings on appellant's settlement requests has rendered the record so deficient as to create a substantial risk that the penalty was imposed in an arbitrary and capricious manner. (U.S. Const., amend. VIII; *People v. Rundle* (2008) 43 Cal.4th 76, 110-111.) Reversal also is required because the deficiencies in the record are prejudicial to appellant's ability to prosecute his appeal. (U.S. Const., amend. XIV; *People v. Catlin* (2001) 26 Cal.4th 81, 166-167.) The

court's refusal to inquire directly of the jurors who questionnaires have been lost, and particularly the fact that prospective juror Kelvin Smith's questionnaire has been lost, directly impacts appellant's ability to demonstrate that the prosecutor's challenge to Smith was racially motivated. The court's refusal to inquire of court staff in order to clarify which jurors were or may have been exposed to extraneous evidence denies appellant the full ability to demonstrate juror misconduct.

VI.

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT UNFAIRLY PREJUDICED APPELLANT'S PENALTY PHASE TRIAL

During his penalty phase closing argument, lead prosecutor Glynn spent considerable time and effort arguing to the jury that appellant lacked remorse for what he had done. (36 RT 7065.) Glynn argued that appellant never showed remorse for the victim. (36 RT 7096.) Glynn argued that the length of time between the crime and appellant's admission of wrongdoing demonstrated a lack of remorse. (36 RT 7065.) Glynn argued that appellant's remorse took more than 1,500 days to manifest.[40] Glynn claimed that it was only after appellant's "despicable attempt" to blame someone else for the crime failed that appellant found God and claimed to be remorseful. (36 RT 7088.)

Glynn also observed that, during the period of time between the killing and appellant's first expression of remorse, appellant ransacked Avril's apartment and stole her property. He also smoked cocaine the night of the killing. Then he lied under oath and tried to pin the crime on Donald Thomas. (36 RT 7065-7066.) Glynn noted that appellant gave Avril's camera to appellant's daughter, arguing that it showed "how much

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[40] It was only during Glynn's rebuttal argument that he acknowledged appellant expressed remorse to Theresa Johnson not long after the killing. (36 RT 7168.)

sensitivity, how much remorse, how much caring this man had." (36 RT 7117.) Glynn pointed out how much money appellant netted from his crimes and how much of that money was spent on drugs. (36 RT 7118.)

Glynn urged the jury to consider "the crassness" of what appellant did after killing the victim. (36 RT 7116-7117, 7165-7167.) Glynn told the jurors they could consider the overall crassness, appellant's lack of remorse and the lack of any sensitivity at all after he murdered the victim in a brutal fashion. (36 RT 7117.)

Glynn also put considerable effort into arguing that most of the factors in mitigation set forth in the instructions did not apply in appellant's case. Glynn pointed out that the jury had not heard any evidence showing that appellant committed the offense while under the influence of extreme mental or emotional disturbance. (36 RT 7073-7074.) Glynn argued that factors (e), (g) and (j) did not apply because appellant acted alone. (36 RT 7074, 7079.) Glynn contended that factor (f) did not apply because there was no way any of the jurors could believe that appellant reasonably believed in the existence of a moral justification or extenuation of his conduct. (36 RT 7074.) Glynn argued at length against the applicability of factor (h), whether or not at the time of the offense appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or

the effects of intoxication. (36 RT 7075-7079.) Glynn then concluded that discussion with the following comment:

> I have gone through six factors that do not apply and crossed them out. And you may wonder, "Well, why do I waste my time doing that?" The reason is that these are factors that the law contemplates you'll consider in deciding whether to show leniency to Mr. McKinzie. And since none of those factors apply, you have less reason to show him leniency. (36 RT 7079.)

Glynn concluded his closing argument with a quote from "an old English jurist," Lord Justice Denning:

> Punishment is the way in which society expresses its denunciation of wrongdoing. In order to maintain respect for the law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the majority of citizens for those crimes. The truth is that some cases are so outrageous that society insists on adequate punishment because the wrongdoer deserves it. (36 RT 7122-7123.)

A. Prosecutor Glynn's Arguments Constituted Misconduct Because Glynn Urged the Jury to Impose a Death Sentence Based on Nonstatutory Factors in Aggravation

Appellant's death sentence must be reversed because the arguments discussed above constituted prosecutorial misconduct. A prosecutor may not argue that a juror should use a defendant's lack of remorse as an aggravating circumstance favoring imposition of the death penalty. (*People v. Crittenden* (1994) 9 Cal. 4th 83, 148, cert. den. (1995) 516 U.S. 849.) Such an argument violates the state statutory scheme by allowing death to

be based on a nonstatutory aggravating factor. (*Ibid.*, citing *People v. Boyd* (1985) 38 Cal.3d 762, 772-776]; accord, *Bellmore v. State* (Ind. 1992) 602 N.E.2d 111, 129 [trial court's reliance on lack of remorse as a nonstatutory aggravating factor violated Indiana death penalty statute].)

In *Boyd*, this court held that evidence of bad conduct on the defendant's part which is not probative of any statutory penalty factor is irrelevant and inadmissible as to the prosecution case for aggravation. (*People v. Boyd*, *supra*, 38 Cal.3d at 774.) This important state procedural protection and liberty interest, i.e., the right not to be sentenced to death except upon the basis of statutory aggravating factors, is also protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. den. (1994) 513 U.S. 914.)

While the presence of remorse is a mitigating factor and the prosecutor may argue that no such mitigation has been shown, it is improper under the California statutory scheme to suggest to a jury that it may weigh the absence of a mitigating factor as though it were a factor in aggravation. (*People v. Panah* (2005) 35 Cal.4th 395, 496; *People v. Davenport* (1985) 41 Cal.3d 247, 288-290; see also, *People v. Edelbacher* (1989) 47 Cal.3d 983, 1032, 1035 [reversal in part because prosecutor's argument violated

Boyd and *Davenport*].) Whether a prosecutor's argument regarding lack of remorse is improper thus "depends to a degree on the inference one is asking the jury to draw from it." (*People v. Cox* (1991) 53 Cal.3d 618, 685, quoting *People v. Thompson* (1988) 45 Cal.3d 86, 124.) If it is "reasonably likely" that a juror would construe a prosecutor's comments as suggesting the defendant's lack of remorse militated in favor of imposing the death penalty, then the argument violates state law. (*People v. Payton* (1992) 3 Cal. 4th 1050, 1071 [effect of prosecutorial argument to be judged under reasonable likelihood standard]; see *Boyde v. California* (1990) 494 U.S. 370, 378-381, 386 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

There can be little doubt but that the jury understood Glynn's arguments urging the jury to consider appellant's purported lack of remorse and the "crassness" of appellant's conduct after the killing -- including conduct that occurred long after the killing such as appellant's attempt to blame Donald Thomas for the killing -- as authorization for them to consider non-violent conduct unrelated to the killing as an aggravating factor. (36 RT 7116-7117, 7165-7167.) Nor should there be any question that Glynn's reliance on Lord Justice Denning was understood by the jurors as asking them to consider the "revulsion" of society as an aggravating factor. (36 RT 7122-7123.) Nor can there be any question that Glynn's claim that they had "less reason" to show appellant leniency because,

according to Glynn, none of the factors in mitigation listed in the court's instructions were applicable was understood by the jurors as an assertion that the absence of those mitigating factors could be considered in aggravation of the offense. (36 RT 7079.)

Glynn's misconduct during closing argument was directed toward illegitimately adding to the aggravating side of the ledger. A defendant's perceived lack of remorse is deeply offensive to a jury. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 [a "defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision" whether to impose death].) Putting appellant's alleged lack of remorse at the center of the case for aggravation was bound to "create the most severe 'type of prejudice' to [appellant]." *Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 684 [prosecutor's equating failure to testify with lack of remorse requires reversal of death sentence].)

In *People v. Cain* (1995) 10 Cal.4th 1, this court indicated that, practically speaking, it does not matter whether a juror weighs a defendant's lack of remorse as the presence of aggravation rather than as the absence of mitigation. (*Id.* at p. 78; accord, *People v. Gonzalez*, *supra*, 51 Cal.3d at 1232.) Appellant respectfully disagrees. If, for instance, before factoring in lack of remorse, a juror believes the arguments for life and death are of equal strength, the difference between adding weight to the death side of the

scale (which would result in aggravation outweighing mitigation) and merely not adding weight to the life side (which would result in aggravation and mitigation remaining equal) could easily mean the difference between a verdict of death and a verdict of life. To discount such error, as this court has done in the past, relies on a perception of the weighing process that is distinctly at odds with the actual statutory scheme. (Cf. *People v. Rodriguez* (1986) 42 Cal.3d 730, 788 [Acknowledging that the mere absence of a mitigating element may weigh against a finding that the instant offense is less serious than other crimes of the same general character but does not suggest that the crime is more serious]; accord, *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1033 [reversing in part because the prosecutor argued the absence of a mitigating factor was aggravating].)

To discount Glynn's misconduct based on the misperception expressed in *Cain* would itself violate due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) The same is true with regard to the Eighth Amendment requirement that sentencing procedures be especially reliable. (*Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 11 [101 S.Ct. 1866, 68 L.Ed.2d 359]; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [108 S.Ct. 1981, 100 L.Ed.2d 575].)

Glynn's misconduct violated appellant's Fifth, Sixth and Eighth Amendment rights to be sentenced in accordance with court proceedings

which are reliable, rather than arbitrary and capricious. (*Johnson v. Mississippi*, *supra*, 486 U.S. at 584; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392].) Glynn's misconduct must cause this court to doubt the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 [105 S.Ct. 1087, 84 L.Ed.2d 53]) (conc. opn. of Burger, C.J.); see also Cal. Const., art I, § 17.) It is accordingly reasonably probable that, due to the misconduct discussed above, at least one juror's evaluation of mitigation versus aggravation was distorted to appellant's disadvantage. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) It certainly cannot be found that the prosecutor's misconduct had "no effect" on the penalty verdict. Appellant's death sentence must be reversed.

VII.

APPELLANT'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE THE INTRODUCTION OF PHOTOGRAPHS TAKEN BOTH DURING THE AUTOPSY AND AT THE SCENE OF THE DISCOVERY OF THE VICTIM'S BODY DENIED APPELLANT HIS RIGHT TO DUE PROCESS, A FAIR TRIAL AND A RELIABLE DETERMINATION OF PENALTY AS GUARANTEED BY THE CALIFORNIA AND UNITED STATES CONSTITUTIONS

Prior to the commencement of trial, the prosecution filed a motion seeking leave to admit a considerable number of photographs[41] taken both during the autopsy of the victim and at the drainage canal where the victim's body was found. (1 CT 113-172.) The prosecution contended that the photographs demonstrated intent and malice and claimed that the probative value of the photographs outweighed the prejudicial impact of the photographs. (1 CT 118-128.) The prosecution also argued that the photographs were not cumulative. (1 CT 129-130.)

Defense counsel objected to a number of the photographs. Counsel objected to People's Exhibit number 125 as being "very, very unpleasant" and cumulative to People's Exhibit number 126, which the prosecution intended to enlarge. (2 RT 282-283.) Both photographs depicted Ruth Avril's body as it was found in the drainage canal. (1 CT 133-134.) The

[41] Nearly 200 photographs were taken by the medical examiner and the Oxnard Police Department. (1 CT 115.)

prosecution claimed that the position of Avril's hands as depicted in People's Exhibit number 125 were in a defensive position. The prosecution argued that injuries to the victim and the blood on the victim's clothing as depicted in the photograph demonstrated malice and intent. (1 CT 133-134; 2 RT 284.)

The trial court overruled appellant's objection, finding that the probative value of the photograph outweighed prejudice. (2 RT 291-292.) People's Exhibits 125 and 126 were admitted before both juries. (11 RT 2184; 31 RT 6073.)

Defense counsel also objected to People's Exhibits 142 and 143 as being cumulative in that they both depicted the same injuries and asked the court to exclude Exhibit 143. (2 RT 316-317.) Exhibit number 142 was an autopsy photograph depicting bruises and lacerations on the left side of the victim's face. (1 CT 136-137.) Exhibit 143 also depicted the victim's left eye and surrounding area, but it also depicted petechial hemorrhages in the victim's eye. (1 CT 137; 2 RT 317.) The prosecution argued that Exhibit 143 clarified anticipated testimony and showed malice and intent. (1 CT 137.)

The trial court overruled appellant's objections. (2 RT 317.) People's Exhibit numbers 142 and 143 were admitted before both juries. (11 RT 2196; 31 RT 6073.)

Defense counsel also objected to the use of People's Exhibit numbers 144 and 145, both of which depicted the inside of the victim's mouth. (2 RT 316.) The prosecution argued that Exhibit 144 showed that the victim was beaten around the face, demonstrating intent and malice and corroborating anticipated testimony from Ralph Gladney and Theresa Johnson. (1 CT 138.) The prosecution noted that Exhibit 145 depicted petechial hemorrhages[42] and argued that the photograph would corroborate anticipated testimony. (1 CT 138.)

The trial court overruled appellant's objections. (2 RT 316.) People's Exhibit numbers 144 and 145 were admitted before both juries. (11 RT 2196; 31 RT 6073.)

Defense counsel objected to People's Exhibit numbers 146 and 150 as being cumulative to People's Exhibit number 151. (2 RT 295, 300.) Defense counsel pointed out that the injuries to the victim's neck were depicted in People's Exhibit number 151. (2 RT 295.) Exhibit number 146 depicted multiple injuries to the right side of the victim's face. The prosecution noted that the photograph supported the prosecution's theory that the victim was beaten and strangled -- demonstrating malice and intent -- and argued that the photograph corroborated Theresa Johnson's

[42] Assistant Medical Examiner Frank later testified that the injuries were caused by a blow or impact by the teeth rather than by strangulation. (31 RT 6019-6020.)

anticipated testimony that appellant struck the victim with the trunk lid of the victim's car. (1 CT 138-140.) The prosecution also argued that Exhibit number 146 did not show the bruising on the victim's neck. (2 RT 295.)

The trial court allowed the use of Exhibit numbers 146 and 151 but directed the prosecution to withdraw Exhibit number 150. (2 RT 298, 315.) The trial court held that there would not be any significant prejudice from the fact that some of the injuries were depicted in two of the photographs. (2 RT 298, 300, 302.) People's Exhibit numbers 146 and 151 were admitted before both juries. (11 RT 2196; 31 RT 6073.)

People's Exhibit number 164 was a bloody and gruesome photograph of the top of the victim's brain with a portion of the skull removed. (People's Exhibit No. 164; 1 CT 146.) Defense counsel objected to Exhibit number 164, arguing that the photograph was "terribly shocking to the senses" and that it would unduly prejudice the jury. (2 RT 302, 310.) Counsel argued that the internal injuries could be described adequately without the use of this photograph. (2 RT 308-310.)

The prosecution argued that Exhibit 164 was much the same as People's Exhibit number 163, only taken from a different angle, showing a darkened area on the center of the victim's brain and bruising on both sides of the scalp. (2 RT 305-307.) When asked whether the testimony regarding Exhibit number 164 would be that the photograph showed "literally an

injury on the brain," prosecutor Glynn responded that Exhibit number 164 showed a subdural hematoma. (2 RT 306.) Glynn and prosecutor Morgan then indicated that the photograph showed hemorrhage in the scalp tissue along the side of the photograph. (2 RT 306.)

The court overruled appellant's objection. (2 RT 310-311.) People's Exhibit 164 was entered into evidence before both juries. (11 RT 2184; 31 RT 6073.) The court excluded People's Exhibit number 163, finding that Exhibit number 164 was from "a less inflammatory angle." (2 RT 310-311, 317.)

Appellant contends that the admission of these photographs infringed his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, as well as his rights guaranteed by article I, sections 7, 15 and 17 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding.

A. Reversal is Required Under the California Standard

Under California law, a trial court has broad discretion to admit photographs of a crime victim over an objection that the photographs are unduly gruesome or inflammatory. The exercise of such discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453-454, quoting *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 133-134.) Even photographs that are "gruesome" may be admitted when the

photographs are "highly relevant to the issues raised by the facts or if the photographs would clarify the testimony of a medical examiner." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 454.) The court's evaluation whether the admission of the photographs in this matter was erroneous depends upon the evaluation of two factors: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in determining that the probative value of each photograph outweighed its prejudicial effect. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 453; *People v. Carter* (2005) 36 Cal.4th 1114, 1166; *People v. Moon* (2005) 37 Cal.4th 1, 34.)

The trial court nonetheless is obliged to shield the jury from depictions that "sensationalize an alleged crime, or are unnecessarily gruesome." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 454.) Appellant contends that careful review of the photographs in question in this matter demonstrates that the photographs were offered only to inflame the juries. People's Exhibit numbers 125 and 126, for example, are gruesome photographs of the victim's body in a drainage canal. The prosecution argued that the photographs should be admitted because they depicted:

> the extreme malice behind this murder by showing the victim callously thrown into the ditch with severe injuries to her face and head. The blood on Ruth's clothes and face indicate the brutality of the attack, and the position of the hands corroborates the prosecution's theory that she was trying to defend herself as they are clutched at her chest in a defensive position. (1 CT 133-134; See also 2 RT 284-285.)

It should be very evident to this court that the prosecution was not using the words "extreme malice" in the legal sense of "intent to kill." The prosecution was instead using those words to demonstrate that appellant was callous and heartless because he left the victim's body in a drainage ditch. The photographs themselves really do not depict the injuries to the victim's face and in fact show very little of the victim's head. The limited extent that the victim's head injuries are depicted clearly was cumulative to the injuries as depicted in People's Exhibit numbers 140, 142 through 148 and 151.

The prosecution's claim that the position of the victim's hands in People's Exhibit number 125 demonstrated a defensive posture clearly was little more than a speculative attempt to justify the admission of photographs with little true relevance. Little or no harm was done to the victim's body in the area in which her hands were located so it is less than clear what the prosecution believed the victim to have been fending off by placing her hands across her chest. Even more to the point, there was very little evidence to suggest that the victim was even alive when she was thrown into the drainage canal. No evidence was offered suggesting that the victim aspirated any of the water in the drainage canal, something she was very likely to have done had she still been breathing when she was thrown into the canal. Nor did Assistant Medical Examiner Frank find any carbon

monoxide in the victim's blood (11 RT 2184, 2188; 31 RT 6047-6048), a finding that would have suggested that the victim was alive in the trunk of the car as she was being transported to the canal.

The photographs of the victim's body in the drainage canal were not relevant to any disputed facts. To be sure, the photographs corroborated Loganbill's testimony that he found the victim's body in the drainage canal, but that fact was not contested in any way. The fact that the body was recovered in a body of water also may have been relevant to explain the difficulty of estimating an accurate time of death, but the photographs really added nothing to that issue that could not have been explained by Frank without showing gruesome photographs to a jury.

The prosecution in this matter offered People's Exhibit numbers 125 and 126 -- and all of the photographs of the scene at Arnold Street for that matter -- for one purpose only: to inflame the jurors. The probative purposes of the photographs urged by the prosecution simply did not exist. The admission of those photographs was erroneous under California law.

Appellant contends that the admission of People's Exhibit number 164 was an even more egregious error. People's Exhibit number 164 was a particularly bloody and gruesome photograph of the top of the victim's head with the skull removed and the brain exposed. Defense counsel correctly argued that this photo was "terribly shocking to the senses" (2 RT 302),

similar to something out of "some horrible slasher movie" (2 RT 308) and unduly prejudicial. (2 RT 310.) Counsel correctly noted that the internal injuries at issue could have been adequately described without this photograph. (2 RT 308.)

The purported purpose of this gruesome photograph was, again, proof of "malice and intent." (1 CT 146.) In the end, however, Assistant Medical Examiner Frank used the photograph only to illustrate that the victim suffered bruising to the muscles and inside aspect of the skin on her scalp. (11 RT 2168-2171; 31 RT 6031-6033.) The victim's brain -- the object that completely dominates this photograph -- was not mentioned by Frank other than during her extremely vivid description of how she sliced and peeled the victim's scalp from her head before removing the top of the victim's skull. (11 RT 2167-2169; 31 RT 6031-6032.) It is difficult to see how the extremely limited probative value of this exhibit outweighed the incredibly prejudicial impact of the photograph on the jurors. The admission of this photograph was erroneous under state law.

B. Denial of Appellant's Right to a Reliable Determination of Penalty

The admission of these photographs also violated appellant's federal constitutional right to a reliable capital-sentencing determination. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49

L.Ed.2d 944] [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393].) There is a great danger that when exposed to photographs like those at issue here, jurors will foreclose consideration of other evidence and render their verdict based upon the emotional impact of the photographs. The result of this is the failure to consider mitigating evidence, and the failure to consider mitigating evidence offends Eighth Amendment principles. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [102 S.Ct. 869, 71 L.Ed.2d 1].)

Studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see, Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a*

Murder Trial: Probative or Prejudicial? (1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].)

Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., *supra*, 21 Law & Hum. Behav. at p. 492-494 [same].) If a jury is more likely to render a guilty verdict when shown autopsy photographs than it would be if not shown the photographs, a penalty phase jury would be similarly affected and more likely to return a death verdict when shown the photographs than it would be if not shown the photographs.

Logic supports this conclusion because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the

establishment of hard facts."].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs. Viewing graphic photographs of victims' corpses creates a strong emotional reaction in a juror and creates a likelihood that the reaction will be so strong that it will override consideration of the other evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome photographs causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et. al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

Even assuming that as a general rule photographs depicting the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty (see *People v. Farnam*, *supra*, 28 Cal.4th at pp. 185-186), this court never has held that this automatically qualifies photographs for admission at the penalty phase of a capital trial. In fact, this

court has observed that trial courts should be alert to how gruesome photographs play on a jury's emotions, especially in a capital trial. (*People v. Weaver* (2001) 26 Cal.4th 876, 934 [considering whether admission of gruesome photographs denied appellant a fair penalty phase determination].) Even in those cases that uphold the admission of photographs that seemingly relate only to the circumstances of the offense at issue, the photographs usually derive their probativeness from the fact that they are able to uniquely demonstrate some aspect of the crime warranting consideration that cannot be demonstrated in another manner. (See, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 182 [manner in which 12-year-old victim was hogtied was "indescribable in mere words."].) Such a factor clearly did not exist in this case.

C. Violation of Appellant's Rights to Due Process and a Fair Trial

Although violations of state evidentiary principles do not implicate the federal and state constitutions as a general rule, the admission of the photographs in question prevented appellant from getting a fair trial in this matter. (See *Lisenba v. California* (1941) 314 U.S. 219, 228 [62 S.Ct. 280, 86 L.Ed. 166] [recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law]; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1464-1465; *People v. Partida* (2005) 37 Cal.4th 428, 434-435 [a defendant may argue on

appeal that the erroneous admission of evidence contrary to Evidence Code section 352 violated his right to due process by rendering his trial fundamentally unfair]; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 [recognizing that admission of gruesome photographs may deprive defendant of fair trial and require reversal of judgment].)

D. Necessity for Reversal

Appellant submits that the prejudicial nature of these photographs really cannot be overstated. The photographs of the victim's body in the drainage canal really offered nothing to prove any disputed facts. The prosecution's claim that the position of the victim's hands in People's Exhibit number 146 depicted a defensive posture was nothing more than speculation that the victim was alive when her body was placed into the canal. That speculation was unsupported by any evidence. No carbon monoxide was found in the victim's blood. No testimony was offered to establish that there was any water in the victim's lungs. People's Exhibit numbers 125 and 126 were dramatic and extremely prejudicial photographs that proved nothing.

People's Exhibit number 164 was much worse. The purported purpose of the photograph -- to show blood on the inside of the victim's skin on the sides of her head -- clearly was a sham. The photograph really was offered for the purpose of prejudicing the jurors. It should be very

questionable that any jurors even noticed the accumulation of blood on the inside of the victim's skin even as Frank testified. It is far more likely that the jurors saw only the victim's scalp peeled back and her brain exposed. This court cannot find the introduction of these photographs harmless, either to appellant's conviction by the first jury or the death verdict returned by the second jury. Appellant's convictions and death sentence must be reversed.

VIII.

APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS ON ACCOMPLICE TESTIMONY CONSTITUTED AN INFRINGEMENT ON APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND JURY TRIAL BECAUSE IT LIGHTENED THE PROSECUTOR'S BURDEN OF PROOF

At the conclusion of evidence in the guilt trial in this matter, the trial court instructed the jury that if anyone committed the crimes charged in counts six and eight (Pen. Code, § 459), Theresa Johnson was an accomplice as a matter of law and her testimony implicating appellant should be viewed with caution. (2 CT 416-417; CALJIC Nos. 3.16 and 3.18, as modified.) The court also instructed the jury on the requirement of corroboration, but limited that requirement to counts six and eight:

> You cannot find the defendant guilty of Counts 6 or 8 based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect the defendant with the commission of the offense. ¶ Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving what the accomplice stated out-of-court was true. (2 CT 414; CALJIC No. 3.11 as modified.)

Appellant's convictions must be reversed because the trial court's instructions erroneously limited the applicable accomplice instructions to counts six and eight, thereby impermissibly lessening the prosecution's burden of proof. A trial court has a *sua sponte* duty to instruct on all

principles of law that are closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People* v. *Breverman* (1998) 19 Cal.4th 142, 154; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) The trial court has a *sua sponte* duty to instruct the jury on the applicable principles of accomplice testimony whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Guiuan* (1998) 18 Cal.4th 558, 560-561, 569; *People v. Terry* (1970) 2 Cal.3d 362, 398.)

The trial court's instructions on accomplice liability were erroneous because the court expressly limited the requirement of corroboration to counts six and eight. By so limiting the instructions, the court necessarily instructed the jurors that they need not concern themselves with the requirement of corroboration as to the remaining charges. This error was not mitigated in any way by the fact that the court did not limit CALJIC No. 3.18 to counts six and eight, as reasonable jurors could only have understood the accomplice instructions to have been limited to counts six and eight. Lead prosecutor Glynn in fact told the jurors precisely this during his guilt phase closing argument. (17 RT 3247.)

Reasonable jurors also would have understood the requirement of corroboration not to apply to the testimony given by Donald Thomas -- even

though Thomas certainly could be viewed as an accomplice both to the killing and to appellant's possession of Avril's property and the use of Avril's ATM card -- as Thomas was not charged or implicated in the commercial burglaries charged in counts six and eight.

That Thomas could have been found to have been an accomplice by the jury was supported by James Young's testimony. Young testified that toward the end of 1995 or the early part of 1996, while in Thomas' bedroom, Young heard Thomas talking about a burglary. (15 RT 2865-2867.) Thomas said that he had a TV and VCR that he had to sell that he got from an apartment across the way from Mike Fontenot's garage.[43] (15 RT 2868, 2876.) Thomas said that he went into the apartment but got scared and left when somebody woke up. (15 RT 2868-2870.) Thomas said that things got bad in the house. (15 RT 2870.) Thomas used the word "we" while talking about being in the apartment but did not say who the other person was. Young understood that to mean that Thomas was not alone in the apartment. (15 RT 2876-2877.)

Jury instructions that have the effect of reversing or lightening the burden of proof constitute an infringement on the defendant's constitutional right to due process and jury trial under both the United States and

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[43] Someone standing outside the Fontenot garage would be able to see Avril's garage. (15 RT 2879.)

California Constitutions. (U.S. Const., amends. V, VI and XIV; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *People v. Flood* (1998) 18 Cal.4th 470, 480; *People v. Garceau* (1993) 6 Cal.4th 140, 209, (conc. opn. of Mosk, J.), citing *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *People v. Saddler* (1979) 24 Cal.3d 671, 679-680, citing *People v. Serrato* (1973) 9 Cal.3d 753, 766-767.)

Reversal is required unless this court can find the error harmless beyond a reasonable doubt. (*People v. Cox* (2000) 23 Cal.4th 665, 676-677; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Harmless error review under *Chapman* evaluates the basis upon which the jury actually rested its verdict. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; quoting *Yates v. Evatt* (1991) 500 U.S. 391, 404 [111 S.Ct. 1884, 114 L.Ed.2d 432].) Reversal is required unless this court can determine that the verdict actually rendered in this matter was surely unattributable to the erroneous instruction. (*Id.* at page 279.)

This court cannot make such a finding in this matter, as Johnson's testimony regarding appellant's conduct and statements was a critical feature of the prosecution's case against appellant. Appellant's defense during the guilt phase was that he came into possession of Avril's property by receiving it from Donald Thomas. Appellant also provided fairly

substantial evidence to prove that Thomas was in fact the person who murdered Avril, including appellant's own testimony that he obtained Avril's property from Thomas, who told appellant that he obtained the property in a burglary of "the lady's pad by Peggy's." (16 RT 2988-2992, 3005-3008, 3011, 3045-3057, 3064-3065, 3073-3078, 3091-3094, 3097-3099.)

Appellant also testified that Thomas later told appellant that the property had come from Avril and that she had been beaten. Thomas and the people with Thomas took her, put her body in the trunk and drove her to Malibu and dumped her body. (16 RT 3007-3008, 3015-3016, 3101, 3105, 3121-3122, 3130.) Thomas told appellant that they were supposed to rob Avril's house but ended up robbing her garage. (16 RT 3122.) Thomas told appellant that Avril was hit with the trunk lid as she tried to get out of the trunk. (16 RT 3122-3123.) Thomas told appellant that they waited for Avril and things got bad. (16 RT 3022.)

Appellant bolstered this defense by the fact that Thomas' palm print was found on Avril's stereo cabinet after her death. (15RT 2885, 2887-2888, 2890-2893.) That Thomas killed Avril also was supported by Thomas' own testimony. Thomas claimed he learned a month or so after her death that Avril had died, at about the time he spoke with Detective Palmieri. (15 RT 2818.) Thomas asked Palmieri whether Avril's stereo had

been stolen. (15 RT 2849-2850, 2910.) No one from law enforcement had told Thomas that a stereo was missing but he knew something was missing because Michael Fontenot told him that appellant had a stereo for sale. (15 RT 2819, 2821-2822, 2849-2850, 2915.)

Thomas told Palmieri that he should check appellant out as a suspect. (15 RT 2850-2851.) Thomas also named a person with the first name of Kenny as possibly having been involved. (15 RT 2911-2912.) Thomas described Kenny as being a black male with whom he used to play dominos in the garage across from Avril's garage. He indicated that Kenny had served time in prison and was on parole. (15 RT 2912.) Palmieri asked Thomas why he thought Kenny was involved but Thomas never explained the basis for his suspicion. (15 RT 2912-2913.)

The jury in this matter heard a relatively close case during the guilt phase, a case in which they could have decided that both Johnson and Thomas were accomplices. The credibility of those two witnesses was extremely important to the prosecution's case even as it was subject to considerable doubt because both Johnson and Thomas had considerable motivation to shift blame to appellant.

The trial court's limitation of the accomplice instructions to counts six and eight enhanced the testimony of Johnson and Thomas by lessening the quantum and quality of evidence needed to support the credibility of

their testimony as to the remaining counts. The court cannot find beyond a reasonable doubt that the trial court's erroneous instructions did not contribute to the jury's verdicts. Appellant's convictions must be reversed.

IX.

THE TRIAL COURT ERRED BY FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

The trial court in this matter failed to instruct the jury that they must agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder. That failure abridged appellant's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Appellant acknowledges that this court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Cook* (2007) 40 Cal.4th 1334, 1365; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) Appellant submits that this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this court acknowledged first that "In every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475.) The court then declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[44]

In subsequent cases, this court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People* v. *Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that felony murder and premeditated murder are not distinct crimes]), but it has nonetheless continued to hold that the elements of those crimes are not the same. For example, in *Carpenter* the court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d 441, quoted above, "meant that the

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[44] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: In the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all.... [This is a] profound legal difference ...." (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 476-477, fn. omitted.)

elements of the two types of murder are not the same." (*People* v. *Carpenter*, *supra*, 15 Cal.4th at p. 394.) Similarly, the court has declared that "the elements of the two kinds of murder differ" (*People v. Silva*, *supra*, 25 Cal.4th at p. 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817 [119 S.Ct. 1707, 143 L.Ed.2d 985].) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted in fn. 26, *supra,* p. 102) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232 [119 S.Ct. 1215, 143 L.Ed.2d 311]). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of

statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299 [52 S.Ct. 180, 76 L.Ed. 306], when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not. (*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342 [31 S.Ct. 421, 55 L.Ed. 489].)

The "elements" test announced in *Blockburger* subsequently was elevated to a rule of constitutional dimension. It now is the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697 [113 S.Ct. 2849, 125 L.Ed.2d 556]; *Monge v. California* (1998) 524 U.S. 721, 738 [118 S.Ct. 2246, 141 L.Ed.2d 615], dis. opn. of Scalia, J [The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire Double Jeopardy jurisprudence].) The elements test also is relevant to the attachment of the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173 [121 S.Ct. 1335,

149 L.Ed.2d 321]), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt. (*Monge v. California*, *supra*, 524 U.S. at p. 738, dis. opn. of Scalia, J.; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 [123 S.Ct. 732, 154 L.Ed.2d 588], lead opn. of Scalia, J.)

Malice murder and felony murder are defined by separate statutes and "each ... requires proof of an additional fact that the other does not" (*Blockburger v. United States*, *supra*, 284 U.S. at p. 304). Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.) Therefore, it is incongruous to say, as this court did in *Carpenter*, that the language in *Dillon* relied upon by appellant "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime also is the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge* v. *California*, *supra*, 524 U.S. at p. 738, dis. opn. of Scalia, J.; see *People* v. *Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny 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." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [20 S.Ct. 2348, 147 L.Ed.2d 435].)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the California Constitution and statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488 [100 S.Ct. 1254, 63 L.Ed.2d 552]). Because this is a capital case, the right to a unanimous verdict also is guaranteed by Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 [111 S.Ct. 2491, 115 L.Ed.2d 555]

(plur. opn.) [leaving this question open].)

The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334 [100 S.Ct. 2214, 65 L.Ed.2d 159]; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 [109 S.Ct. 2765, 106 L.Ed.2d 1]; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Therefore, jury unanimity is required in capital cases. Moreover, even in non-capital cases, in which the federal Constitution generally does not require unanimity, at least six jurors must agree. (U.S. Const., amends. VI & XIV; *Burch v. Louisiana* (1979) 441 U.S. 130, 131-139 [99 S.Ct. 1623, 60 L.Ed.2d 96], [state statute allowing conviction by a vote of five out of six jurors was unconstitutional]; *Ballew v. Georgia* (1978) 435 U.S. 223, 239-245 [98 S.Ct. 1029, 55 L.Ed 234] [state statute allowing conviction by a unanimous five-person jury was unconstitutional].)

In this case, there were three possible mental states alleged to support a conviction for first degree murder - premeditation, the specific intent to commit a robbery, and the specific intent to commit a burglary. The absence of an instruction requiring unanimity on the elements of first degree murder created the possibility of a three-way split, with the jurors

dividing 4-4-4 (or 5-3-4) on which mental state had been proven and no group of at least six jurors agreeing on any one. Even if this were not a capital case, a conviction obtained in this manner could not stand. (*Burch v. Louisiana*, *supra*, 441 U.S. at pp. 131-139; *Ballew v. Georgia*, *supra*, 435 U.S. at pp. 239-245.)

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. at pp. 630-645.) There are three reasons why this is so. First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single *mens rea* element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647,654, fn. 4 [malice and premeditation are the ordinary elements of first degree

murder].)

The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder.[45] (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *Id.* at p. 1268, conc. opn. of Kennard, J.) Moreover, this court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, the court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.] (*Id.* at p. 545, italics added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was

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[45] Specific intent to commit the underlying felony, the *mens rea* element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Ca1.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Ca1.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514 [68 S.Ct. 665, 92 L.Ed. 840]; *People v. Guthrie* (1983) 144 Cal.App.3d 832,839).

established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (Pen. Code, § 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they be labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (*Ring v. Arizona* (2002) 536 U.S. 584, 603-605 [122 S.Ct 2428, 153 L.Ed. 566]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, includes the right to a unanimous verdict.

Third, Penal Code section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation

marks omitted).

For the above reasons, the trial court erred by failing to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and therefore reversal is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

X.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40 [111 S.Ct. 328, 112 L.Ed.2d 339]; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of

proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [114 S.Ct. 1239, 127 L.Ed.2d 583].) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt

Both juries in this matter were instructed on CALJIC No. 2.90 in one form or another. The first jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (2 CT 384; 18 RT 3337UU-3337VV.) The first jury also was instructed that the People had "the burden of proving the truth of a special circumstance" and that if they had "a reasonable doubt as to whether a special circumstance [was] true" they must find it not true. (2 CT 398; 18 RT 3337CCC-3337DDD.) The first jury further was instructed that the People bore the burden of proof as to the special allegation pursuant to Penal Code section 667.9, subdivision (a), and that they must find the

allegation not true should they harbor a reasonable doubt. (2 CT 418; 18 RT 3337PPP.)

The second jury was given a modified version of CALJIC No. 2.90, tailored to the aggravating circumstances of prior convictions and other crimes involving the use or threat of force or violence, which provided in pertinent part as follows:

> A defendant in the penalty phase of a criminal action is presumed to be innocent of the prior criminal activity and prior felony convictions until the contrary is proved, and in case of a reasonable doubt whether his guilt of such matters is satisfactorily shown, they may not be considered as aggravating circumstances. This presumption places upon the People the burden of proving the truth of prior criminal activity and prior felony convictions beyond a reasonable doubt. (3 CT 835; 36 RT 7230-7231.)

These principles were supplemented by several instructions that explained the meaning of reasonable doubt. Reasonable doubt defined for both juries as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (2 CT 384; 3 CT 835; 18 RT 3337VV; 36 RT 7230-7231.)

The juries also were given interrelated instructions that discussed the relationship between the reasonable doubt requirement and circumstantial

evidence. The first jury was given a modified version of CALJIC No. 2.01 that was adapted so as to include the alleged special circumstances and the allegation pursuant to Penal Code section 667.9, subdivision (a). (2 CT 364; 18 RT 3337JJ-3337KK.) The first jury also was instructed on a combined version of CALJIC Nos. 2.02 and 8.83.1. (2 CT 420; 18 RT 3337QQQ-3337RRR.) The court read a modified version of CALJIC No. 2.02 to the second jury, adapted to apply only to prior convictions and prior criminal activities involving the use or threat of force or violence. (3 CT 840; 36 RT 7234-7235.)

These instructions, addressing different issues in almost identical terms, advised appellant's juries that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (2 CT 364, 420; 3 CT 840; 18 RT 3337JJ-3337KK, RT 3337QQQ-3337RRR; 36 RT 7234-7235.) These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt.

This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., amends. VI & XIV; Cal. Const.,

art. I, § 16), and a reliable capital trial (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218]; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)[46] First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (2 CT 364, 420; 3 CT 840; 18 RT 3337JJ-3337KK, RT 3337QQQ-3337RRR; 36 RT 7234-7235.)

An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A "reasonable interpretation" does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see

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[46] Although defense counsel did not object to these instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they are such as to affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood*, *supra*, 18 Cal.4th at p. 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

Sullivan v. Louisiana, *supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," emphasis added.) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [105 S.Ct. 1965, 85 L.Ed.2d 344], italics added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 524.)

Here, all four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the

reasonable interpretation and reject the unreasonable." (2 CT 364, 420; 3 CT 840; 18 RT 3337JJ-3337KK, RT 3337QQQ-3337RRR; 36 RT 7234-7235, emphasis added.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way -- by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales*, *supra*, 51 Cal.3d at pp. 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508]; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

There is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. CALJIC Nos. 1.00, 2.21.1, 2.22, 2.27, and 2.51 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions to the first jury that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (2 CT 358-359; 18 RT 3337FF-3337GG); CALJIC No. 2.21.1, regarding discrepancies in testimony (2 CT 372; 18 RT 3337OO-3337PP); CALJIC No. 2.22, regarding weighing conflicting testimony (2 CT 374; 18 RT 3337PP-3337QQ); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (2 CT 377; 18 RT 3337RR); and CALJIC No. 2.51, regarding motive (2 CT 378; 18 RT 3337RR). The trial court also gave CALJIC Nos. 1.00, 2.21.1, 2.22 and 2.27 to the second jury. (3 CT 803, 815, 817-818; 36 RT 7210-7211, 7217-7219.)

Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a criminal defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*,

397 U.S. 358.)

Several of these instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (2 CT 359; 18 RT 3337FF-3337GG; 3 CT 803; 36 RT 7210-7211.) CALJIC No. 2.01 also referred to the jury's choice between "guilt" and "innocence." (2 CT 364; 18 RT 3337JJ-3337KK.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish the defendant is guilty," while the absence of motive "may tend to show the defendant is not guilty." (2 CT 378; 18 RT 3337RR.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proved beyond a reasonable doubt. They encouraged jurors to find appellant guilty because it had not been proved that he was "innocent."

CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not

> convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (2 CT 374, 3 CT 817; 18 RT 3337PP-3337QQ, 36 RT 7218-7219.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence" standard, i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (2 CT 377, 3 CT 818; 18 RT 3337RR, 36 RT 7219) likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." CALJIC No. 2.27 undercuts that principle by instructing the jury -- without qualifying this language to apply only to *prosecution* witnesses -- both that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists." Taken together, these two rules suggest that appellant had the burden of proving the "fact" that the homicide was not a felony murder. This court has acknowledged the flaws in this instruction, noting that "the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and encouraged "further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand -- in the face of so many instructions permitting conviction upon a lesser showing -- that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144 [addressing circumstantial

evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)

While recognizing the shortcomings of some of the instructions, this court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence.

The court's analysis is flawed for several reasons. First, what this court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this court's essential rationale -- that the flawed instructions were "saved" by the language of CALJIC No. 2.90 -- requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An

instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[47] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent

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[47] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one -- rather than vice-versa -- the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's first jury heard a number of separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. This court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943, citations omitted.)

Under this principle, it cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible *per se*.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Such a showing cannot be made in this matter both because much of the evidence against appellant came from flawed and questionable testimony by Theresa Johnson and because the guilt phase jury heard substantial evidence of third party culpability. The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) Accordingly, the judgment must be reversed.

XI.

THE TRIAL COURT'S INSTRUCTION ON MOTIVE IMPERMISSIBLY REDUCED THE PROSECUTOR'S BURDEN OF PROOF BY PERMITTING THE JURY TO FIND GUILT BASED SOLELY UPON MOTIVE

The trial court instructed the first jury under CALJIC No. 2.51[48] This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive shifted the burden of proof to appellant to show an absence of those things in order to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed the Jury to Determine Guilt Based Solely on Motive

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere

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[48] CALJIC No. 2.51, as given, provided as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to establish the defendant is not guilty." (2 CT 378; 18 RT 3337RR.)

modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

In this case, the jurors reasonably could have concluded that if motive was insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase "inclusio unius est exclusio alterius" could mislead a reasonable juror as to the scope of an instruction].) Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7 & 15.)

B. The Instruction Impermissibly Lessened the Prosecutor's Burden of Proof and Violated Due Process

The jury was instructed that an unlawful killing during the commission of burglary or robbery is first degree murder when the perpetrator has the specific intent to commit burglary or robbery. (2 CT 391; 18 RT 3337ZZ.) Later in the instructions, the trial court defined the mental state required for robbery and burglary. (2 CT 402, 409; 18 RT

3337FFF-3337GGG.) This definition was incorporated by reference into the instructions on the robbery-murder and burglary-murder special circumstances. (2 CT 399-400; 18 RT 3337DDD-3337EEE.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded – i.e., that the jury find that appellant had the intent to rob or burglarize the victim. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana*, *supra*, 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony murder allegation was that appellant killed Ruth Avril in order to steal from her. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The Court of Appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction -- that motive was not an element of the crime charged and need not be proved -- was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if appellant had the intent to rob or the intent to steal, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction on Motive Shifted the Burden of Proof to Imply That Appellant Had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an absence of motive or a motive different than that advanced by the prosecutor when, in fact, appellant had no burden of proof whatsoever.

As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required

CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent to rob or steal from Avril was unnecessary for guilty verdicts on the first degree murder charge under a felony-murder theory, as well as the burglary and robbery charges and findings of true as to the felony-murder special circumstance allegations. Accordingly, this Court must reverse the judgment because the error -- affecting the central issue before the jury -- was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision and neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these omissions in the California capital-sentencing scheme run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538

[107 S.Ct. 837, 93 L.Ed.2d 934]; see also, *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[49]

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

With the issuance of three opinions within the past ten years, *Jones v. United States*, *supra*, 526 U.S. 227, *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for

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[49] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt.

penalty phase instructions in California capital cases. (See also *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 24, 159 L.Ed.2d 403].) As the Court has observed, "*in a capital sentencing proceeding*, as in a criminal trial, ''''the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'''' [Citations.]" (*Monge v. California*, *supra,* 524 U.S. at p. 732, italics added.)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

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

Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253.)

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

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

In *Ring v. Arizona*, the court applied the principles of *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511], the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. (*Ring v. Arizona*,

supra, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense.[50] (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) The court observed: "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. We hold that the Sixth Amendment applies to both." (*Ibid.*)

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

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[50] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610, conc. opn. of Scalia, J.)

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As the court stated, "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*)

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

New Jersey, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be made beyond a reasonable doubt.

It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The court also has stated that the section

190.3 factors of the California death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

California law, and the practice in other states, also supports the conclusion that the existence of aggravating facts and the weighing and balancing process are factual determinations for the jury which must be proved beyond a reasonable doubt.[51] The reasonable doubt standard is

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[51] Aggravating facts must be proved beyond a reasonable doubt in 30 of the 36 states that authorize the death penalty. (See Ala. Code, § 13A-5-45(e); Ariz. Rev. Stat. Ann., § 13-751(B); Ark. Code Ann., § 5-4-603(b)(1); Colo. Rev. Stat, § 18-1.3-1201(1)(d); Del. Code Ann. tit. 11, § 4209(c)(3)a.1 [at least one aggravating fact must be found to exist beyond a reasonable doubt]; Ga. Code Ann., § 17-10-30(c); Idaho Code, § 19-2515(3)(b); Ill. Comp. Stat. ch. 720, § 9-1(f); Ind. Code Ann., § 35-50-2-9(a); Kans. Stat., § 21-4624(e); Ky. Rev. Stat., § 532.025(3); La. Code Crim. Proc. Ann. art. 905.3; Md. Crim. Law Code § 2-303(g)(1); Miss. Code Ann., § 99-19-103; Mo. Rev. Stat. 565.032.1(1); Mont. Code Ann., §§ 46-18-302(b); 46-18-305; Neb. Rev. Stat., §§ 29-2520(4)(f), 29-2521(b)(2); Nev. Rev. Stat. Ann., § 175.554(4); N.H. Rev. Stat. Ann., § 630:5 (III); N.M. Stat. Ann., § 31-20A-3; N.C. Gen. Stat., art. 100, § 15A-2000(c)(1); Ohio Rev. Code, § 2929.04(B); Okla. Stat. Ann. tit. 21, § 701.11; Ore. Rev. Stat., 163.150(d); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii); S.C. Code Ann., § 16-3-20(A); S.D. Codified Laws Ann., § 23A-27A-5; Tenn. Code Ann., § 39-13-204(f); Tex. Crim. Proc. Code Ann., § 37.071(c); Wyo. Stat., § 6-2-102(d)(i)(A). Four states require the trier of fact to find that aggravating facts outweigh mitigating facts and/or justify death beyond a reasonable doubt. (See Ark.

routinely applied in California in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, e.g., that the defendant was armed during the commission of an offense, must be proved by the standard of beyond a reasonable doubt. (See CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat

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Code Ann., § 5-4-603(a)(2) and (a)(3) [requiring the jury to find beyond a reasonable doubt both that total aggravation outweighs total mitigation and that the imposition of the death penalty is justified and appropriate in the circumstances]; Utah Code, § 76-3-207(5)(b) [requiring the jury to be persuaded beyond a reasonable doubt both that total aggravation outweighs total mitigation and that the imposition of the death penalty is justified and appropriate in the circumstances]; Wash. Rev. Code, § 10-95-060, [before jurors can return a death verdict they must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency]; Va. Code, § 19.2-264.4(C). [requiring the Commonwealth to prove "beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."].

defendants differently . . . unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

B. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments for several reasons.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of

death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [96 S.Ct.

2960, 49 L.Ed.2d 913] [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [108 S.Ct. 1860, 100 L.Ed.2d 384] [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

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

are contrary to law or the evidence presented."[52] A fact could not be established -- i.e., a fact finder could not make a finding -- without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

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[52] Of course, the United States Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393 [114 S.Ct. 948, 127 L.Ed.2d 236]; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *Bullington v. Missouri* (1981) 451 U.S. 430, 446 [101 S.Ct. 1852, 68 L.Ed.2d 270].)

C. Conclusion

For the reasons set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof necessary to the jury's determinations at the penalty phase. Appellant's death sentence must be reversed.

XIII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After hearing all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is a fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The absence of a mitigating factor is not, and cannot be considered by you as an aggravating factor.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

> "The law permits you to consider sympathy for the defendant which is based on the evidence you have heard. You may not consider sympathy for the defendant's family as mitigation, but you may consider evidence of the effect of this case on defendant's family insofar as it illuminates positive qualities of the defendant's background or character.
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> In order to return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life in prison without the possibility of parole. (3 CT 850-852; 36 RT 7239-7241.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed because it did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., amend. XIV), to a fair trial by jury (U.S. Const., amends. VI & XIV), and to a reliable penalty determination (U.S. Const., amends. VI, VIII & XIV), and require reversal of appellant's death sentence. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.)

A. The Instructions Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life in prison without the possibility of parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [108 S.Ct. 1853, 100 L.Ed.2d 372].) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory

aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5 [103 S.Ct. 2733, 77 L.Ed.2d 235].) In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result. (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392, fn. omitted.)

Appellant acknowledges that this court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different. Their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*Ibid.*, emphasis added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of

the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [100 S.Ct. 1759, 64 L.Ed.2d 398].) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367].) Because the instruction rendered the penalty determination unreliable (U.S. Const., amends. VIII & XIV.), the death judgment must be reversed.

B. The Instructions Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized Penalty, for Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1037.) Indeed, this court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown*, *supra*, 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return

a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warranted" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in

capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255]), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's reference to a "justified and appropriate" penalty. (3 CT 851-852; 36 RT 7239-7241.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very

end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

This instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is constitutionally unreliable (U.S. Const., amends. VIII & XIV) and violates appellant's right to due process. (U.S. Const., amend. XIV; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Appellant's death sentence must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[53] The United States Supreme Court has held that this mandatory language is consistent with the individualized

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

consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California*, *supra*, 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88, as given, or in any of the special or modified instructions given by the trial court. The modified version of CALJIC No. 8.88 given by the trial court only addresses directly the imposition of the death penalty by informing the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

Reasonable jurors deliberating appellant's sentence might not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instructions given to appellant's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) In addition, the instructions improperly reduced the prosecution's

burden of proof below that required by Penal Code section 190.3. An instructional error that mis-describes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, emphasis in original.)

This court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [15 S.Ct. 610, 39 L.Ed.

709].)[54]

People v. Moore, *supra*, is instructive on this point. There, this court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its

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[54] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [93 S.Ct. 2208, 37 L.Ed.2d 82], the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" * * * * there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions on the decision between death and life without parole.

opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey*, *supra*, 469 U.S. at p. 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants -- if not more entitled -- to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such

protection. (See U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [102 S.Ct. 2382, 72 L.Ed.2d 786].)

The slighting of a defense theory in jury instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [93 S.Ct. 354, 34 L.Ed.2d 335] [disapproving instruction placing unauthorized burden on defense].) The defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed To Inform the Jurors That Appellant Did Not Have To Persuade Them That the Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes*, *supra*, 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative . . . there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and

even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, rev'd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed. The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point.

E. Conclusion

For the reasons set forth above, the trial court's modified version of CALJIC No. 8.88 failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. The instruction also essentially directed a death verdict in violation of appellant's right to jury

trial under the Sixth Amendment. Appellant's death sentence must be reversed.

XIV.

APPELLANT'S SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT'S REFUSAL TO GIVE DEFENSE SPECIAL INSTRUCTION NO. FIVE -- EXPLAINING WHICH FACTORS WERE AGGRAVATING AND WHICH FACTORS WERE MITIGATING -- PREVENTED THE JURORS FROM INCLUDING MITIGATING FACTORS ABOUT APPELLANT IN THEIR WEIGHING PROCESS

Appellant's trial counsel asked the trial court to give a special instruction explaining to the jury both that only the first three factors listed in Penal Code section 190.3 could be considered aggravating factors and that the remaining factors could only be considered as factors in mitigation. (2 Supp. Clerk's Transcript on Appeal 363.) Appellant's proposed instruction read as follows:

> The only factors which you may consider as aggravating factors are those set forth in paragraphs (a), (b) and (c) of the foregoing instruction.[55] You are not required to find that any of those factors are aggravating, and may find that any of those factors are mitigating. ¶ The other factors set forth in the foregoing instruction can only be considered by you as mitigating factors. The absence of a mitigating factor is not, and cannot be considered by you as, an aggravating factor. (2 Supp. Clerk's Transcript on Appeal 363.)

The trial court refused the proposed special instruction[56] based on this court's decisions in *People v. Ochoa* (1998) 19 Cal.4th 353, 458,

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[55] Appellant asked that this special instruction be given immediately following CALJIC No. 8.85. (1 Supp. Clerk's Transcript on Appeal 363.)

[56] The trial court added the last sentence of the proposed instruction to CALJIC No. 8.88. (3 CT 363.)

People v. Osband, *supra*, 13 Cal.4th at p. 705, and *People v. Williams* (1997) 16 Cal.4th 153, 268-269. (35 RT 6781.)

Because the trial court refused to give this proposed instruction, the remaining instructions effectively informed the jury that while they were permitted to consider mitigating facts about appellant, those facts could not be used in the balancing process. The jury was instructed that "[a] mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an *extenuating circumstance* in determining the appropriateness of the death penalty." (CALJIC No. 8.88, in pertinent part as given, emphasis added; 3 CT 850; 36 RT 7239-7241.) The jury also was instructed that

> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (CALJIC No. 8.88, in pertinent part as given; 3 CT 851-852; 36 RT 7239-7241.)

This instruction was erroneous in that it -- when considered with the definition of what constituted an "extenuating circumstance" given in CALJIC No. 8.85 -- precluded the jurors from considering facts about

appellant that were unrelated to the commission of the crime itself as mitigation in the weighing process explained in CALJIC No. 8.88. The relevant portion of CALJIC No. 8.85 was as follows:

> In determining which penalty is to be imposed you shall consider, take into account and be guided by the following factors if applicable: . . . ¶ (k) Any other circumstance which extenuates, which means lessens, the gravity of the crime even though it is not a legal excuse for the crime *and* any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. (CALJIC No. 8.85 in pertinent part as given, emphasis added; 3 CT 829-831; 36 RT 7226-7229.)

The word "and" is italicized in the above quote because the use of that word emphasizes the point appellant is making in this argument, as it clearly distinguishes between extenuating circumstance -- circumstances that lessen the gravity of the crime -- from facts and circumstances about appellant. Because it was phrased in this matter, this instruction informed the jury that sympathetic or other aspects of appellant's character are not extenuating circumstances. The jury was thus able to "take into account and be guided by" sympathetic or other aspects of appellant's character in determining penalty, but was definitionally precluded from inclusion of those same sympathetic or other aspects of appellant's process in the actual weighing process set forth in CALJIC No. 8.88 because sympathetic or other aspects of appellant's character did not fall within the definition of

mitigating circumstances provided by CALJIC No. 8.88.

Appellant's proposed instruction would have cured this fault. Appellant acknowledges that a number of cases have held that the failure to identify which factors are aggravating and which are mitigating does not render Penal Code section 190.3 unconstitutionally vague, but those cases do not address the specific argument made in this matter, namely that the instructions as given in this matter prevented the jury from giving "independent mitigating weight" to all relevant evidence, thus violating the requirement -- under the Eighth and Fourteenth Amendments to the United States Constitution -- that the jury must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] fns. & italics omitted; *People v. Williams*, *supra*, 40 Cal.4th at p. 320.)

Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 [114 S.Ct. 2630, 129 L.Ed.2d 750], quoting *Gregg v. Georgia*, *supra*, 428 U. S. at p. 189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) "The selection decision * * * requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the

defendant's culpability." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973.)

A. Appellant Was Entitled to a Clarifying Pinpoint Instruction Informing the Jury Both That All of the Factors from Penal Code Section 190.3 Could Be Used in Mitigation and That Only the First Three Could Be Used in Aggravation.

A trial court has a *sua sponte* duty to instruct on all principles of law that are closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People* v. *Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. St. Martin*, *supra*, 1 Cal.3d at p. 531.) A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142-1143, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Sears* (1970) 2 Cal.3d 180, 190.) Clarifying instructions, such as Defense Special Instruction No. Five, must be given when requested by the defendant. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

As noted above, jury instructions that have the effect of reversing or lightening the burden of proof constitute an infringement on the defendant's constitutional right to due process and jury trial under both the United States and California Constitutions. (U.S. Const., amends. V, VI and XIV; *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *People v. Flood*, *supra*, 18 Cal.4th at p. 480; *People v. Garceau*, *supra*, 6 Cal.4th at p. 209,

(conc. opn. of Mosk, J.), citing *Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 520-524 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *People v. Saddler*, *supra*, 24 Cal.3d at pp. 679-680, citing *People v. Serrato*, *supra*, 9 Cal.3d at pp. 766-767.)

The trial court's refusal to give appellant's requested instruction violated his right to present a defense (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]), his right to a fair and reliable capital trial (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638), and his right to the presumption of innocence, requirement of proof beyond a reasonable doubt, and fair trial as secured by due process of law (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].)

In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., amends. VI & XIV; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *Duncan v. Louisiana* (1968) 391 U.S. 145 [88 S.Ct. 1444, 20 L.Ed.2d 491]; *People v. Sedeno* (1974) 10 Cal.3d 703, 720, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12), and violated federal due process by arbitrarily depriving him of his state right to

the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., amend. XIV; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones*, *supra*, 445 U.S. at p. 488.)

Appellant acknowledges that previous decisions of this court have held that the "selection process is a moral and normative one for which assignment of a proof burden would be inappropriate." (*People v. Cook*, *supra*, 40 Cal.4th at p. 1365, citing *People v. Welch*, *supra*, 20 Cal.4th at p. 767 and *People v. Holt* (1997) 15 Cal.4th 619, 683-684.) Appellant nonetheless contends that reconsideration of that position is necessary and appropriate because the instructional error in question actually prevented the jurors from giving independent mitigating weight -- during the process of weighing aggravation against mitigation -- to anything other than circumstances extenuating the crime. The instructions prevented the jurors from including any aspects of appellant's character as mitigation in the weighing process, in violation of Penal Code section 190.3.[57]

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[57] The relevant portion of Penal Code section 190.3 was as follows:

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in the state prison for a term of life without the possibility of parole." (Pen. Code, § 190.3, in pertinent part.)

That preclusion violated the requirement -- under the Eighth and Fourteenth Amendments -- that the jury must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fns. and italics omitted; *People v. Williams*, *supra*, 40 Cal.4th at p. 320.) Such a preclusion also violated appellant's right to due process and a fair trial under the Fourteenth Amendment because it allowed the jury to return a death verdict without first complying with the weighing process mandated by Penal Code section 190.3. When the state prescribes a process by which a defendant may be deprived of life or liberty, due process mandates that the defendant can only be deprived of his life or liberty in accordance with that process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

It seems indisputable that a statute that precluded consideration of any aspects of appellant's character as mitigation during the weighing process would be unconstitutional. Jury instructions that preclude consideration of any aspects of appellant's character as mitigation during the weighing process lead to the same unconstitutional result. It makes little difference whether this court chooses to assign a burden of proof as to the existence of aggravating facts, the fact remains that the prosecution bears the burden of proving a quantum of aggravating facts sufficient to outweigh mitigating facts. The elimination of mitigating facts from that weighing

process necessarily reduces that burden.

The trial court erred by refusing appellant's proposed instruction. Reversal is required unless this court can find the error harmless beyond a reasonable doubt. (*People v. Cox*, *supra*, 23 Cal.4th at pp. 676-677; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Harmless error review under *Chapman* evaluates the basis upon which the jury actually rested its verdict. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; quoting *Yates v. Evatt*, *supra*, 500 U.S. at p. 404.) Reversal is required unless this court can determine that the verdict actually rendered in this matter was surely unattributable to the erroneous instruction. (*Id.* at page 279.)

The court cannot make such a finding in this matter, as there is no record whatsoever as to which aggravating factors and mitigating factors were found by the jury or the weighing process undertaken by the jurors. Appellant's death sentence must be reversed.

XV.

APPELLANT'S SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT'S REFUSAL TO GIVE DEFENSE SPECIAL INSTRUCTION NO. 14 VIOLATED APPELLANT'S RIGHTS TO PRESENT A DEFENSE, TO THE PRESUMPTION OF INNOCENCE, TO JURY TRIAL, TO PROOF BEYOND A REASONABLE DOUBT BY A PROPERLY INSTRUCTED JURY AND TO A FAIR TRIAL AS SECURED BY THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

Appellant submitted a proposed special instruction -- Defense Special Instruction No. 14 -- specifically clarifying that four things could be considered by the penalty phase jurors as constituting mitigating evidence. The proposed instruction read as follows:

> Evidence has been produced concerning the following: ¶ 1. Defendant's voluntary confession to the crime, his sorrow for his crime, and his acceptance of responsibility for his crime. ¶ 2. Defendant's drug addiction. ¶ Defendant's care and love for his children and step children. ¶ Defendant's behavior in County jail while awaiting trial. ¶ Any or all of the above may be considered as mitigating circumstances. (1 Supp. Clerk's Transcript on Appeal 372; 35 RT 6794.)

The trial court refused to give this instruction based on its finding that the instruction was argumentative. (35 RT 6795-6796.) After the trial court indicated its intent to refuse the instruction, defense counsel indicated that his primary concern was crafting an instruction pinpointing remorse as a mitigating factor. (35 RT 6796.) The court acknowledged that CALJIC No. 8.85 did not specifically mention remorse but indicated its belief that

factor (k) informed the jury that they could consider "anything else." (35 RT 6796-6797.)

The trial court's refusal of this special instruction requires the reversal of appellant's sentence. A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Hall* (1980) 28 Cal.3d 143, 158-159, overruled on other grounds in *People v. Bouzas* (1991) 53 Cal.3d 467, 478; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *People v. Sears*, *supra*, 2 Cal.3d at p. 190; see also *Penry v. Lynaugh* (1989) 492 U.S. 302 [109 S.Ct. 2934, 106 L.Ed.2d 256].)

The trial court concluded that appellant's proposed instruction was argumentative, noting that *People v. Benson* (1990) 52 Cal.3d 754 "involved an itemized mitigation list" that was properly refused because it was argumentative. (35 RT 6795.) Appellant submits that the trial court read more into the *Benson* decision than was appropriate. The proposed instruction in *Benson* was not argumentative because it listed evidence, it was argumentative because it treated the evidence elicited during Benson's trial as established facts, not as evidence. The proposed instruction in *Benson* was as follows:

> You may consider as further mitigating factors, the following facts or circumstances: ¶ (a) Richard Benson had a deprived

> and chaotic childhood during which he received little or no religious or moral training. ¶ (b) Richard Benson, in his formative years, was warehoused in group homes and institutions where he received little, if any, personal attention or affection. ¶ (c) In spite of the inadequacies of Richard Benson's family life, his personal bonds with his brothers and sister still remained. ¶ (d) Richard Benson, in his formative years, was subjected to mental abuse by his parents. ¶ (e) Richard Benson, in his formative years, was subjected to emotional abuse by his parents. ¶ (f) Richard Benson is an abuser o[f] drugs and is addicted to drugs. ¶ (g) That these murders were committed while Richard Benson was under the influence of mental or emotional disturbance. ¶ (h) That the capacity of Richard Benson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. ¶ (i) Richard Benson confessed in detail as to what he did and cooperated with the detectives of the District Attorney's Office and investigators of the San Luis Obispo Sheriff's Department as to his involvement. ¶ (j) That in his lengthy confession, Richard Benson repeatedly expressed remorse for his crimes. ¶ (k) Any other circumstance or circumstances arising form [sic] the evidence which you, the jury, deem to have mitigating value. (*Id.* at pp. 804-805.)

The proposed instruction in *Benson* did not tell the jurors that there was evidence which, if believed by the jurors, could be considered in mitigation. With the exception of item (k), and possibly item (j) as well, the proposed instruction in *Benson* instead argued very clearly that certain things were proven facts. This court did not uphold the trial court's exclusion of Benson's proposed instruction because it contained a list of evidence from which a jury could find mitigation, it upheld the exclusion because the proposed instruction invited the jury to draw favorable

inferences from the evidence. (*People v. Benson*, *supra*, 52 Cal.3d at p. 806.)

Nor should this court be persuaded by the trial court's apparently reliance on the court's decision in *People v. Daniels* (1990) 52 Cal.3d 815. Daniels sought a special instruction "telling the jury that in deciding the issue of premeditation and deliberation, the jury may consider eight listed factors, including knowledge of the issuance of a warrant, motive, flight, and physical inability." (*Id.* at p. 870.) Once before this court, Daniels noted that this court had permitted such a listing of evidence in *People v. Wright*, *supra*, 45 Cal.3d 1126. (*Id.* at p. 871.)

This court rejected Daniels' claim, but in doing so did not pronounce a blanket rule against identifying evidence in a proposed special instruction. The court noted that "*Wright's* approval of detailed jury instructions on factors bearing upon eyewitness identification, however, does not signal our approval of equally detailed instructions on every issue to come before a criminal jury." (*People v. Daniels*, *supra*, 52 Cal.3d at p. 871.) The decision in *Wright* was instead based on the court's conclusion, in *People v. McDonald* (1984) 37 Cal.3d 351, "that some of the relevant factors bearing upon eyewitness identification may be imperfectly known to jurors, and contrary to the intuitive beliefs of many." (*Id.* at p. 871, citing *People v. McDonald*, *supra*, 37 Cal.3d at p. 368.) The court had "no similar concerns

with regard to whatever factors might bear upon the issues of premeditation and deliberation." (*Id.* at p. 871.)

From this it should easily be seen that *Daniels* is not, contrary to the trial court's apparent belief, authority for the proposition that a listing of evidence automatically should be considered argumentative. Whether appellant's proposed instruction should have been given instead depended upon an evaluation of whether the relevant factors bearing on mitigation were "imperfectly known to jurors, and contrary to the intuitive beliefs of many."

Appellant submits that there can be little no doubt but that the concept of mitigation and the weighing of mitigation against aggravation is imperfectly known to jurors and contrary to the intuitive beliefs of many. This is particularly true in this case given the trial court's refusal to instruct the jury that only the first three factors listed in Penal Code section 190.3 could be considered in aggravation and that the remaining factors could only be considered in mitigation (Argument XIV, above), as the jury was not specifically told that the facts listed in appellant's proposed special instruction could be considered in mitigation. That appellant was addicted to drugs and his relationship to his children and step-children were potentially mitigating facts certainly could seem counterintuitive to reasonable jurors.

Appellant's special instruction was neither argumentative nor cumulative, and it did not contain incorrect statements of law.[58] (See *People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697.) The proposed instruction simply set forth the four specific areas of mitigating evidence proffered by appellant, effectively curing the ambiguity inherent in the CALJIC No. 8.85 explanation of what can be considered in mitigation under factor (k). (Argument XIV, above.) The instruction did not require the jurors either to find or even to consider the specific mitigating factors; it merely told the jurors that the specified facts "may be considered as mitigating circumstances." (3 CT 372.)

The trial court's refusal to give appellant's requested instruction violated his right to present a defense (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi*, *supra*, 410 U.S. 284), his right to a fair and reliable capital trial (U.S. Const., amends. VIII & XIV; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638), and his right to the presumption of innocence, requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const.,

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[58] To the extent that appellant's requested instruction may be deemed to have contained language which the court considered argumentative, that language should have been edited out by the trial court, and it was error for the court not to do so. (See *People v. Sanchez* (1950) 35 Cal.2d 522, 528 [the trial court could easily have cured any defect in defendant's proposed instruction by striking out the one offending paragraph].)

amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Estelle v. Williams*, *supra*, 425 U.S. at p. 503.)

In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., amends. VI & XIV; Cal. Const., art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. at p. 302; *Duncan v. Louisiana*, *supra*, 391 U.S. 145; *People v. Sedeno*, *supra*, 10 Cal.3d at p. 720, overruled on other grounds in *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., amend. XIV; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones*, *supra*, 445 U.S. at p. 488.) The erroneous denial of appellant's request for this pinpoint instruction requires reversal for the reasons set forth in Argument XIV, above. Appellant's death sentence must be reversed.

XVI.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT'S REFUSAL TO GIVE DEFENSE SPECIAL INSTRUCTION NO. SEVEN LESSENED THE PROSECUTOR'S BURDEN OF PROOF AND SHIFTED THE BURDEN TO APPELLANT TO ESTABLISH THE EXISTENCE OF MITIGATION

Appellant's trial counsel asked the trial court to give a special instruction explaining to the jury that they had the option of returning a verdict of life without the possibility of parole even if they did not find any evidence in mitigation.[59] (1 Supp. Clerk's Transcript on appeal 365, 369; 35 RT 6772-6775.) Counsel argued that it was a correct statement of the law and suggested that the jury needed to be told they did not have to impose the death penalty if they did not find any mitigating circumstances. (34 RT 6744; 35 RT 6772-6775.)

Deputy District Attorney Morgan offered two responses to the proposed instruction. Morgan first noted that defense counsel apparently intended to offer mitigating evidence. (35 RT 6773.) Morgan also disagreed with Wiksell's premise that the jury could impose life without parole even if they found no facts in mitigation, pointing out that the proposed

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[59] Defense counsel actually submitted two identically worded proposed instructions, numbered seven and eleven, that provided as follows:

"You may decide to impose the penalty of life without possibility of parole even if you find that there are no mitigating factors present." (1 Supp. Clerk's Transcript on appeal 365, 369.)

instruction reopened "the can of worms of the 'shall' versus 'may' argument" previously addressed at length by the court and parties.[60] Morgan believed the law clearly provided for a balancing test in which the jurors are required "to assign different weights to different factors, and at the end of that process, the law helps dictate what the verdict shall be." (35 RT 6773.)

The trial court refused to give the proposed instruction, finding that the concept was adequately covered by CALJIC No. 8.88:

> Well, I agree with both of [Deputy District Attorney Morgan's] arguments, and -- but I'm not -- I'm not giving it -- I'm not refusing it because it would be wrong for you to argue this. I think the jury already is told this in 8.88 when it says 'so substantial' in relation to the mitigation. A little or a lot of mitigation doesn't matter. The aggravation still has to be so substantial, it still has to be enough to make the death penalty appropriate. And so it's already covered in that way, and I think that throwing this in could tend to throw the jury off in the sense that it's not -- it's not a case where there's not mitigation to argue. It's just not. And I think the cases have repeatedly held that this type of embellishment is not necessary given the current CALJIC language. (35 RT 6775.)

Appellant acknowledges that this court has held that instructions such as appellant's proposed special instruction are not required because "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no

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[60] During the instructions discussion in the first penalty phase, Morgan argued that it would be legally correct to instruct the jury that they "shall" return a death verdict if they determine that aggravation outweighed mitigation. (18 RT 3398-3399.)

mitigating circumstances were found to exist." (*People v. Ray* (1996) 13 Cal.4th 313, 355-356, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 52.) Appellant nonetheless contends that the rule in those prior cases should be reconsidered and overruled. CALJIC No. 8.88 did not cure the problem appellant sought to address with this proposed instruction.

CALJIC No. 8.88 instead exacerbated the problem by expressly telling the jurors that they must be persuaded, before returning a verdict of death, "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (3 CT 852, CALJIC No. 8.88 as given, in pertinent part.) This language did nothing to inform the jury that a verdict of life without parole was an option even if they did not find any mitigating circumstances. (*People v. Duncan*, *supra*, 53 Cal.3d at p. 979.) To the contrary, the word "comparison" suggests that the jurors are required to make a finding of mitigation even before the jurors can determine whether there was sufficient aggravation to justify a death verdict.

The trial court was correct in noting that "[a] little or a lot of mitigation doesn't matter" to the weighing process, but it was wrong in finding that CALJIC No.8.88 need not be supplemented because this was "not a case where there's not mitigation to argue." (35 RT 6775.) The jury could very well have credited appellant's evidence but declined to consider

it as being mitigation. For example, the jurors could have believed that appellant was addicted to drugs but nonetheless have declined to view that condition as being a mitigating factor because they believed that drug addiction is not an "excuse" for murder. The trial court's reasoning was flawed in that it viewed the necessity for appellant's proposed special instruction as depending upon counsel's ability to argue the existence of mitigation rather than on the possibility that the jury would reject those arguments and find no facts in mitigation.

Even if this court disagrees that *Johnson* and *Ray* should be overruled, this court still should distinguish those cases because they both involved a claim that the trial court should have given the instruction *sua sponte*. (*People v. Ray*, *supra*, 13 Cal.4th at p. 355; *People v. Johnson*, *supra*, 6 Cal.4th at p. 52.) The decision in *Johnson* also was premised in part on the fact that Johnson did not contend that instructions actually given were incorrect, but rather that the instruction was incomplete. The court noted that Johnson's failure to request a "clarifying" instruction barred review of the issue on appeal. (*Id.* at p. 52.)

Neither of those grounds are applicable to this matter. Appellant does in fact contend that the instruction as given was incorrect insofar as it suggests that aggravation must be compared with established mitigating factors in making the determination whether the aggravating factors are

sufficiently substantial to warrant the death penalty. It would be a rare case in which a jury concluded that even a single aggravating factor was not substantial in light of a complete absence of mitigating circumstances.

Nor is the second ground, failure to request a clarifying instruction, an issue in this matter because appellant's proposed special instructions are in fact requests for clarification. As noted above, a criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. (*People v. Gutierrez*, *supra*, 28 Cal.4th at pp.1142-1143, citing *People v. Wright*, *supra*, 45 Cal.3d at p. 1137; *People v. Sears*, *supra*, 2 Cal.3d at p. 190.) The proposed instruction also was correct on the law. (See *People v. Cook*, *supra*, 40 Cal.4th at p. 1364 [finding that a pinpoint instruction informing the jury that life without parole could be justified by a finding of single mitigating factor was misleading in that it wrongly implied that at least one mitigating factor was needed to justify a sentence of life imprisonment without parole].) The proposed instruction was neither argumentative nor duplicative of other instructions. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 470.)

Appellant contends that CALJIC No. 8.88 as given in this matter lessened the prosecutor's burden of proving sufficient evidence to justify the death penalty and also implicitly shifted the burden of proof to appellant by requiring appellant to adduce mitigating evidence. Contrary to the clear

implication of CALJIC No. 8.88, appellant was not required to adduce any mitigating evidence before the jury was authorized to return a verdict of life without parole. Because the instruction as given lessened the prosecution's burden of proof and shifted the burden to appellant, appellant's sentence must be reversed for the reasons set forth in appellant's discussion of the standard of review above. Appellant's death sentence must be reversed.

XVII.

THE FAILURE TO REQUIRE THE JURY TO MAKE WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

The instructions given in this case under the trial court's modified versions of CALJIC No. 8.85 and CALJIC No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his right to due process and equal protection under the Fourteenth Amendment and his right to meaningful appellate review under the Eighth Amendment. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316 [83 S.Ct. 745, 9 L.Ed.2d 770].)

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, *supra*, 486 U.S. 367, the

requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this court has held that the 1978 death penalty scheme is not unconstitutional because it fails to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

As noted above, the failure to require written findings also denied appellant the equal protection of the law. In noncapital cases the sentencer

is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170, subd. (c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found in some fashion.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 36 states that permit capital punishment in which capital sentencing systems, 29 states require written findings regarding all, or at least one, of the aggravating facts found by the jury in support of a death sentence.[61]

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[61] See Ala. Code, § 13A-5- 47(d); Ariz. Rev. Stat. Ann., § 13-752(E); Ark. Code Ann., § 5-4-603(a); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II)(A); Conn. Gen. Stat., § 53a-46a(e); Del. Code Ann. tit. 11, § 4209(c)(3)b.1 [requiring the jury to "report" the vote count on aggravating facts not found true]; Fla. Stat., § 921.141(3) [requiring the trial court to make a written

Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death. California's failure to require such findings renders its death penalty procedures unconstitutional. Appellant's death sentence must be reversed.

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finding that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances]; Ga. Code Ann., §§ 17-10-30(c) & 17-10-31.1; Idaho Code, § 19-2515(8)(a)-(b); Ind. Code Ann., §§ 35-50-2-9(d) [requiring that the jury be provided a special verdict form for each alleged aggravating factor]; Kans. Stat., § 21-4624(e); Ky. Rev. Stat., § 532.025(3) La. Code Crim. Proc. Ann. art. 905.7; Md. Crim. Law Code § 2-303(i)(4); Miss. Code Ann., § 99-19-103; Mont. Code Ann., § 46-18-306 [requiring the trial court's sentencing determination be supported by specific written findings of fact as to the existence or nonexistence of each of the aggravating and mitigating circumstances]; Neb. Rev. Stat., §§ 29-2521(b)(2), 2522(3); Nev. Rev. Stat. Ann., § 175.554(4); N.H. Rev. Stat. Ann., § 630:5 (IV) [requiring the jury to return special findings identifying any aggravating factors found to exist]; N.M. Stat. Ann., § 31-20A-3; N.C. Gen. Stat., art. 100, § 15A-2000(c)(1); Okla. Stat. Ann. tit. 21, § 701.11; 42 Pa Cons. Stat. Ann., § 9711(f) [requiring the jury to set forth in such form as designated by the court the findings upon which the death sentence is based]; S.C. Code Ann., § 16-3-20(C); S.D. Codified Laws Ann., § 23A-27A-5; Tenn. Code Ann., § 39-13-204(g); Tex. Crim. Proc. Code Ann., § 37.07(c); Va. Code, § 19.2-264.4(D); Wyo. Stat., § 6-2-102(e).

XVIII.

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment.... The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa[62] as one of the few nations which has executed a large number of persons.... Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 225-229 (conc. and dis. opn. of Harrison, J.).) The death penalty has been abolished in all of the Western Europe nations, Canada and Australia. Twenty-nine nations have abolished the death penalty for all crimes in the last 10 years, including Albania, Rwanda, Armenia, the United Kingdom, Turkey, the Philippines and several countries that were formerly part of the Soviet Union. (Amnesty International, "*Abolitionist and Retentionist Countries*"<http:/www.amnesty.org/en/death-penalty/abolitionist-and-

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[62] South Africa abandoned the death penalty in 1997.

retentionist-countries> [as of Feb. 25, 2009] .)

That Western Europe has abolished the use of the death penalty is especially important because our Founding Fathers looked to the nations of Western Europe for the "law of nations," as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [16 S.Ct. 139, 40 L.Ed. 95]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners, was constitutionally forbidden here. (See *Miller v. United States, supra,* 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment," as defined in the Constitution, is not limited to whatever violated the standards of decency that existed within

the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100 [78 S.Ct. 590, 2 L.Ed.2d 630].) And if the standards of decency, as perceived by the civilized nations of Europe to which our Framers looked as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, fn. 31 [108 S.Ct. 2687, 101 L.Ed.2d 702] ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Thus, assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes -- as opposed to extraordinary punishment for extraordinary crimes -- is contrary to those norms. Nations

in the Western world no longer accept it, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.) For these reasons, the very broad death scheme in California, and the regular use of death as a punishment, violates the Eighth and Fourteenth Amendments. Consequently, appellant's death sentence should be set aside.

XIX.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AMENDMENT PROTECTION AGAINST ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

A. Intercase Proportionality Review Is Necessary Under the Eighth Amendment Because the California Statutory Scheme Fails To Perform the Type of Narrowing Required To Sustain the Constitutionality of a Death Penalty Scheme

Despite the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29], the

court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Based upon that, this court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 193.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thus "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.' As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris*." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 995 (dis. opn. of Blackmun, J.), quoting *Harris v. Pulley* (9th Cir.) 692 F.2d 1189, 1194.)

The time has come for *Pulley v. Harris* to be reevaluated, as the special circumstances of the California statutory scheme fail to perform the type of narrowing required to sustain the constitutionality of a death penalty scheme in the absence of intercase proportionality review. Comparative case review is the most rational, if not the only, effective means by which to

demonstrate whether the scheme as a whole is producing arbitrary results. That is why half of the states that sanction capital punishment require comparative, or intercase, proportionality review.[63]

The capital sentencing scheme in effect in this state when this case was tried in 1998 and 1999 was the type of scheme that the *Pulley* Court had in mind when it said "that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) One reason for this is that the scope of the special circumstances that render a first-degree murderer eligible for the death penalty is unduly broad. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-26 .) Even assuming that California's capital-sentencing statute's narrowing scheme is not so overly broad that it is actually unconstitutional on its face, the narrowing function embodied by the statute barely complies

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[63] Ala. Code § 13A-5-53(b)(3); Conn. Gen. Stat. Ann. §53a-46b(b)(3); Del. Code Ann. tit. 11, § 4209(g)(2); Ga. Code Ann. § 17-10-35(c)(3); Ky. Rev. Stat. Ann. § 532.075(3); Miss. Code Ann. §99-19-105(3)(c); Mo. Rev. Stat. 565.035.3(3); Mont. Code Ann. § 46-18-310(1)(c); Neb. Rev. Stat. §§ 29-2521.01, 29-2521.03, 29-2522(3); N.H. Rev. Stat. Ann. § 630:5(XI)(c); N.M. Stat. Ann. § 31-20A-4(c)(4); N.C. Gen. Stat. § 15A-2000(d)(2); Ohio Rev. Code Ann. § 2929.05(A); S.C. Code Ann. § 16-3-25(c)(3); S.D. Codified Laws Ann. § 23A-27A-12(3); Tenn. Code Ann. § 39-13-206 (c)(1)(D); Va. Code Ann. § 17.1-313(C)(2); Wash. Rev. Code § 10.95.130(2)(b).

with constitutional standards. Furthermore, the open-ended nature of the aggravating and mitigating factors, especially the circumstances-of-the-offense factor delineated in subdivision (a) of Penal Code section 190.3, grants the jury tremendous discretion in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 [dis. opn. of Blackmun, J.].)

The minimal narrowing of the special circumstances, plus the open-ended nature of the aggravating factors, work synergistically to infuse California's capital-sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few first-degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks other safeguards, such as a beyond-the-reasonable-doubt standard and jury unanimity requirement for aggravating factors, the use of an instruction informing the jury which factors are aggravating and which are mitigating, or the use of an instruction informing the jury that it is prohibited from finding nonstatutory aggravating factors. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital-sentencing scheme does not operate in a manner that enables it to ensure consistency in penalty-phase verdicts; nor does it operate in a manner that assures that it will prevent arbitrariness in capital sentencing. Because of that, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review requires the reversal of appellant's death sentence.

B. The Absence of Intercase Proportionality Review Violates Appellant's Right To Equal Protection of the Law

The United States Supreme Court has repeatedly held that a greater degree of reliability in sentencing 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 provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws.

At the time of appellant's sentence in 1999, California required intercase proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (f).) The Legislature thus provided a substantial benefit for all

prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) Persons sentenced to death, however, are unique among convicted felons in that they are not accorded this review, despite the extreme and irrevocable nature of a death sentence. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this court found that argument to be unavailing.

Appellant contends that the reasoning undergirding *Allen* was fatally flawed. The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Though this may be true, the larger point that is missed by this observation is that the basic requirement for any death penalty scheme is to ensure that capital

punishment is not imposed in a random and capricious fashion. It seems somewhat amiss that there was a settled way to assure that this type of randomness does not occur in noncapital cases, but no way to ensure that it does not occur in capital cases.

Jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is also well-situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305 [107 S.Ct. 1756, 95 L.Ed.2d 262].) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See *Kennedy v. Louisiana* (2008) 554 U.S. ___ [128 S. Ct. 2641]; *Atkins v. Virginia*, *supra*, 536 U.S. 304; *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335]; *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *Coker v. Georgia* (1977) 433 U.S. 584 [97 S.Ct. 2861, 53 L.Ed.2d 982].) Juries, like trial courts and counsel, are not immune from error. They may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices,

regardless of who made them.

Jurors also are not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first-degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287, italics added.) The idea that the disparity between life and death is a "narrow" one violates constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."

(*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the state to apply its disparate review procedures to capital sentencing.

Finally, this court relied on the additional "nonquantifiable" aspects of capital sentencing, when compared to noncapital sentencing, as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and noncapital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights, and bans arbitrary and disparate treatment

of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388].) In addition to protecting the exercise of federal constitutional rights, the equal protection clause also prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

This court has cited the fact that a death sentence reflects community standards as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of the same type of disparate sentence review that is provided to all other convicted felons in this state; the type of review routinely provided in virtually every state that has enacted death penalty laws, and that is provided by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case.

XX.

THE TRIAL COURT'S FAILURE TO DELETE INAPPLICABLE STATUTORY MITIGATING FACTORS PRECLUDED A FAIR AND RELIABLE CAPITAL-SENTENCING DETERMINATION

CALJIC No. 8.85 is typical of a state or federal pattern jury instruction in that it is designed to cover all of the statutory factors set forth in Penal Code section 190.3 that may apply to any given capital case. The trial court instructed the jury pursuant to CALJIC No. 8.85 without deleting from its terms the statutory mitigating factors for which there was no supporting evidence. (3 CT 829-831; 36 RT 7226-7229.) The failure to delete the inapplicable mitigating factors rendered the instruction constitutionally deficient.

The instruction itself tells the jury that it should "consider, take into account and be guided by the following factors, if applicable." (3 CT 829.) There is no issue that three of the listed factors -- (e), (f), and (j) -- were not applicable in this matter. By not deleting these factors from the jury instruction, the court made circumstances for which there was no evidentiary support a part of the weighing process undertaken by the jury in determining whether appellant lived or died. Because there was no evidentiary support for these factors, they would naturally have been weighed against the defendant.

The result of the failure to delete these factors from the instruction rendered factors that would have been considered mitigating if there had been supporting evidence (e.g., the victim consented to the homicidal act) aggravating by virtue of the fact that they were absent from the case. This is the natural interpretation a jury would draw when a prosecutor takes the time to point out that there is no evidence supporting a factor.[64] Such an argument makes what is in essence a non-factor with which the jury should not be concerned a factor in aggravation because of the lack of evidence to support it. This type of argument essentially tells the jury that the legislature considered factors such as these to be mitigating, but "see, they don't exist here and this defendant has fewer mitigating circumstances than other defendants that the legislature thought about when passing this statute." This distorts the legislative intent in passing Penal Code section 190.3 and renders the jury's death sentence constitutionally unreliable.

The shift in focus that occurred by leaving inapplicable factors in the jury instruction also diminished the impact on the weighing process of the mitigating evidence that was presented by appellant. By being permitted to shift the focus -- no matter how slight the shift may have been -- to the potential mitigating evidence that was not presented, the prosecutor was able to dilute the mitigating evidence that appellant did present. The

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[64] Lead prosecutor Glynn made this very argument. (36 RT 7073-7079.)

dilution of appellant's mitigating evidence precluded full consideration of that mitigating evidence. Thus, the trial court's failure to tailor CALJIC No. 8.85 to this case by deleting the inapplicable sentencing factors created a barrier to full consideration of appellant's mitigating evidence and deprived appellant of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-5; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605.)

A. Use of the Phrase "If Applicable" in CALJIC No. 8.85 Did Not Cure the Constitutional Defect

Appellant is mindful that CALJIC No. 8.85 directs the jury to consider the enumerated factors only "if applicable." On its face, this could be read to lead the jury to a deliberative process in which the jurors consider a factor, decide it is not applicable, and then discard it from the weighing process entirely. While appellant continues to maintain that the more likely scenario is that discussed above -- that the absence of mitigation on the inapplicable factors would be interpreted as aggravation -- he acknowledges that there is some support for an argument that the phrase "if applicable" saves the constitutionality of the instruction.

Ultimately, the reason that the phrase "if applicable" does not save the instruction from being unconstitutional is that the instruction was not given in isolation, but was given in conjunction with CALJIC No. 8.88.

Thus, one must consider both of these instructions together to understand how a jury would interpret the phrase "if applicable" in CALJIC No. 8.85. When one does that, the meaning of the "if applicable" phrase in CALJIC No. 8.85 becomes confusing at best, and the construction that is consistent with its constitutionality becomes less likely.

There are two places in CALJIC No. 8.88 that relate back to the "if applicable" phrase in CALJIC No. 8.85. The first instance occurs in the second paragraph of the instruction, which directs the jury to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (3 CT 850.) The "applicable factors" upon which the jury has been instructed are all of the factors in Penal Code section 190.3, even though some of them may be inapplicable to the case at bar. Appellant supposes that one could argue that the phrase "applicable factors" could be taken to mean the factors the jury has found applicable, but that would be an incorrect reading of the phrase. If that is what the instruction was meant to say, it would direct the jury to be guided by the factors the jurors determined to be applicable to the case; a fairly simple direction to provide to the jury. The fact is that the phrase, in a common-sense reading, tells the jury to consider to be applicable all of the circumstances upon which the jury has been instructed, i.e., all of the circumstances contained in Penal Code section 190.3.

The second phrase of import for purposes of this contention is a phrase contained in the fourth paragraph of CALJIC No. 8.88. In that paragraph, the jury is instructed that it should "assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (3 CT 851.) This instruction certainly refers directly back to CALJIC No. 8.85 since that is the instruction that tells the jury the factors to be considered in determining the appropriate sentence. There can be no saving construction placed on this directive when it is considered in conjunction with CALJIC No. 8.85. This instruction gives the jury free reign to place what is in essence a negative moral value on the fact that some mitigating circumstances do not exist.

In short, the phrase "if applicable," does not save the failure to delete inapplicable mitigating circumstances from CALJIC No. 8.85 before giving that instruction to a jury. In this case, since that failure had a negative impact on appellant's penalty phase determination, appellant's death sentence must be reversed.

XXI.

THE IMPOSITION OF AGGRAVATED TERMS ON COUNTS TWO AND FOUR VIOLATED APPELLANT'S RIGHT TO JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT

At the time of sentencing in this matter, the trial court imposed aggravated terms on counts two (Pen. Code, § 211) and four (Pen. Code, § 215, subd. (a)). The court selected the aggravated term because "the connection of these crimes to the death of Ruth Avril outweighs any and all mitigation that might be present." (37 RT 7302-7303.)

Appellant contends that the imposition of aggravated term on counts two and four violated appellant's right to jury trial and proof beyond a reasonable doubt of any fact used to increase appellant's sentence above the statutory maximum. Because there is little question that a criminal defendant is entitled to a jury trial on the existence of aggravating facts other than the fact of conviction, appellant has limited the following discussion to the question whether the court has correctly held that the right to jury trial is not implicated when the sentencing decision is based in part on recidivism-based factors.

A. Recidivism-Based Factors

It is beyond question that appellant was entitled to a jury trial and the proof beyond a reasonable doubt for the vast majority of the facts in

aggravation that may have been relied upon by the trial court. With regard to the use of recidivism-related facts in aggravation, appellant's contention depends upon the question whether the decision of the United States Supreme Court in *Almendarez-Torres*[65] has any continuing vitality in light of *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Blakely v. Washington*, *supra*, 540 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

Appellant contends that the *Almendarez-Torres* decision no longer is valid in light of those decisions. While it is true that the majority opinion in *Apprendi* did not overrule *Almendarez-Torres*, it also is true that the majority expressly avoided the issue and characterized it as possibly being a "narrow exception" to the rule enunciated in *Apprendi*. The defendant in *Apprendi* did not contest the validity of *Almendarez-Torres* and the majority opinion declined, for that reason, to address the issue notwithstanding its acknowledgment that it was arguable both that *Almendarez-Torres* was incorrectly decided and that *Apprendi* should apply to "the recidivist issue." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 489-490.) Justice Thomas' concurring opinion in *Apprendi* also explained at length why the decision in *Almendarez-Torres* was wrong. (*Id.*, *supra*, 530 U.S. at pp. 501-523; see

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[65] *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350]

also *Almendarez-Torres*, *supra*, 523 U.S. at pp. 256-257, 261 [dis. opn. of Scalia, J].)

Blakely -- which also did not involve recidivism -- merely followed *Apprendi*, maintaining the exception for priors without further analysis. (*Blakely v. Washington*, *supra*, 540 U.S. at p. 301) Yet, the *Blakely* decision reflected the position that its author, Justice Scalia, had articulated several times in concurring and dissenting opinions which would disapprove of the *Almendarez-Torres* holding. (See e.g., *Almendarez-Torres*, *supra*, 523 U.S. at 248-271 [dissenting]; *Apprendi v. New Jersey, supra*, 530 U.S. at pp. 498-499 [concurring]; *Jones v. United States*, *supra*, 526 U.S. 227, 253 [concurring; majority limited *Almendarez-Torres* to recidivist issues and distinguished it as a pleading case (*Id.*, at pp. 248-249)].) "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to the defendant's guilt or innocence, but simply to the length of his sentence.' [Citation]" (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 484 [citing Scalia's dissent in *Almendarez-Torres*].)

Much the same as the *Blakely* decision, *Cunningham* merely cited *Apprendi* for the proposition that other than the fact of prior conviction, a criminal defendant has a right to jury trial and proof beyond a reasonable doubt on the existence of any facts used to increase the defendant's

sentence above the statutory maximum. (*Cunningham v. California*, *supra*, 549 U.S. at pp. 274-275) The *Cunningham* decision did not provide any discussion or analysis of recidivism-based factors in aggravation because Cunningham had no prior criminal record. (*Id.* at p. 276.)

Almendarez-Torres also found support for its holding by reference to *Walton v. Arizona*, *supra*, 497 U.S. at pp. 647-649 (*Almendarez-Torres*, *supra*, 523 U.S. at p. 247), which has since been overruled in light of *Apprendi*. (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 588-589.) Thus, it is highly likely that when squarely faced with the question, the United States Supreme Court will hold that *Almendarez-Torres* does not survive *Apprendi*, *Blakely* and *Ring*.

This court also needs only to look at the votes of five Justices on the United States Supreme Court to conclude that the "*Almendarez-Torres* exception" no longer is valid in light of *Apprendi*, *Blakely* and *Cunningham*. The four Justices who dissented in *Almendarez-Torres* expressed the view that there is no rational basis for making recidivism an exception to the requirement of proof to a jury beyond a reasonable doubt. (*Almendarez-Torres v. United States*, *supra*, 523 U.S. at p. 258 (dis. opn. of Scalia, J.).) Justice Thomas, who was part of the majority in *Almendarez-Torres*, joined the four dissenters in *Almendarez-Torres* to form the majority in *Apprendi* and *Blakely* and noted, in his concurring opinion in

Apprendi, that his vote in *Almendarez-Torres* may have been in error. (*Apprendi v. New Jersey, supra,* 530 U.S. at pp. 520-521 (conc. opn. of Thomas, J.).) As is discussed in more detail below, in his concurring opinion in *Shepard v. United States* (2005) 544 U.S. 13 [125 S.Ct. 1254, 161 L.Ed.2d 205] Justice Thomas made it very clear that he no longer believed the *Almendarez-Torres* "recidivism exception" was constitutionally valid.

Appellant acknowledges that the court's decision in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) presumes the continuing vitality of *Almendarez-Torres* by holding that the imposition of an aggravated sentence based on a defendant's criminal history does not implicate the Sixth Amendment right to jury trial. (*Id.* at pp. 818-820.) Appellant contends that *Black II* was wrongly decided. *Almendarez-Torres* was based on a distinction between "sentencing factors" and "elements of the crime" that *Apprendi* and its progeny have soundly rejected. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 478, 484, 494.) The recidivism exception in *Almendarez-Torres* is going to be overruled because any fact used to aggravate a sentence above the statutory maximum must be admitted by the defendant or submitted to and found true by a jury.

B. Recidivism-Related Factors

The record in this matter indicates that appellant was on parole at the

time of this offense. This court has held that recidivism-related facts -- facts that reflect more than the mere fact of conviction such as the quality of a defendant's performance on parole -- qualify a defendant for the aggravated term. Any use of such facts in aggravation denied appellant his right to jury trial and proof beyond a reasonable doubt because the jury's verdicts in this matter did not address appellant's prior performance on probation. (*Blakely v. Washington*, *supra*, 540 U.S. at p. 304 [When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," (citation omitted), and the judge exceeds his proper authority].)

As noted above, appellant must acknowledge that *Black II* adopted a broad interpretation of the *Almendarez-Torres* exception for the "fact of a prior conviction:

> "As we recognized in *McGee*,[66] numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*People v. Black*, *supra*, 41 Cal.4th at p. 819.)

Appellant contends that the court's broad interpretation of the "fact of a prior conviction" in *Black II* was incorrect. In *Shepard v. United States*, *supra*, the United States Supreme Court cautioned that the "fact of a prior conviction" exception should be read narrowly. *Shepard* addressed the

question whether a sentencing court could look to police reports or complaint applications in order to determine whether a prior conviction for burglary by plea constituted a "generic burglary,"[67] making it a violent felony for the purposes of the Armed Career Criminal Act. *Shepard* answered that question in the negative, holding that a court considering the issue was "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (*Id.* at pp. 15-16.)

A more limited version of this "categorical approach" previously had been set forth in *Taylor v. United States* (1990) 495 U.S. 575 [110 S.Ct. 2143, 109 L.Ed.2d 607], in which the court held that burglary was a violent felony for the purposes of the Armed Career Criminal Act if the entry was into a building or enclosed space. *Taylor* held that the "later court" making such a determination was limited to examination of the statutory definition of the prior offense and the fact of conviction. *Taylor* also recognized an exception to this "categorical approach" for cases in which the charging instrument alleged an entry into a building and the jury's verdict necessarily

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[66] *People v. McGee* (2006) 38 Cal.4th 682.

[67] A "generic burglary" for the purposes of the Armed Career Criminal Act means a burglary of a building or enclosed space. States with "non-generic" burglary statutes also include acts such as entries into vehicles or boats. (*Shepard v. United States*, *supra*, 544 U.S. at pp. 15-17.)

included a finding of an entry into a building. (*Shepard v. United States*, *supra*, 544 U.S. at p. 17.)

The issue came before the United States Supreme Court in *Shepard* after the District Court declined the prosecution's suggestion that the court should review the police reports and applications for issuance of the complaint in order to determine whether the burglary in *Shepard* was a generic burglary. (*Shepard v. United States*, *supra*, 544 U.S. at pp. 17-18.) The First Circuit reversed the District Court, finding that the police reports and applications for issuance of the complaint were "sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime." (*Id.* at p. 18.)

During the hearing on remand the prosecution submitted police reports and complaint applications for two additional burglaries. (*Shepard v. United States*, *supra*, 544 U.S. at p. 18.) Shepard submitted an affidavit in which he pointed out both that none of the facts contained in the police reports were elicited or read by the court during his pleas and he was not asked during those pleas whether the facts in those reports were true. (*Id.* at p. 18.) The District Court again declined to impose the mandatory minimum 15-year sentence, finding that the prosecution had failed to meet its burden of proving that Shepard had admitted the commission of three generic burglaries. (*Id.* at pp. 18-19.)

The United States Supreme Court granted certiorari after the Circuit Court of Appeals again reversed and directed the District Court to impose the 15-year minimum sentence. (*Shepard v. United States*, *supra*, 544 U.S. at p. 19.) Once before the Supreme Court, the Government raised several arguments in support of modifying the "categorical approach" outlined in *Taylor*. (*Id.* at pp. 20-23.)

The Supreme Court declined to depart from *Taylor*, in part out of concern that to do so would infringe a defendant's right to jury trial under the Sixth Amendment. (*Shepard v. United States*, *supra*, 544 U.S. at pp. 23-24.) The court noted that the record of conviction in a state with a non-generic burglary statute would not establish the fact necessary to make the offense a generic burglary "as it would be in a generic State when a judicial finding of a disputed prior conviction is made on the authority of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)." (*Id.* at p. 25.) The court held that

> "While the disputed fact here can be described as a fact *about a prior conviction*, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi,* to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." (*Id.* at p. 25, emphasis added.)

Appellant acknowledges that the portions of *Shepard* discussed above were joined only by a plurality of the court comprised of Justices

Souter, Scalia, Ginsberg and Stevens. This court need only look to the concurring opinion authored by Justice Thomas, however, to conclude that a clear majority of the United States Supreme Court will, at the very least, limit the *Almendarez-Torres* "exception" to the fact of conviction as opposed to facts "about a prior conviction" such as whether a defendant has performed poorly on probation or parole. Justice Thomas declined to join the plurality opinion in *Shepard* because he believed that the judicial factfinding authorized by the Armed Career Criminal Act was itself an unconstitutional infringement on the Sixth Amendment right to jury trial. (*Shepard v. United States*, *supra*, 544 U.S. at pp. 26-27, conc. opn. of Thomas, J.) Justice Thomas claimed -- much the same as has appellant in this brief -- that a majority of the Justices now believe that *Almendarez-Torres* was wrongly decided and argued that even the limited judicial factfinding authorized by the plurality's "refinement" of *Taylor* resulted in constitutional error. (*Id.* at pp. 27-28.)

Thus it should be quite clear that the only reason there is not a clear majority opinion in *Shepard* holding that the "recidivism exception" must be narrowly applied is because the fifth Justice supporting the result in *Shepard* did not believe that even a narrow application -- one that does not permit a judicial finding of fact *about a conviction* -- is constitutional. *Shepard* thus provides this court with a relatively rare case in which

discerning the meaning of a plurality opinion is not merely a speculative reading of judicial tea leaves. Four Justices of the United States Supreme Court will permit judicial factfinding *only* about the fact *of* conviction and not of facts *about* a conviction. A fifth Justice would not even permit the limited judicial factfinding authorized by the plurality. The adoption of the broad view of the "recidivism exception" in *Black II* was erroneous.

C. The Violation of Appellant's Right to Jury Trial and Proof Beyond a Reasonable Doubt Was Not Harmless.

Denial of the right to jury trial on the existence of aggravating facts is reviewed on appeal under the harmless error standard of review set forth in *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35]. (*Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466], slip opn. at pp. 6-8; *People v. Sandoval* (2007) 41 Cal.4th 825, 838.) Under *Neder*, reversal is required if, after a thorough examination of the record, a reviewing court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States*, *supra*, 527 U.S. at p. 19)

Recuenco suggests this court should find that the error in this matter was not harmless beyond a reasonable doubt because California does not have a statutory procedure for submission of the issue whether aggravating facts exists to a jury. Recuenco was charged in the State of Washington

with second degree assault together with an allegation that he personally used a firearm in the commission of the offense. (*Washington v. Recuenco*, *supra*, 548 U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466], slip opn. at p. 1.) The jury convicted Recuenco and returned a special verdict, requested by defense counsel, finding that Recuenco was armed with a deadly weapon. (*Id.*, slip opn. at p. 1-2.)

At the time of sentencing the court imposed a three-year enhancement for personal use of a firearm at the request of the prosecutor even though the special verdict found true only use of a deadly weapon. (*Washington v. Recuenco*, *supra*, 548 U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466], slip opn. at p. 1.) The Washington State Supreme Court ultimately reversed that decision because the jury had not returned a finding of personal use of a firearm. In reaching that result the Washington Supreme Court held that *Blakely* violations were structural errors. (*Id.*, slip opn. at pp. 2-3.)

The prosecution sought certiorari in the United States Supreme Court. Once before that court, Recuenco argued that harmless error analysis could not be conducted in his case because Washington state law provided no procedure for a jury to determine whether a defendant was armed with a firearm. (*Washington v. Recuenco*, *supra*, 548 U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466], slip opn. at p. 3.) The United States Supreme Court

avoided that question, finding that Washington State law was not clear as to whether Washington state law provided such a procedure. (*Id.*, slip opn. at pp. 3-4.) The Supreme Court then held that *Blakely* errors are subject to harmless error analysis under *Neder* and remanded the matter to the Washington Supreme Court for further proceedings to apply the appropriate harmless error analysis. (*Id.*, slip opn. at pp. 4-9.) Significantly, however, the court also held that although the absence of a procedure for submitting the issue to a jury would not require *per se* reversal, it would suggest that Recuenco would be able to prove that the error was not harmless beyond a reasonable doubt in his particular case. (*Id.*, slip opn. at p. 4.)

Recuenco is important because the issue avoided by the United States Supreme Court -- whether Washington law provided a procedure for submitting to the jury the question whether Recuenco was armed with a firearm -- cannot be avoided in this case. There is no ambiguity in California statutory law as to the existence of a procedure for submission to a jury the question whether one or more facts in aggravation exist. No such procedure exists. Subdivision (b) of Penal Code section 1170 -- as was in effect at the time appellant's offenses were committed -- assigned the duty to determine the existence of aggravating facts to the trial court:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days

> prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. (Pen. Code, § 1170, subd. (b), in pertinent part.)

Because there was no statutory procedure in California for the submission of the issue of existence of aggravating facts to the jury, this court cannot say that the jury verdict would have been the same absent the error. (*Neder v. United States*, *supra*, 527 U.S. at p. 19.) The jury simply could not have returned the findings as to the existence of the aggravating facts found by the trial court because California law did not provide a procedure by which the trial court could have submitted the issues to the jury.

Even if the court disagrees with that contention, appellant contends that the error in this matter cannot be deemed harmless because this court cannot find beyond a reasonable doubt that the error did not contribute to the sentencing determination. Appellant acknowledges that *Sandoval* took a different view of harmless error analysis under *Neder* than the analysis

appellant is urging this court to undertake. *Sandoval* held that harmless error analysis under *Neder* requires reviewing courts to determine whether a jury would have found *any* the individual facts in aggravation rather than whether the error contributed to the sentencing determination itself. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 839.) *Sandoval* held that no constitutional error has occurred if a defendant is eligible for an aggravated term under the DSL based on facts that have been established consistent with the requirements of the Sixth Amendment. (*Id.* at p. 838.)

Appellant submits that the *Sandoval* prejudice analysis is incorrect and unconstitutional because the prejudice analysis in *Neder* addresses the ultimate decision made by the jury rather than the component findings of fact necessary to that ultimate decision. The ultimate decision in the context of sentencing is the sentencing choice itself, not the findings of fact that support the sentencing decision. The mere finding of a single fact in aggravation ordinarily does not, in and of itself, require the imposition of an aggravated sentence. Under the DSL the trial court is required to render a sentencing decision based on a weighing of aggravating facts against mitigating facts.

Neither *Neder* nor *Cunningham* provides much guidance as to how *Neder* should be applied to this matter but *Neder* does suggest two relevant inquiries: Whether the defendant contested the issue and adduced sufficient

evidence to support a contrary finding by a jury and whether the evidence as to the issue was overwhelming. (*Neder v. United States*, *supra*, 527 U.S. at pp. 17, 19.)

Appellant submits that both inquiries support a finding that the denial of appellant's right to jury trial was not harmless under *Neder*. As noted in *Sandoval*, the court cannot assume that "the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury" because the aggravating facts relied upon by the trial court -- and the intent and objectives of appellant -- were not elements of the charged offenses. (*People v. Sandoval*, *supra*, 41 Cal.4th. at p. 839.) Appellant thus did not have either a reason or the opportunity to challenge the existence of the facts ultimately relied upon by the trial court both to select the aggravated term. (*Id.* at p. 839.)

The court also cannot be confident that the factual record would have been the same had the existence of the aggravating facts been tried to a jury because appellant did not have the same incentive and opportunity to challenge the existence of the aggravating facts during the sentencing hearing that would have existed during a trial before a jury with proof beyond a reasonable doubt. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 840.) Nor should the court be confident that its evaluation of the proof of aggravating facts would be the same as an evaluation made by a jury

because whether appellant failed on prior grants of probation necessarily would be based on broad, vague and subjective standards. (*Id.* at p. 840.) The denial of appellant's right to jury trial cannot be deemed harmless under *Neder* or *Sandoval*.

XXII.

THE IMPOSITION OF UNSTAYED SENTENCES ON COUNTS THREE, FOUR AND FIVE WAS ERRONEOUS BECAUSE EACH OF THOSE OFFENSES AROSE DURING A SINGLE, INDIVISIBLE TRANSACTION

Appellant contends that the imposition of sentence on counts three (Pen. Code, §§ 459 and 462, subd. (a)), four (Pen. Code, § 215, subd. (a)) and five (Pen. Code, § 209, subd. (b)) was precluded by Penal Code section 654, which prohibits multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294, citing *People v. Miller* (1977) 18 Cal.3d 873, 885.) It is improper to impose any sentence, concurrent or consecutive, when the subordinate or concurrent term is based on a single, indivisible course of conduct involving a single victim. (*People v. Lawrence* (2000) 24 Cal.4th 219, 226; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.) The correct procedure for disposing of a term prohibited by section 654 is to impose and stay sentence. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346.)

Appellant anticipates that respondent will claim that the trial court's sentencing choice was justified based on the trial court's implied finding of separate intent or purposes. (*People v. Hicks* (1993) 6 Cal.4th 784, 789; *People v. Le* (2006) 136 Cal.App.4th 925, 931.) This court must reject any such claim for three reasons. First, an implied finding of separate intent or

purpose would be contradicted by the trial court's finding that Penal Code section 654 required the court to stay appellant's sentence on count two, first degree robbery. (37 RT 7303.)

Second, any such implied finding necessarily would conflict with the prosecution's theory of the case, something that presumably was adopted by the jury. Lead prosecutor Glynn elected -- during his guilt-phase closing argument -- to use the taking of Avril's car as the corpus of the robbery. (17 RT 3205, 3212.) Glynn argued that residential burglary (Pen. Code, § 459) was shown by the fact that someone entered Avril's garage with the intent to rob Avril. (17 RT 3205.) Glynn noted his belief that the evidence circumstantially proved that Avril had her car keys with her when she was attacked in her garage. (17 RT 3209-3210.)

Glynn focused the jury's attention on the fact that a garage can be part of an inhabited dwelling -- both for robbery and for burglary -- even though the garage did not have a door connecting the garage directly to the interior of the residence. (17 RT 3211.) Glynn argued that the evidence showed both that the car was in Avril's immediate presence and that she did not voluntarily give up her car. Glynn argued that the taking was accomplished by the use of "the ultimate force." (17 RT 3210-3211.)

Glynn's guilt-phase closing argument also makes it very clear that -- under the prosecution's theory of the case -- the kidnapping charged in count

five was an integral part of the robbery, which did not end until appellant reached a place of safety. (17 RT 3213-3214.) Glynn argued that the appellant was not in a place of safety until after he killed Avril, dumped her body and got off of Arnold Road. (17 RT 3213-3214.)

Third, any such implied finding made by the trial court would have violated appellant's right to jury trial and proof beyond a reasonable doubt as to the existence of any fact used to increase a defendant's sentence over and above the statutory maximum. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Blakely v. Washington*, *supra*, 540 U.S. 296 and *Cunningham v. California*, *supra*, 549 U.S. 270.) As noted above, the maximum sentence that can be imposed under California law when two or more crimes derive from a single, continuous transaction is the statutory term permitted by the code section that provides for the greatest punishment. (Pen. Code, § 654, subd. (a).)

In making this third point, appellant is mindful that prior case law does not support his position. For example, in *People v. Jones* (2002) 103 Cal.App.4th 1139 the court rejected the defendant's claim that Penal Code section 654 prohibited imposition of any sentence for a violation of Penal Code section 12021, subdivision (a), based on the use of a gun in the commission of Penal Code section 246. (*Id.* at p. 1143.) The court noted that the question whether a course of criminal conduct constitutes an

indivisible course of conduct depended upon the intent and objective of the defendant, which it deemed to be a question of fact for the trial court. (*Id.* at p. 1143.) The court held it was "clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent." (*Id.* at p. 1144.)

Appellant contends that *Jones* and all of the many cases following that line of reasoning now must be revisited and reversed in light of *Apprendi* and its progeny. Under California law, the statutory maximum penalty that can be imposed for a series of offenses committed during a single, indivisible transaction is the punishment authorized by the code section authorizing the greatest punishment. (Pen. Code, § 654, subd. (a).) The only exception to that rule arises when a factual finding is made that that the defendant harbored separate purposes or intents in the commission of the different offenses. (*People v. Hicks*, *supra*, 6 Cal.4th at p. 789; *People v. Le*, *supra*, 136 Cal.App.4th at p. 931.)

The jury's verdicts in this matter did not, in any way, address the factual issues raised by the applicability of Penal Code section 654. Nor did appellant ever admit that he harbored a separate intent or purpose. The allocation of that fact-finding to the trial court denied appellant his right to jury trial on a fact used to elevate his sentence above that which was permitted solely by the factual findings made the jury. This court must

direct the trial court to stay sentence on counts three, four and five.

XXIII.

THE JUDGMENT SHOULD BE REVERSED DUE TO CUMULATIVE ERROR THAT DEPRIVED APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

Each of the grounds set forth above prevented appellant from receiving a fair capital murder trial as guaranteed by state law and by the Fifth, Sixth, Eighth and Fourteenth Amendments, and each one warrants reversal of the judgment, the sentence, or both. But even if the court should conclude that any one of the federal or state law violations shown above is insufficient to require a new trial, the court should consider the effect of the errors taken together, and reverse due to cumulative error.

The accumulation of errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair in violation of the due process clause of the United States Constitution. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179). The same principle holds true under the California Constitution. As this court stated in *People v. Hill, supra*, 17 Cal.4th at pp. 844-845:

> a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Purvis*, *supra*, 60 Cal.2d at pp. 348, 353 [combination of 'relatively unimportant misstatement[s] of fact or law,' when considered on the 'total record' and in 'connection with the other errors,' required reversal]; *People v. Herring*, *supra*, 20 Cal.App.4th at pp.

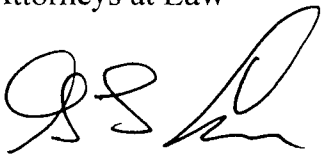
> 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; see *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227 [same]; see also *Samayoa*, *supra*, 15 Cal.4th at p. 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering 'the cumulative impact of the several instances of prosecutorial misconduct' before finding such impact harmless]; cf. *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820 [noting the prosecutorial misconduct in that case was 'occasional rather than systematic and pervasive'].) (*Id.* at pp. 844-845.)

In this case, as shown above, any of the errors independently provide grounds for reversal. Taken together, the cumulative impact of any two or more of the errors produced an unfair trial under California law, prejudicially deprived appellant of due process of law under the Fourteenth Amendment, and resulted in an unfair and unreliable capital murder trial in violation of the Eighth Amendment.

Dated: March 2, 2009

Respectfully submitted,

Cannon & Harris
Attorneys at Law



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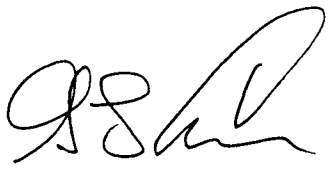
CERTIFICATION OF WORD COUNT

I hereby certify that I have checked the length of this computer-generated brief using the word count feature of my word-processing application. (Cal. Rules of Court, rule 8.630(b).) The brief as currently constituted, excluding tables, indices and this certificate, contains 71,289 words.

Dated: March 2, 2009



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PROOF OF SERVICE BY MAIL

I am over eighteen (18) years of age and not a party to the within action. My business address 6046 Cornerstone Court West, Suite 141, San Diego, California, 92121-4733. On March 2, 2009, I served the within

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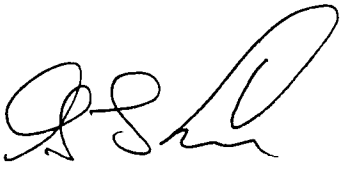
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 2, 2009



DECLARANT